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ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS

A GUIDE TO THE KEY ISSUES

KATIA YANNACA-SMALL

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A GUIDE TO THE KEY ISSUES

Edited by
KATIA YANNACA-SMALL

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Foreword

International investment arbitration has a lineage that may be traced to concession and other contracts of foreign investors with host governments. Disputes under those contracts gave rise to a small number of large arbitrations between the two World Wars and for some three decades after World War II. Only very large investors normally were in a position to persuade host governments to agree to arbitration of disputes that might arise under contracts between them. Implementation of the resultant arbitral obligations was in some cases significant, in others frustrated.

Two developments transformed this episodic scene. The first was the conclusion of the World Bank's Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States, the "ICSID Convention", which came into force in 1966. It provides a standing forum for the settlement of disputes between foreign investors and host governments. The second was the conclusion of bilateral investment treaties between States. By this writing, there are—counting agreements arising not only bilaterally but those from the Energy Charter Treaty, NAFTA and CAFTA—some 2,700 such treaties in force. They are the main source of the jurisdiction of ICSID. But they are by no means simply procedural and jurisdictional in effect, because they provide standards for the treatment and taking of foreign investment that represent a remarkable advance on the contentious content of customary international law. By together enabling the foreign investor to require a host government to arbitrate disputes between them, on the basis of agreed international legal standards, a new era in international dispute settlement has opened. ICSID currently deals with as many cases as has the International Court of Justice in the whole of its history.

This cascade of international litigation has spawned a multiplicity of problems, procedural, jurisdictional, and substantive. This book analyzes recurrent issues that arise in the disposition of those problems. Katia Yannaca-Small, drawing on her experience as a senior lawyer both of the OECD and ICSID, has assembled a group of knowledgeable and acute authors, many of them leading practitioners in this field, who address the most salient and persistent of those issues. And she herself has written six of the essays, which tackle some of the most sensitive questions.

In the last few years, international investment arbitration has come under attack. The criticism, much of it uninformed, has a nationalistic and autarchic tinge. Two South American States Members of ICSID, apparently under the influence of a third,

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have withdrawn from the treaty, giving reasons that would have warmed the heart of Carlos Calvo. The European Union is poised to displace bilateral investment treaties between its members by its own rules.

The adoption by the United States of a revised model bilateral investment treaty in 2004 was regressive, and current reconsideration in the Congress may lead the U.S. to resile further from its traditional support of foreign investment. Nevertheless, fresh bilateral investment treaties are being concluded, and international investment arbitration flourishes.

This valuable volume will assist the student and practitioner of international investment arbitration in understanding and addressing its primary problems, which are as complex as they are recurrent.

Stephen M. Schwebel,
former President of the International Court of Justice

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Acknowledgments

This book aims to serve as a guide on investment arbitration not only to the knowledgeable sophisticated reader but also to the newcomer in this field. This challenging task, to balance the educational and expert elements, could not have been achieved without the wonderful group of top-of-the-line contributors who very graciously undertook this task. I am grateful not only for their valuable contributions to this book but also for the support, collegiality, and cooperation I have enjoyed with all of them throughout the years.

I take this opportunity to thank the delegates of the OECD Investment Committee; its Chair, Manfred Schekulin; the former OECD Deputy Director, Rainer Geiger; and the Head of the OECD Investment Division, Pierre Poret for the stimulating context in which they allowed me to operate and their confidence in and support for my work in this field. I also greatly benefited from working with the ICSID team and getting first hand experience of the work of this leading institution in the field of investment arbitration.

I would like to make a special mention of the late Thomas Wälde, a brilliant and generous mentor who always encouraged and challenged me. Thomas passed away more than a year ago, in October 2008, after having put the last touch on a piece which, as he said to me, "had always wanted to write." I am deeply honoured that one of his last, if not his very last intellectual contribution to this field is included in this volume.

Nothing of all this would have ever been possible, without the constant encouragement, support, and patience of my husband, David Small, who not only greatly assisted with the editing of this volume but also held the fort at home during the long hours I spent on the preparation of the book. His acute and critical legal mind has always challenged me. Special thanks go to my three children, Alexander, Sophia, and Ileana, who, despite their young age, understood and accepted the demands of the task on their mom's time and supported her in it. I could not close these acknowledgments without respectfully saluting and wholeheartedly thanking my parents, who always encouraged me and pushed me forward. My father will see this book published. My mother, who was the greatest inspiration in my life, will never do so.

Katia Yannaca-Small,
December 2009, Washington D.C.

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About the Authors

Katia Yannaca-Small

Katia Yannaca-Small is a Senior Counsel with the International Centre for the Settlement of Investment Disputes (ICSID), where she administers investment disputes brought before the Centre and works on issues of outreach policy related to the Centre's activities. Prior to joining ICSID, she was the Legal Advisor to the OECD Investment Division, where she was responsible for analytical work on all legal issues related to international investment agreements and, in particular, developments in investor-state dispute settlement. She is an often-cited writer and speaker on this subject. Ms. Yannaca-Small holds a J.D. from the Athens University Law School, Greece; two post-graduate degrees (D.E.A.) on Public International Law and International Economic Law from the University of Paris I-Sorbonne and is a graduate of the École Nationale d'Administration (E.N.A.), France.

Katia Yannaca-Small contributed as author and edited this book strictly in her personal capacity. The views expressed do not engage ICSID or the OECD.

Stanimir Alexandrov

Stanimir Alexandrov is a partner at the Washington, DC office of Sidley Austin LLP and Professorial Lecturer of Law at The George Washington University Law School. He focuses his practice on international dispute resolution, including investor-State arbitration, international commercial arbitration, and trade disputes before the World Trade Organization (WTO). He has represented private parties and governments in arbitration before the International Centre for Settlement of Investment Disputes (ICSID), and in ICC, UNCITRAL, and AAA international arbitrations, and he has also represented governments in WTO disputes. He has been appointed to the ICSID's Panel of Arbitrators and Panel of Conciliators and serves as an arbitrator in a number of cases. He has authored several books and a number of articles on public international law and international arbitration topics. He is a member of the Institut de Droit International. Prior to entering private practice he served as vice minister of foreign affairs of Bulgaria.

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Aurélia Antonietti

Aurélia Antonietti is currently a consultant with the International Centre for Settlement of Investment Disputes (ICSID), where she also served as Counsel from 2003 to 2006. Ms Antonietti also worked as an associate with the law firm of Lévy Kaufmann-Kohler in Geneva from 2006 to 2008, and with the law firm of Gide Loyrette Nouel in Paris prior to 2003. She qualified as an Avocat with the Paris Bar and as a Solicitor of the Supreme Court of England and Wales.

Yas Banifatemi

Yas Banifatemi is a Partner in Shearman & Sterling's International Arbitration Group and heads the firm's Public International Law practice. She advises and represents States, State-owned entities and corporations on both public international law and international arbitration issues. She has acted as counsel and arbitrator in arbitration cases under the ICSID, UNCITRAL, ICC, LCIA, SCC and Swiss Arbitration Rules, with particular focus on international investment, oil and gas and general commercial matters. She participates as expert on investment law issues in the works of international organizations and institutions, including the World Bank, United Nations Conference on Trade and Development (UNCTAD), International Law Association (ILA) and International Bar Association (IBA). She teaches international investment law at University of Panthéon-Sorbonne, and regularly appears as speaker, particularly on issues of investment arbitration and public international law. She has authored numerous publications on international arbitration and public international law, in French and in English.

Andrea K. Bjorklund

Andrea K. Bjorklund is a Professor at the University of California, Davis, School of Law. She teaches courses in international arbitration and litigation, international trade, international investment, conflict of laws, public international law, international business transactions, and contracts. Her primary research focus is investor-State arbitration, and she has written extensively on matters such as denial of justice, the defense of necessity, national treatment, mandatory rules of law, State immunity to the enforcement of arbitral awards, transparency norms and the participation of *amici curiae* in investment arbitrations. Her pieces have been published, *inter alia*, in the *American Review of International Arbitration*, the *Hastings Law Journal*, the *Virginia Journal of International Law*, and the *Oxford Handbook of International Investment Law*. She is also co-author, with Meg Kinnear and John Hannaford, of *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11*. Prior to entering the academy, Professor Bjorklund worked for the U.S. Department of State defending the U.S. government in investor-State arbitrations brought under the NAFTA and also in private practice.

Roberto Echandi

Roberto Echandi is the Ambassador of Costa Rica to the Kingdom of Belgium, the Grand Duchy of Luxembourg and the European Union, and he is the Chief Negotiator

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for the Association Agreement between Central America and the European Union. Previously, he was Special Adjunct Ambassador of Costa Rica for negotiation of the U.S.-Central America Free Trade Agreement. He has also served as Director-General at the Ministry of Foreign Trade of Costa Rica, and as legal advisor to the Appellate Body of the World Trade Organization (WTO). Ambassador Echandi has been Adjunct Professor of Law at Georgetown University Law Center, Washington D.C., and is currently a Faculty member of the MA Program on International Economic Law and Policy of the University of Barcelona.

Nils Eliasson

Nils Eliasson is Head of Dispute Resolution Asia at Mannheimer Swartling, Hong Kong. He is specialized in international commercial arbitration and investment arbitration, and has acted as counsel in international arbitrations encompassing a wide range of industries, including energy, oil and gas, construction, infrastructure, engineering, license disputes, mergers and acquisitions, insurance, and other areas. He has also acted as counsel for investors and States in a number of investment arbitrations under bilateral investment treaties as well as under the Energy Charter Treaty. He holds a Ph.D. in Law from the University of Lund and has written many articles on international arbitration and investment arbitration. He teaches international arbitration and international investment law at the universities in Lund and Stockholm.

Timothy L. Foden

Timothy L. Foden is an associate in the International Dispute Resolution Group of Crowell & Moring. Apart from working on a variety of international commercial arbitration matters, he has worked on a wide array of international litigation matters in both federal and state courts, ranging from terrorism cases to products liability matters. He has particular experience in the development of the political question and preemption doctrines and their application to private parties.

Julien Fouret

Julien Fouret is a member of the Paris Bar and an associate at Derains & Gharavi, Paris. He is specialized in Public International Law and International Investment Law with a particular interest in International Peaceful Dispute Settlement procedures. Since 2002, he has been the editor of the "Chronique de Règlement Pacifique des Différends Internationaux" in the *Revue Québécoise de Droit International*, which comprises analysis of the ICJ, ICTY and ICTR as well as ICSID case law. He is the author, with Dany Khayat, of the *Recueil des Commentaires des Décisions du CIRDI (2002–2007)*, analyzing exhaustively the 121 decisions published during that period. The *Recueil* is to be published every five years.

Emmanuel Gaillard

Emmanuel Gaillard is a partner at Shearman & Sterling LLP and heads the firm's International Arbitration practice. He is also a Professor of Law at Paris XII University. He has represented major corporations, States and State-owned entities in hundreds of

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international arbitration cases. He regularly acts as sole arbitrator, party-appointed arbitrator or chairman in both investment and commercial arbitrations. He is also frequently called upon to appear as expert witness on arbitration law issues in international arbitration proceedings or enforcement actions before domestic courts. He has written extensively on all aspects of arbitration law, in French and in English. He co-authored *Fouchard Gaillard Goldman on International Commercial Arbitration*, the leading and most often cited publication in this field. In 2007, he authored the first published essay on the legal theory of international arbitration based on his course at the Hague Academy of International Law (*Aspects philosophiques du droit de l'arbitrage international*, soon to be published in English as *Legal Theory of International Arbitration*). He is also widely recognized as a leading expert on ICSID and international investment arbitration, and has published since 1985 a yearly feature in the *Journal du Droit International*, commenting on ICSID decisions and awards. In 2004, he published a seminal volume on ICSID arbitration case law entitled *La Jurisprudence du CIRDI*. He was appointed by France to the ICSID Panel of Arbitrators. He also appears as an expert on the investment panels of OECD and UNCTAD, and participates as an observer in the works of UNCITRAL. He is a member of the International Council for Commercial Arbitration (ICCA) and chairs the International Arbitration Institute (IAI).

Kaj Hobér

Kaj Hobér is a partner at Mannheimer Swartling, Stockholm, and Professor of East European Commercial Law, Uppsala University, where he also teaches international arbitration and international investment and trade law. He has acted as counsel and arbitrator (including chairmanships) in more than 300 international arbitrations, including many investment arbitrations. He is past Chair of the IBA sub-committee on Investment Treaty Arbitration. He is the author and editor of several books on arbitration and has published numerous articles on international arbitration, Russian, Soviet and East European law and international investment and trade law. As of 1 January 2010, he is also Professor of International Law, Centre for Energy, Petroleum and Mineral Law and Policy (CEPMLP), University of Dundee.

Gabrielle Kaufmann-Kohler

Gabrielle Kaufmann-Kohler is a Professor of Private International Law at Geneva University Law School, the Director of the Geneva Master in International Dispute Settlement, and a partner at Lévy Kaufmann-Kohler. She focuses primarily on international commercial and investment arbitration, is also active in sports arbitration, and has handled over one hundred fifty international arbitrations mainly as arbitrator, most often as chair. She appears on numerous arbitration panels, including ICSID, ICC and AAA. She is Honorary President of the Swiss Arbitration Association, a member of the International Council for Commercial Arbitration (ICCA), of the Board of the AAA, and of the LCIA. Her teaching and research activities focus primarily on international arbitration and she has published extensively in the areas of her specialization.

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Meg Kinnear

Meg Kinnear is Secretary General of the International Centre for Settlement of Investment Disputes (ICSID) and was formerly Senior General Counsel, Trade Law Bureau, Departments of Justice and Foreign Affairs & International Trade, Canada. She has appeared as counsel before international trade dispute panels, participated in the negotiation of international trade and investment agreements and advised on Canada's international trade and investment obligations. Ms. Kinnear has also written various publications including *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11*, with Andrea Bjorklund and John Hannaford.

Barton Legum

Barton Legum is a partner in Salans' Paris Office and Head of the firm's Investment Treaty Arbitration Practice. He has argued cases before numerous international arbitration tribunals, the International Court of Justice and state and federal trial and appeals courts in the United States. From 2000 to 2004, he served as Chief of the NAFTA Arbitration Division in the Office of the Legal Adviser, United States Department of State. In that capacity, he served as lead counsel for the United States Government in arbitrations under the investment chapter of the North American Free Trade Agreement. The United States won every case decided under his tenure. He is also the editor of *International Litigation Strategies and Practice* (2005), a book published by the American Bar Association. In addition, he is often published on international dispute resolution topics and frequently speaks at conferences on international arbitration and litigation. He is a member of the Paris and New York bars.

Mark McNeill

Mark McNeill is counsel in the International Arbitration Group in the Paris office of Shearman & Sterling LLP. He specializes in international investment arbitration and international commercial arbitration. He has advised corporate clients and governments in dozens of international arbitrations before the ICSID, the ICC and other arbitral institutions, as well as in *ad hoc* arbitrations under the UNCITRAL Rules. He spent four years (2003-2006) in the Office of the Legal Adviser of the U.S. State Department where he represented the United States in investor-State arbitrations under the investment chapter of the North American Free Trade Agreement (NAFTA), and participated in the drafting of investment and dispute resolution provisions in United States' bilateral investment treaties and investment chapters of free trade agreements.

Andrea J. Menaker

Andrea J. Menaker is a partner in White & Case, LLP, in Washington, D.C., where she specializes in international arbitration and public international law. She has extensive experience in matters involving treaty-based claims, international investment protections, sovereign immunity, and the enforcement of foreign arbitral awards. She has represented clients in arbitrations before the International Centre for Settlement of Investment Disputes (ICSID) and its Additional Facility, the International Chamber of Commerce (ICC) and other arbitral institutions, as well as in *ad hoc* arbitrations under

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the UNCITRAL Rules. She was an adjunct professor at Georgetown University Law Center where she taught international commercial arbitration for several years. Prior to joining White & Case, she was Chief of the NAFTA Arbitration Division at the U.S. State Department where she was lead counsel representing the United States in NAFTA Chapter 11 arbitrations and drafted investment and dispute resolution provisions in the United States' BITs and FTAs.

Ucheora Onwuamaegbu

Ucheora Onwuamaegbu is senior counsel at the International Centre for Settlement of Investment Disputes (ICSID) where he heads a team administering various arbitral proceedings. Before joining ICSID in 2001, he was senior legal officer at the United Nations Compensation Commission (UNCC), Geneva. A barrister and solicitor of the Supreme Court of Nigeria and a solicitor of the Supreme Court of England and Wales, he had practiced in both jurisdictions prior to joining the UNCC. He is a senior research fellow at the Vale Columbia Center on Sustainable International Investment and is a member of the Editorial Board of the *ICSID Review – Foreign Investment Law Journal* and the Vale Columbia *Year Book on International Investment Law and Policy*. He is also an associate member of the Institute of World Business Law at the International Chamber of Commerce (ICC) and has served on different committees of the American Bar Association's International Law Section. He has written and spoken extensively on different aspects of investor-State dispute resolution.

Antonio R. Parra

Antonio R. Parra is Secretary General of the International Council for Commercial Arbitration and a Consultant with the World Bank. From 1999 to 2005, he served as the first Deputy Secretary-General of the International Centre for Settlement of Investment Disputes (ICSID) and from 1990 to 1999 he was Legal Adviser, ICSID. His earlier positions include Senior Counsel, ICSID; Senior Counsel, World Bank; Counsel, World Bank; Assistant Legal Counsel, OPEC Fund for International Development; and Research Staffer, OPEC Secretariat. At the World Bank and ICSID, Mr. Parra was a member of the staff teams that worked on the establishment of the Multilateral Investment Guarantee Agency and the preparation of the World Bank Guidelines on the Treatment of Foreign Direct Investment. He is a Fellow of the Chartered Institute of Arbitrators, an Editorial Board member of *The Law and Practice of International Courts and Tribunals* and a Consultative Member of the Investment Treaty Forum at the British Institute of International and Comparative Law. He has published 35 articles and book chapters on development finance, investment law and arbitration topics.

Jan Paulsson

Jan Paulsson is co-head of Freshfields Bruckhaus Deringer LLP's international arbitration and public international law groups. He has acted as counsel or arbitrator in hundreds of international arbitrations, and he has conducted cases under the ICC, UNCITRAL, ICSID, LCIA, SCC and ICDR Rules, as well as before the International Court of Justice. He is also President of the London Court of International Arbitration,

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the World Bank Administrative Tribunal, and the EBRD Administrative Tribunal; a Vice President of the ICC's International Court of Arbitration; and a member of the Permanent Court of Arbitration in The Hague. In addition, he holds the Michael Klein Distinguished Scholar Chair at the University of Miami and is a Centennial Professor at the London School of Economics. His publications include the standard reference work *International Chamber of Commerce Arbitration*, which he co-authors with Messrs. W.L. Craig and W.W. Park.

Georgios Petrochilos

Georgios Petrochilos is a partner in the international arbitration and public international law groups of Freshfields Bruckhaus Deringer LLP, and is based in the firm's Paris office. He is qualified as an *Avocat* in France and an Advocate of the Supreme Court in Greece, and he has acted as counsel and arbitrator in cases under the Rules of the ICC, UNCITRAL, LCIA, SCC, PCA, ICSID, ICSID Additional Facility and the Cairo Centre, and before the International Court of Justice. He is a representative of Greece in UNCITRAL's Working Group II, a member of the International Commercial Arbitration Committee of the ILA, a Member of the Chartered Institute of Arbitrators, and a *rapporteur* for the Institute for Transnational Arbitration. He has published extensively, including the monograph *Procedural Law in International Arbitration* (OUP 2004) and (as co-author) the forthcoming fourth edition of *Craig, Park and Paulsson on International Chamber of Commerce Arbitration* (OUP 2010).

August Reinisch

August Reinisch is Professor of international and European law at the University of Vienna. From 2004 to 2006 he was also Dean for International Relations of the University's Law School, where he is currently Director of the LL.M. program. He is also Adjunct Professor at the Bologna Center/SAIS of Johns Hopkins University. Since 2001 he has served as U.S.-government-appointed arbitrator on the *In Rem* Restitution Panel according to the Austrian General Settlement Fund Law 2001. He has served as arbitrator in investment cases and as an expert adviser in litigation as well as international arbitration. He has extensively published in international law with a focus on investment arbitration. He has authored *Recent Developments in International Investment Law* (Pedone 2009) and co-authored with Christoph Schreuer, Loretta Malintoppi and Anthony Sinclair the second edition of *The ICSID Convention: A Commentary* (CUP 2009). He has recently edited *Standards of Investment Protection* (OUP 2008) and co-edited, with Christina Knahr, *International Investment Law in Context* (Eleven International Publishing 2008) as well as, with Christina Binder, Ursula Kriebaum and Stephan Wittich, *International Investment Law in the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009).

Abby Cohen Smutny

Abby Cohen Smutny is a partner at White & Case LLP in Washington, D.C. She is recognized as a leading international arbitration expert whose practice focuses on international arbitration of investment disputes. She has served as counsel in dozens of investment arbitrations, representing both claimants and respondents, in cases before

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ICSID and its Additional Facility, the ICC, the Vienna International Arbitral Centre, the LCIA, as well as in *ad hoc* arbitration, such as under the UNCITRAL Rules. She is Vice-Chair of the Arbitration Committee of the IBA and formerly the Chair of the Investment Treaty subcommittee. She is a member of the Executive Council of the American Society of International Law and was formerly a member of the Executive Committee. She is a Vice-Chair of the Board of the Institute for Transnational Arbitration and a member of the Investment Treaty Forum of the British Institute for Comparative and International Law, and she was formerly Chair of the International Law Section of the Bar Association of the District of Columbia.

Lee Steven

Lee Steven is counsel at White & Case LLP in Washington, D.C. His practice focuses on international dispute resolution. He has particular experience in matters involving State parties, including disputes implicating State responsibility, expropriation claims, sovereign immunity, investment treaty protections, and the enforcement of foreign judgments and arbitral awards. He has represented parties in numerous arbitration proceedings before the International Centre for Settlement of Investment Disputes (ICSID) and its Additional Facility, and he has represented or advised clients in international litigation proceedings in U.S. federal courts and on arbitration matters before the AAA, the LCIA, the ICC, the SCC, and the Arbitration and Mediation Center of the WIPO.

Baiju S. Vasani

Baiju S. Vasani is a partner in Crowell & Moring's International Dispute Resolution Group resident in the firm's Washington D.C. and London offices. He is also an Adjunct Professor of Law at Georgetown Law Center. He focuses his practice exclusively on international investment and commercial arbitration covering various sectors and industries across the globe. He has appeared before various international tribunals under the auspices of, among others, the ICC, ICSID, the LCIA, and the LMAA, as well as before *ad hoc* arbitration tribunals and the federal and state courts of Texas. Prior to joining Crowell & Moring, he was a senior associate in the international arbitration group of another international law firm, and in-house legal counsel for a Fortune 500 company, involved in both contentious (arbitration and litigation) and transactional matters in connection with the company's United Kingdom and European operations.

Thomas W. Wälde

The late Thomas W. Wälde (1949–2008) was Professor & Jean-Monnet Chair of International Economic, Natural Resources & Energy Law at CEPMLP/University of Dundee & Essex Court Chambers, and a leading scholar and practitioner in the field of international energy and resources law. He was a specialist in international investment, economic, oil, gas, energy and mineral law, with a particular focus on arbitration in these fields. He had also been Interregional Adviser on Petroleum, Mineral & Investment Law with the United Nations and Executive Director of the Dundee University Centre for Energy, Petroleum and Mineral Law & Policy. In addition, he was the founding editor of *Oil, Gas & Energy Law* and *Transnational Dispute Management*.

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Arbitration Under International Investment Agreements

A Guide to the Key Issues

Investor-state dispute settlement mechanisms embodied in most investment agreements provide rights to foreign investors to seek redress for damages arising out of alleged breaches by host governments of investment-related obligations. The advantages for foreign investors are clear: investor-state disputes are resolved through mechanisms governed by international standards and procedures, and resolution does not rely on standards of the host state and the domestic courts, which may have a local bias or be subject to the influence of the host government.

The number of investment disputes has risen spectacularly over the last few years. The take-off was slow. The first Bilateral Investment Treaty (BIT) between Germany and Pakistan was concluded exactly 50 years ago, in 1959, and was followed by an explosion of similar agreements. The main institution to deal with investment disputes, ICSID, was established in 1966. Yet, it was only in the mid-1990s that investors grasped the real potency of this protection tool offered to them by their governments and began to generate an activity beyond the early expectations of the legal and policy communities.

Since then, approximately 2700 bilateral investment agreements and a growing number of free trade agreements with investment chapters have formed the legal fabric for such disputes. Also since then, numerous debates have taken place over interpretations given by arbitral tribunals to various treaty provisions at both the jurisdictional and merits phases of arbitration.

What is the procedure to follow when an investor takes a government to arbitration? What are the key recurrent jurisdictional and substantive issues in investment arbitration? How do arbitrators deal with them? What kind of relief is usually awarded? How are awards enforced? Do the decisions which touch upon them create precedent? Do they contribute to the creation of a consistent body of jurisprudence?

Although there is a growing volume of literature by academics, practitioners, and international organizations specializing in the field, this book surveys the entire procedure and focuses on the key, recurrent issues involved in the unfolding of investment arbitration. After introducing the reader to the existing array of investment treaties and

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the mechanisms provided by these agreements for the settlement of investment disputes, it addresses the main procedural, jurisdictional, substantive, and post-award issues that one finds in most, if not all, of the cases.

This book can be used as a handbook by all those interested in investment arbitration: legal practitioners, academics, government officials, students. It aims to provide the reader with an integrated approach from the launching of the arbitration, an understanding of the issues in their setting, and an easily accessible comparison of the available jurisprudence on each of the topics examined.

Further, it aims to do so by calling on recognized leaders in the field—private practitioners, academics, and current as well as former government or international organization officials—who generously share their vast experience and present the issues as they see them. The governmental aspect, which reflects the mixed character of investor-state arbitration, where the defendant is always a government, is not always reflected in the existing literature. By including this perspective, the book respects this distinctive character of investor-state arbitration.

Katia Yannaca-Small
Washington, DC, December 2009

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PART I

Investment Treaties and the Mechanisms Provided for the Settlement of Investment Disputes

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Chapter 1

Bilateral Investment Treaties and Investment Provisions in Regional Trade Agreements: Recent Developments in Investment Rulemaking

*Roberto Echandi**

INTRODUCTION

Given that no multilateral legal framework on investment exists, to date a significant part of the legal disciplines which relate to the relationship between host States and international investors has been developed at a bilateral and regional level, that is, through Bilateral Investment Treaties (BITs) and investment chapters included in Regional Trade Agreements (RTAs).

In effect, rules establishing minimum guarantees regarding the treatment of foreign investment have existed for more than two centuries.[1] However, BITs have been identified as the first international agreements which were exclusively focused on the treatment of foreign investment. BITs are negotiated between two states to protect and promote investments of investors of one party in the territory of the other party. These treaties date back to 1959 and traditionally have had a relatively uniform content that, with the exception of the introduction of provisions on investor-state dispute resolution in the 1960s, until recently had not changed markedly since their inception. The number of BITs negotiated worldwide increased dramatically over the last 15 years.

* Ambassador of Costa Rica to the Kingdom of Belgium and the Grand Duchy of Luxembourg and the European Union.

1 The opinions and views expressed in this paper do not represent the position of the Government of Costa Rica and fully fall under the responsibility of the author.

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Although the number negotiated by year has started to decline over the last five years, the cumulative number of these agreements reached more than 2500 by June 2007.[2]

A second group of International Investment Agreements (IIAs) consists of investment chapters included in Regional Trade Agreements. Over the last decade, the number of RTAs worldwide has been growing steadily, reaching more than 250 by the end of 2007.[3] RTAs are negotiated usually among countries of the same region to facilitate the cross-border movement of goods, services, capital, or people. RTAs vary enormously and range from agreements that provide only for economic cooperation to agreements that create a common market. Such agreements may be bilateral, plurilateral, regional, interregional, or multilateral. They may involve states at the same or at different levels of economic development.

This chapter is not intended to describe the contents of the obligations included in BITs and investment chapters of RTAs. This exercise has already been undertaken elsewhere in great detail.[4] Rather, it is intended to focus on the dynamism of investment rulemaking over the last decade in the context of BITs and investment chapters in RTAs. Contrary to other areas of public international law, over the last 10 years, the negotiation of international rules and disciplines in investment has been quite responsive to changing international economic and political context. Two trends are evident in this regard.

First, investment rulemaking has responded to the deep transformation and "globalization" of the international economy. The old paradigm where investment was visualized as a substitute to trade has long been overcome. Today, the positive interaction between trade and investment is not only evident and well documented, but it has become evident that both trade and investment are complementary strategies at the hand of international enterprises to serve an increasingly competitive and globalized international market. With the dramatic growth in international trade in services and the disaggregation of production on a global scale, governments in both developed and developing countries have become increasingly aware of the key role that foreign investment plays in positioning their national economies in an interdependent world economy. Investment rulemaking over the last decade has been responsive to such evolving international context. In particular, it is such context that explains the main distinctions between BITs and investment chapters in RTAs.

Despite minor specificities, the main distinction between most BITs and most investment chapters in RTAs tends to be the breadth of their respective underlying rationales. While the overwhelming majority of BITs contain obligations aimed at providing investment protection, the logic behind the majority of investment chapters

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2 *See* United Nations Conference on Trade and Development (UNCTAD) (2008), *Latest developments in Investor-State Dispute Settlement*, IIA MONITOR No. 1, 2008, INTERNATIONAL INVESTMENT AGREEMENTS (Geneva, United Nations).

3 *Ibid.*

4 *See, inter alia*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), BILATERAL INVESTMENT TREATIES 1995–2006: TRENDS IN INVESTMENT RULEMAKING (Geneva, United Nations 2007); UNCTAD, INTERNATIONAL INVESTMENT ARRANGEMENTS: TRENDS AND EMERGING ISSUES (Geneva, United Nations 2006); R. DOLZER & M. STEVENS, BILATERAL INVESTMENT TREATIES (The Hague, Boston and London, Martinus Nijhoff Publishers 1995).

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in RTAs is not only to provide protection to investment but also to promote, as much as possible, the right of entry to foreign investment into the economy of the host country. Such evolution in the rationale of IIAs is to a great extent a side effect of the evolution of the historical context in which international investment flows have taken place over the last 50 years.

Second, the other important factor shaping investment rulemaking over the last decade has been the tremendous increase in the number of investor-state dispute settlement (ISDS) cases. Provisions concerning investor-state dispute settlement have been included in BITs since the 1960s. However, the use of these provisions to institute arbitral proceedings was rare until the last decade. From 1987—when the first investor-state dispute based on a BIT was recorded under the arbitral proceedings of the International Centre for Settlement of Investment Dispute (ICSID) of the World Bank—until April 1998, only 14 BIT-related cases had been brought before ICSID, and only two awards and two other settlements had been issued.[5] However, since the late 1990s, the number of cases has grown enormously. The cumulative number of treaty-based cases has risen to at least 290 by the end of 2007, with 182 brought before ICSID (including ICSID's Additional Facility) and more than 100 before other arbitration fora.[6]

A creative dynamic has been generated between investment negotiation and adjudication, as the latter puts into test the breadth of the concepts and obligations assumed by Contracting Parties to IIAs, which are then subject to interpretation in the context of investment disputes. In particular, over the past decade, a number of countries have concluded a "new generation" of RTAs that liberalize trade in goods and services, while also containing investment protection provisions similar to those that traditionally have appeared in BITs. This new generation of RTAs, like a "new generation" of BITs, has generated important innovations in IIA practice.

Although not yet representing the numerical majority of existing IIAs, this group of new generation agreements represents the most significant innovation in investment rulemaking over the last decade, and it comprises most of new BIT models and investment chapters negotiated in the context of RTAs by country members of the North American Free Trade Agreement (NAFTA) and other countries in the Americas, the Asia-Pacific Rim, and North Africa. This chapter asserts that investment disputes, and in particular those that have arisen in the context of the implementation of NAFTA, have influenced the refinement of the provisions of this new generation of IIAs as well as the inclusion of a series of procedural and substantive innovations in these agreements.

The chapter will address the main distinction between BITs and investment chapters in RTAs, focusing on the evolution of their respective rationales, moving from the original exclusive focus on investment protection toward also promoting liberalization of investment flows. It will also discuss the main features of the new generation of

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5 Source: ICSID Web page at www.worldbank.org/icsid/cases.

6 United Nations Conference on Trade and Development (UNCTAD) (2008), *Latest Developments in Investor-State Dispute Settlement*, IIA Monitor No. 1, 2008, International investment agreements (Geneva, United Nations).

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IIAs and explain how such features respond to challenges derived from the interpretation of substantive and procedural provisions included in previous agreements.

BITS AND INVESTMENT PROVISIONS IN RTAS: THE GRADUAL SHIFT FROM INVESTMENT PROTECTION TO THE PROMOTION OF LIBERALIZATION OF INVESTMENT FLOWS

The Investment Protection Rationale of BITs

From a legal perspective, the structure and content of the BITs tend to be strikingly similar worldwide. Core elements found in all such treaties include provisions dealing with the scope of application; admission of investment, fair and equitable treatment; national treatment and most-favored-nation (MFN) expropriation and compensation; transfers of payments and dispute settlement, both between Contracting Parties and between a Contracting Party and an Investor.[7]

One of the key distinctive features of traditional BITs is that they only protect investment which has been established and admitted in the territory of the host country in accordance with the latter's domestic legislation. This is what is called the "admission clause," and its main implication is that it limits the scope of application of the agreement to the established investment.

BITs do not grant any protection to the investor in the phase where the investment has not yet been affected—what is known in the investment jargon as protection in the "preestablishment" phase. This allows the host country to apply any screening mechanism for foreign investment it may have in place and, therefore, to freely determine the conditions under which foreign investment—if any—would be allowed to enter the country. Further, the admission clause allows the host country to maintain any existing discriminatory legislation which may affect the entry of foreign investment into any sphere of economic activity. Because BITs apply only to those investments which have been admitted in accordance with the host country's laws, if domestic legislation allows for the existence of State monopolies or reserves certain economic activities to national investors or even to foreign investors of a particular nationality, that is part of the legal context in which foreign investment is to be deemed admitted into the host country.

Clearly, traditional BITs have not been conceived as instruments to provide foreign investment with the right of establishment in the host countries. BITs are agreements which focus on providing a set of guarantees to protect the property of foreign investors *only* in those economic activities where they may be permitted to invest.

The nature and objectives of BITs can be better understood by looking at the historical context from which they emerged. The first BIT was signed between the Federal Republic of Germany and Pakistan in 1959.[8] During the 1960s and 1970s,

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7 For a detailed analytical description of each of these provisions, see references cited in note 4, *supra*.

8 Source: UNCTAD (1998), Bilateral Investment Treaties in the Mid-1990s (Geneva, United Nations).

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other European countries followed the same path, and an important number of BITs with developing countries were also negotiated.

From a political economy perspective, two fundamental systemic factors explain the emergence of BITs during this period. First, with the decolonization movement in full sway, numerous former European colonies became newly independent States. Foreign entrepreneurs with investments in these countries were confronted not only with the loss of the legal protection granted by existing legislation in the former colonial power but also with the rising trend of economic nationalism promoted by the new governing elites. Several Governments in newly independent States were hostile to what they considered a long-lasting exploitation of their economies by foreign interests and consequently geared their political and economic policies toward asserting their national sovereignty, in particular over their natural resources. Within this context, capital-exporting countries had a clear incentive to negotiate investment regimes which would set a minimum standard of protection to their investments abroad.

A second variable which explains the nature of the emergence and character of BITs were the patterns of production and international division of labor which prevailed in the world economy during the 1950s and 1960s. During this period, foreign direct investment (FDI) in developing countries tended to focus either on the extraction and processing of raw materials—in the mining, agricultural sector, for example—or on manufacturing industries which had been promoted by import-substitution industrialization (ISI) policies.

The two factors cited explain why traditional BITs were originally conceived as instruments to protect the private property which foreign investors owned abroad, increasingly important given a historical juncture in which economic nationalism was rife and in which the risk of being subject to expropriation or nationalization appeared to be always present. This is further supported by the fact that the overwhelming majority of the approximately 400 BITs that had been concluded worldwide by the 1980s were negotiated between a developed—capital exporting—country on the one hand and a developing—capital importing—country on the other,[9] usually between a European country and a country from the African or Asian region.[10]

The historical context in which the BITs were originally conceived has changed.[11] We are living in a world in which patterns of international production of manufactures

9 The explosion in South-South negotiation of BITs started in the late 1980s and prevailed over the 1990s. Until today, BITs have not tended to be negotiated between two developed countries. *See* UNCTAD, *supra* note 8.

10 For many reasons, most Latin American countries refrained from negotiating BITs until the 1980s. One of the reasons was the Calvo Doctrine, according to which a foreign investor was required to rely solely on local remedies to solve any potential investment-related dispute arising with the host State.

11 An analysis of the BITs negotiated worldwide during the last two decades shows three prevailing trends: First, the total number of BITs negotiated has proliferated significantly. Since the end of the 1980s and up to 2008, more than 2200 additional BITs were negotiated. Second, during this period, there was a deviation from the North-South pattern which had characterized the negotiations of these agreements in the past. After the 1980s, an increasing number of BITs began to be negotiated between developing countries as well as by economies in transition. Third, it was during this period that most of the countries of the Western Hemisphere engaged

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as well as international trade in services—most of which need commercial presence to be effectively provided—have become key not only to allow better standards of living for consumers but also to provide the domestic economy for both developed and developing countries, with the competitive edge required to increase and diversify their exports to the world market.

Within this context, greater *market access* through *market presence*, and not just protection for private property, is gradually becoming part of the main interest of international investors when seeking the application of an IIA. International investment rules have increasingly been adopted as part of bilateral and regional RTAs that address and seek to facilitate trade and investment transactions. IIAs are increasingly being formulated as part of agreements that encompass a broader set of issues, including notably trade in goods and services and other factors of production. These agreements, in addition to a variable range of trade liberalization and promotion provisions, contain commitments to liberalize, protect, and/or promote investment flows between the parties. As explained before, the number of such agreements—now reaching more than 250 RTAs—has been growing steadily over the last decade; more than 87 percent were concluded since the 1990s. Further, BITs negotiated by the United States and Canada have traditionally sought to apply not only to established investment but also in the preestablishment phase.

Investment Protection and Liberalization in the "New Generation" of BITs and Investment Chapters in RTAs

New generation IIAs—both BITs and investment chapters in RTAs—provide not only for investment protection but also gradual liberalization. That is the case of IIAs concluded by countries such as Canada, Chile, Japan, Mexico, Peru, Colombia, Central American countries, Singapore, Morocco, Australia, and the United States. These IIAs are more comprehensive; more detailed, and for the most part, more rigorous than any agreement previously concluded. While they address many of the same topics, they also deal with additional issues or modify the approach taken in the NAFTA on the basis of accumulated experience.

New generation IIAs grant to covered foreign investors national and most favored nation treatment with respect to the right of establishment in the host State. This right is generally qualified by a provision that allows the host state to specify sectors or activities of the economy in which the right does not apply, the so-called "negative list" approach. This approach was pioneered by the United States in its BITs but in recent years has also been employed by Canada and Japan in their BITs and by various other countries of Latin America and the Asia-Pacific region in their RTAs.

As more agreements utilizing this approach are being concluded, the annexes have also become somewhat more complex. One annex includes a list of existing laws and

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in negotiations of BITs. By mid-1999, the total number of BITs concluded by the countries of the Western Hemisphere was approximately 58, 55 of which were in fact negotiated after 1990. Sources: UNCTAD, *supra* notes 4 and 8.

regulations that are inconsistent with one or several of the obligations in respect to which Contracting Parties may take reservations. The effect of an annex of nonconforming measures is to bind the level of conformity existing between the domestic legislation of the Contracting Parties and the obligations of the IIA at the time of conclusion of the agreement. Thus, once the IIA enters into force, Parties may amend any of the nonconforming measures included in this annex only if the amendment does not decrease the conformity of the measure with the obligation concerned as it existed immediately before the amendment. Article 6 of the BIT negotiated between Japan and Vietnam (2003) illustrates this approach:

ARTICLE 6

> 1. Notwithstanding the provisions of Article 2 or 4, each Contracting Party may maintain any exceptional measure, which exists on the date on which this Agreement comes into force, in the sectors or with respect to the matters specified in Annex II to this Agreement.
>
> 2. Each Contracting Party shall, on the date on which this Agreement comes into force, notify the other Contracting Party of all existing exceptional measures in the sectors or with respect to the matters specified in Annex II. Such notification shall include information on the following elements of each exceptional measure: (a) sector and sub-sector or matter; (b) obligation or article in respect of the exceptional measure; (c) legal source of the exceptional measure; (d) succinct description of the exceptional measure; and (e) purpose of the exceptional measure.
>
> 3. Each Contracting Party shall endeavour to progressively reduce or eliminate the exceptional measures notified pursuant to paragraph 2 above.
>
> 4. Neither Contracting Party shall, after the entry into force of this Agreement, adopt any new exceptional measure in the sectors or with respect to the matters specified in Annex II.

Most new generation IIAs also envisage a second kind of annex, which comprises a list of economic activities or sectors where the Contracting Parties may maintain or adopt measures inconsistent with one or several of the obligations of the IIA. Thus, in the areas or sectors included in this second annex, parties do not enter into binding commitments. Instead, the Contracting Parties reserve their right to adopt new nonconforming measures which may have not existed at the time of negotiations. This is why this kind of annex is often known as annex of "future measures." Article 10.9 of the Investment Chapter of the FTA between Chile and South Korea illustrates this approach:

ARTICLE 10.9: RESERVATIONS AND EXCEPTIONS

> ". . . 2. Articles 10.3 [national treatment], 10.7 [Performance Requirements] and 10.8 [Senior Management and Boards of Directors] shall not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors or activities, as set out in its Schedule to Annex II . . ."

The use of the negative list approach combined with the increased sophistication of the annexes evidences that signatories of new generation IIAs have not suffered from any regulatory "chilling effect" from the increase in investment disputes over the

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last decade. Further, the response of governments negotiating new generation IIAs has not been to ignore the importance of continuing to promote and protect international investment flows.

IMPACT OF INTERNATIONAL SYSTEM OF DISPUTE SETTLEMENT (ISDS) EXPERIENCE ON INVESTMENT RULEMAKING: A NEW GENERATION OF IIAS

It is evident that the significant increase in the number of ISDS claims over the last decade has had an impact on the process of investment rulemaking. ISDS practice has led numerous countries of the region to realize that the specific wording of IIA provisions does matter and that it can make a significant difference on the outcome of an investment dispute. Thus, it is no coincidence that several countries recently revised their model BITs as well as investment chapters in RTAs and updated their wording, content, and structure to incorporate the lessons learned from investment-related litigious experience.

Over the last couple of years, a new generation of IIAs has been gradually emerging. This "new generation" of IIAs falls mainly into two groups: The first group consists of RTAs containing a chapter on investment. Originally influenced by NAFTA, such treaties have been concluded mainly by the United States with an increasing number of countries such as Chile, Singapore, the five Central American countries and the Dominican Republic, Colombia, Peru, South Korea, Morocco, and Australia. A second group of IIAs comprises BITs incorporating important innovations and which are exemplified by the new model BITs of the United States and Canada, and to a lesser degree, Mexico. The normative evolution in these IIAs has five main features.

First, some recent IIAs have deviated from the traditional open-ended, asset-based definition of investment. Instead, they have attempted to strike a balance between maintaining a comprehensive definition of investment and yet not to apply to assets that are not intended by the Parties to be covered investments.

Second, the wording of various substantive treaty obligations has been revised. Learning from the technical intricacies faced in the implementation of NAFTA's Chapter 11 and other agreements, new IIAs clarify the meaning of provisions dealing with absolute standards of protection, in particular, the international minimum standard of treatment in accordance with international law and indirect expropriation.

Third, these IIAs address a broader scope of issues—not only specific economic aspects like investment in financial services but also other kinds of issues where more room for host country regulation is sought. The protection of health, safety, the environment, and the promotion of internationally recognized labor rights are areas where new IIAs include specific language aimed at clarifying that the investment promotion and liberalization objectives of IIAs must not be pursued at the expense of these other key public policy goals.

Fourth, recent IIAs include transparency provisions, which represent an important qualitative innovation compared to previous IIAs. From a trend of conceiving transparency as an obligation to exchange information between States, these IIAs tend to

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establish transparency also as an obligation with respect to the investor. Further, transparency obligations are no longer exclusively geared toward fostering exchange of information but also as transparency in the domestic process of rulemaking, aiming to enable interested investors to participate in it.

Fifth, new IIAs contain significant innovations regarding investor-state dispute settlement (ISDS) procedures. Greater transparency in arbitral proceedings, including open hearings, publication of related legal documents, and the possibility for representatives of civil society to submit "amicus curiae" briefs to arbitral tribunals is foreseen. In addition, other very detailed provisions on investor-state dispute settlement are included in order to provide for a more legal oriented, predictable, and orderly conduct at the different stages of the ISDS process.

The five kinds of innovations have something in common. They are geared at providing more certainty regarding the scope and extent of the IIA obligations and a more transparent and predictable execution of the ISDS process. Each of these trends will now be further explained.

Greater Precision in the Scope of the Definition of Investment

Over the last decade, one aspect that generated concern in some countries has been the interpretation by some arbitral tribunals of the concept of "investment" under the applicable IIA. It has been considered that some of these interpretations were too broad and went beyond what the Contracting Parties conceived as "investment" when negotiating the IIA. For instance, in the case of *Pope & Talbot v. Canada*,[12] the tribunal found that a market share through trade could be regarded as part of the assets of an investment; and in *S. D. Myers v. Canada*,[13] the arbitral tribunal held that the establishment of a sales office and commitment of marketing time formed a sufficient investment.

Investments can take many forms. This explains why most IIAs use the traditional broad asset-based definition of investment. The ISDS experience has shown the risks of having an extremely broad and unqualified definition of investment.

One approach of avoiding an overreaching definition of investment is called a "closed-list" definition. This approach differs from the broader asset-based definition in that it does not contain a conceptual chapeau to define the term investment; it rather consists in an ample but finite list of tangible and intangible assets. Originally envisaged as an "enterprise-based" definition used in the context of the United States–Canada Free Trade Agreement, this approach evolved toward the definition used in Article 1139 of NAFTA. Subsequently, the closed-list approach has been frequently used by several APEC member countries in the definition of "investment" included in

12 Pope & Talbot, Inc. v. The Government of Canada, UNCITRAL, Interim Award on Merits, June 26, 2000; Award on Merits, April 10, 2001; Award on Damages, May 31, 2002; Award on Costs, November 26, 2002.

13 S.D. Myers, Inc. v. Canada, UNCITRAL, First Partial Award, November 13, 2000.

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their IIAs. Article 96 of the Free Trade Agreement (FTA) between Japan and Mexico illustrates this approach and defines "investment" in the following manner:

(i) the term "investment" means:

(AA) an enterprise;

(BB) an equity security of an enterprise;

(CC) a debt security of an enterprise:

(aa) where the enterprise is an affiliate of the investor, or

(bb) where the original maturity of the debt security is at least 3 years, but does not include a debt security, regardless of original maturity, of a Party or a state enterprise;

(DD) a loan to an enterprise:

(aa) where the enterprise is an affiliate of the investor, or

(bb) where the original maturity of the loan is at least 3 years, but does not include a loan, regardless of original maturity, to a Party or a state enterprise;

(EE) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;

(FF) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (CC) or (DD) above;

(GG) real estate or other property, tangible or intangible, and any related property rights such as lease, liens and pledges, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and

(HH) interests arising from the commitment of capital or other resources in the Area of a Party to economic activity in such Area, such as under:

(aa) contracts involving the presence of an investor's property in the Area of the Party, including turnkey or construction contracts, or concessions, or

(bb) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise; but investment does not mean,

(II) claims to money that arise solely from:

(aa) commercial contracts for the sale of goods or services by a national or enterprise in the Area of a Party to an enterprise in the Area of the other Party, or

(bb) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (DD) above; or >

(JJ) any other claims to money, that do not involve the kinds of interests set out in subparagraphs (AA) through (HH) above;"

During the last decade, the closed-list definition of investment has also begun to be used in the context of BIT negotiations. In 2004, Canada abandoned the asset-based definition of investment in its FIPAs and opted to incorporate in its new Canadian

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BIT model a relatively detailed closed-list definition of investment. In addition to being finite, the list contains a series of specific clarifications to avoid applying the agreement to certain kinds of assets that otherwise would fall under the investment definition.

As the Canadian experience evidences, the difficulty with the closed-list approach is not how ample the definition of investment should be. Countries still prefer a comprehensive definition of investment in their IIAs. Rather, it seems that the concern relates to the precision of the definition. In addition to maintaining an ample concept of investment, countries are likewise eager—as Article 96 of the Japan-Mexico FTA shows—to include clarifications and additional language to make the definition of investment more precise.

Another approach used to make the definition of investment more accurate has been to qualify an otherwise very broad definition. Accordingly, numerous IIAs recently negotiated incorporate a definition of investment in economic terms, that is, they cover, in principle, every asset that an investor owns and controls but add the qualification that such assets must have the "characteristics of an investment". For this purpose, they refer to criteria developed in ICSID practice, such as "the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk." This approach is complemented by explicit exclusions of several kinds of assets, which are not to fall within the category of covered investments under the agreement. Article 10.1 of the Free Trade agreement between Chile and South Korea illustrates this approach[14] and defines the term investment" in the following manner:

> investment means every kind of asset that an investor owns or controls, directly or indirectly, and that has the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gains or profits and the assumption of risk. Forms that an investment may take include, but are not limited to:
>
> (a) an enterprise;
>
> (b) shares, stocks, and other forms of equity participation in an enterprise;
>
> (c) bonds, debentures, loans, and other debt instruments of an enterprise;
>
> (d) rights under contracts, including turnkey, construction, management, production, concession or revenue-sharing contracts;
>
> (e) claims to money established and maintained in connection with the conduct of commercial activities;
>
> (f) intellectual property rights;
>
> (g) rights conferred pursuant to domestic law or contract such as concessions, licenses, authorizations and permits, except for those that do not create any rights protected by domestic law; and
>
> (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens and pledges;

14 Other agreements using this same approach comprise the chapter on investment of the free trade agreements recently negotiated between the United States and Australia, Singapore, and Chile.

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but investment does not mean

(i) claims to money that arise solely from:

(i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of the other Party; or

(ii) the extension of credit in connection with a commercial transaction, such as trade financing; and

(j) an order entered in a judicial or administrative action.

The wording of the definition cited above clearly indicates that, for an asset to be considered as a covered investment, there are, at a minimum, three prerequisites. First, the asset must be owned or controlled by an investor as defined by the agreement; second, the asset must have the characteristics of an investment; and third, the asset must not fall within any of the excluded categories.

The definition does not list all the characteristics that an asset must have in order to be considered an investment. However, the definition does include some minimum parameters, namely the commitment of capital, the expectation of gain or profit, or the assumption of risk. The inclusion of these criteria within the definition of investment has the effect of excluding *ab initio* certain assets—arguably this would be the case for real estate or other property, tangible or intangible, not acquired in the expectation or used for the purpose of economic benefit or other business purposes. However, the wording of the definition means that, in the case of other kind of assets, the determination as to whether they fall within the scope of a covered investment has to be undertaken on a case-by-case basis.

Clarification of the Meaning of Several Key Obligations

A second trend in investment rulemaking derived from the ISDS experience over the last decade relates to the revision of the wording of various substantive IIA obligations. New BITs and investment chapters in RTAs negotiated with various countries by Canada, Mexico, and the United States have tended to clarify the meaning of several substantive provisions, in particular those dealing with absolute standards of protection, such as the international minimum standard of treatment and expropriation.

International minimum standard of treatment. In the case of the international minimum standard of treatment, new generation BITs and RTAs tend to include a provision which explicitly clarifies that the obligation undertaken by the Contracting Parties is to accord covered investments treatment *in accordance with customary international law*. According to these IIAs, the latter includes the notions of fair and equitable treatment and full protection and security. These standards are also explicitly defined in the text of these agreements.

It is evident that the negotiators of these agreements have taken into account the issues discussed in recent NAFTA Chapter 11 arbitrations. An example of this trend is

Article 11.5 of the Free Trade Agreement negotiated between Australia and the United States, which reads as follows:

ARTICLE 11.5: MINIMUM STANDARD OF TREATMENT[15]

> 1. Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security.
>
> 2. For greater certainty, the concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:
>
> (a) 'fair and equitable treatment' includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
>
> (b) 'full protection and security' requires each Party to provide the level of police protection required under customary international law.
>
> 3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

The provision cited above is complemented by the following Annex A, which clarifies the understanding of the IIA parties regarding the concept "customary international law":

> The Parties confirm their shared understanding that 'customary international law' generally and as specifically referenced in Article 11.5 and Annex 11.B results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 11.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

The language of the clause cited above is self-explanatory. This seems to be exactly the intention of the Contracting Parties, partly as a result of the experience with Article 1105 of NAFTA. The debate regarding the fair and equitable treatment clause in Chapter 11 of NAFTA, and more recently in some BIT disputes, has evidenced the risks of including unqualified language in IIAs. The wording of those clauses could be broad enough to apply to virtually any adverse circumstance involving an investment, making the fair and equitable treatment provision among those most likely to be relied upon by an investor in order to bring a claim under the investor-state dispute settlement proceedings.

The inclusion of language clarifying the content and scope of the minimum standard of treatment in new generation BITs and investment chapters in RTAs may be particularly relevant to counterbalance two recent trends in ISDS practice.

15 Article 11.5 shall be interpreted in accordance with Annex 11-A.

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First, the clarification concerning the meaning of customary international law included in, for example, Annex A of the Australia-United States Fair Trade Agreement (FTA) is important to provide guidance as to how to interpret the fair and equitable treatment standard properly. Some recent arbitration panels have granted themselves a certain degree of freedom in this respect. Given the evolutionary nature of customary international law, the content of the fair and equitable treatment standard no longer requires bad faith or "outrageous" behavior on behalf of the host state. By eliminating these requirements, some arbitral decisions had the effect of equating the minimum standard under customary international law with the plain meaning approach to the text. However, it is not self-evident that customary international law has evolved to such a degree.

Furthermore, the clarification included in new generation BITs and RTAs that the minimum standard of treatment comprises two different concepts—i.e., the fair and equitable standard and the standard of full protection and security—is useful to counterbalance some recent arbitral decisions, which merged the two standards in one.[16]

Expropriation. Expropriation is the other area where new generation IIAs have introduced clarifying language. The lack of clarity concerning the degree of interference with the rights of ownership that is required for an act or series of acts to constitute an

16 Some tribunals have found that the full protection and security standard has been breached because the investment has been subject to unfair and inequitable treatment. For instance, in Occidental Exploration and Production Company v. Ecuador (Award, July 1, 2004, London Court of International Arbitration, Case No. UN 346), the standard was found to be breached despite the nonexistence of any physical violence or damage. The dispute in the *Occidental* case stemmed from the execution of a contract between a U.S. company and Petroecuador, an Ecuadorian state company in charge of the exploration and production of oil in Ecuador. After finding that Ecuador—by revoking previous decisions regarding the contract—had frustrated the legitimate expectations of the investor when the investment was made, the tribunal found:

> The Tribunal accordingly holds that the Respondent has breached its obligations to accord fair and equitable treatment under Article II(3)(a) of the Treaty. In the context of this finding the question of whether in addition there has been a breach of full protection and security under this Article becomes moot as treatment that is not fair and equitable automatically entails an absence of full protection and security of the investment. (para.187)

The merger of the standard of full protection and security with the fair and equitable treatment standard in the *Occidental* case seems odd, especially when taking into account that the applicable IIA—the 1993 BIT between Ecuador and the United States—provided for both standards separately. Article II.2(a) of that Agreement stipulates that "*Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and. . . .*" Further, the tribunal did not furnish any explanation for not paying attention to the specific wording of the BIT. The approach used in the *Occidental* case has been followed by other arbitral tribunals. In Azurix v. Argentina (Award, July 26, 2006, ICSID Case No. ARB/01/02), the tribunal repeated the reasoning in the *Occidental* case and also merged the full protection and security standard with the fair and equitable treatment principle.

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indirect expropriation has been one of the most controversial issues during the last decade.[17]

The number of ISDS cases acknowledging that an indirect expropriation has occurred has been small. Nonetheless, parts of civil society in some countries have expressed fears that the prospect of investor-state arbitration arising out of alleged regulatory takings could result in a "regulatory chill" on the grounds that concern over liability exposure might lead host countries to abstain from necessary regulation.

Within this context, new generation BITs and investment chapters in RTAs contain provisions clarifying two specific aspects. First, text has been included to make it explicit that the obligations regarding expropriation are intended to reflect the level of protection granted by customary international law. Second, such clarification has been complemented by guidelines and criteria in order to determine whether, in a particular situation, an indirect expropriation has in fact taken place.

Furthermore, the new generation IIAs clarify that an adverse effect on the economic value of an investment, as such, does not establish that an indirect expropriation has occurred. It is further stated that, except in rare circumstances, nondiscriminatory regulatory actions by a Party aimed at protecting legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriation. Annex 10-D of the Free Trade Agreement between Chile and the United States illustrates this trend:

> The Parties confirm their shared understanding that:
>
> 1. Article 10.9(1) is intended to reflect customary international law concerning the obligation of States with respect to expropriation.
>
> 2. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.
>
> 3. Article 10.9(1) addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.
>
> 4. The second situation addressed by Article 10.9(1) is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
>
> (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:
>
> (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
>
> (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and

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17 For a detailed analysis on this subject, see UNCTAD, Investor-State Dispute Settlement and Impact on Investment Rulemaking 58 (Geneva, United Nations 2007).

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(iii) the character of the government action.

(b) Except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.

What are the motivations behind the inclusion of these clarification clauses in some IIAs? Do these clauses reflect the intention of the Contracting Parties to "correct" any particular trend in the jurisprudential interpretation of expropriation clauses? It could be argued that provisions like the one cited above provide some important guidance for future cases. Another significant role of such clarifying provisions may be that they serve as a signal for civil society. By including such language, governments may acknowledge the concerns of certain sectors of civil society regarding what they perceive as a "regulatory chill" effect of ISDS proceedings. To respond to these concerns, a provision like the one cited above indicates that IIAs are not intended to put in question the regulatory power of host States.

Clarification That Investment Protection Should Not Be Pursued at the Expense of Other Public Policy Objectives

In addition to the features already mentioned, some new BITs and investment chapters in RTAs address a broader scope of issues. The protection of health, safety, cultural identity, the environment, and the promotion of internationally recognized labor rights are some of the areas which these IIAs seek to protect by specific language aimed at clarifying that the investment promotion and liberalization objectives of IIAs must not be pursued at the expense of these other key public policy objectives. Different techniques have been used for that purpose. While some BITs and investment chapters of RTAs have included general treaty exceptions, other treaties have opted for positive language in order to reinforce commitments of the Contracting Parties to safeguard certain values; some IIAs have combined both.

Examples of IIAs including exceptions to safeguard flexibility for regulation are the new U.S. and Canadian model BITs. The latter includes a series of exceptions to preserve a wide fan of public policy objectives, such as the protection of human, animal or plant life and health, the integrity and stability of the financial system, cultural industries, and essential security interests. Furthermore, the 2004 Canadian model BIT includes the following Article 11:

HEALTH, SAFETY AND ENVIRONMENTAL MEASURES

The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory or an investment of an investor. If a Party considers that the other Party has offered such an encouragement, it may request consultations

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with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.[18]

Countries have not only opted to use exceptions but have also incorporated positive language into the IIAs to protect other public policy objectives, notably protection of the environment and respect for core labor rights. Once more, the legal techniques used for such purpose vary among the different IIAs.

One approach has been to make reference to these values in the preamble of the agreement. For instance, the BIT between Japan and Vietnam (2003) explicitly provides in its preamble that the objective to promote investment can be achieved "*without relaxing health, safety and environmental measures of general application. . . .*"

Other IIAs have included "side agreements" to protect labor and environmental standards. For instance, in the context of the Trans-Pacific Strategic Economic Partnership Agreement between Brunei Darussalam, Chile, New Zealand, and Singapore,[19] the Contracting Parties negotiated two side agreements on environment[20] and labor cooperation.[21] Among other aspects, it is made clear that investment promotion and liberalization will not impair the capacity of the Contracting Parties to protect the environment or labor rights in their respective territories. The same technique can be observed in the NAFTA and in the Free Trade Agreement between Canada and Chile.

Other BITs and investment chapters in RTAs have incorporated specific provisions in the investment chapter as well as in additional sections on labor and the environment. This is the case with several free trade agreements negotiated by the United States with countries such as Australia, Chile, Central America, Colombia, Singapore, and Peru. The investment chapters in these IIAs include a provision on environmental measures similar to Article 10.18 of the Free Trade Agreement between South Korea and Chile, which states the following:

> 1. Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that an investment activity in its territory is undertaken in a manner sensitive to environmental concerns.
>
> 2. The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that the other Party has offered such an encouragement, it may request consultations

18 The new U.S. model BIT contains similar provisions on Investment and Environment and Investment and Labor.

19 This agreement applies to investment in services only.

20 Environment Cooperation Agreement among the Parties to the Trans-Pacific Strategic Economic Partnership Agreement.

21 Memorandum of Understanding on Labour Cooperation Among the Parties to the Trans-Pacific Strategic Economic Partnership Agreement.

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with the other Party and the Parties shall consult with a view to avoiding any such encouragement.

The inclusion of provisions clarifying that the protection and liberalization of investment should not be pursued at the expense of other key public policy objectives may be more an indirect rather than a direct result of ISDS practice over the last decade. These normative developments seem to respond to the intention of Contracting Parties to address the concerns of labor unions and environmental nongovernmental organizations (NGOs) regarding investment agreements.

Promotion of Greater Transparency Between the Contracting Parties and in the Process of Domestic Rulemaking

A fourth feature of new generation BITs and investment chapters in RTAs is the qualitative evolution in the conception of the transparency obligations for purposes of the agreement. In addition to the obligation of the Contracting Parties to publish their laws,[22] new approaches include the investors in transparency regulations, providing them not only with rights but also with obligations vis-à-vis the host State.[23] Second, this new method conceives transparency beyond the traditional notion of publication

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22 For instance, Article 10 of the BIT between Uruguay and the United States (2005) provides the following:

ARTICLE 10: PUBLICATION OF LAWS AND DECISIONS RESPECTING INVESTMENT

1. Each Party shall ensure that its:

(a) laws, regulations, procedures, and administrative rulings of general application; and

(b) adjudicatory decisions respecting any matter covered by this Treaty are promptly published or otherwise made publicly available.

2. For purposes of this Article, "administrative ruling of general application" means an administrative ruling or interpretation that applies to all persons and fact situations that fall generally within its ambit and that establishes a norm of conduct but does not include:

(a) a determination or ruling made in an administrative or quasi-judicial proceeding that applies to a particular covered investment or investor of the other Party in a specific case; or

(b) a ruling that adjudicates with respect to a particular act or practice.

23 Thus, for example, Article 15.2 of the BIT between Uruguay and the United States obliges the investor to provide information on its investment to the host government in certain circumstances.

ARTICLE 15: SPECIAL FORMALITIES AND INFORMATION REQUIREMENTS

. . . . . .

2. Notwithstanding Articles 3 and 4, a Party may require an investor of the other Party, or its covered investment, to provide information concerning that investment solely for informational or statistical purposes. The Party shall protect any confidential business information from any disclosure that would prejudice the competitive position of the investor or the covered investment. Nothing in this paragraph shall be construed to prevent a Party from

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of laws and regulations. Rather, it also focuses on the process of rulemaking, attempting to use it as an instrument to promote the principle of due process. Thus, in addition to enabling investors to know and understand the applicable rules and disciplines affecting their investments, this new approach attempts to use transparency as a tool to enable interested persons to participate in the process of investment-related rulemaking. An example of this approach is Article 19, on transparency, of the 2004 Canadian Model BIT:

> 1. Each Party shall, to the extent possible, ensure that its laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and the other Party to become acquainted with them.
>
> 2. To the extent possible, each Party shall:
>
> (a) publish in advance any such measure that it proposes to adopt; and
>
> (b) provide interested persons and the other Party a reasonable opportunity to comment on such proposed measures.
>
> 3. Upon request by a Party, information shall be exchanged on the measures of the other Party that may have an impact on covered investments.

The approach illustrated above applies transparency not only to existing legislation but also to draft bills and regulations. In this respect, Article 19.2 above provides that to the extent possible, the Contracting Parties shall publish in advance any proposed measure of general application that affects investments and also "*provide interested persons and the other Party a reasonable opportunity to comment on such proposed measures*." This approach, which is also used in the new U.S. model BIT, represents a qualitative leap in the content and rationale of transparency provisions in IIAs.

Under this approach, transparency no longer means just information but also participation in investment rulemaking. Second, the obligation does not provide an exclusive right to a foreign investor vis-à-vis the host country. Rather, the obligation is to provide a reasonable opportunity to all interested persons to comment on proposed investment-related measures. Thus, the obligation is not only applicable to the Contracting Parties with respect to the investors of the other Contracting Party but also between each Contracting Party and its own citizens.

It is true that, for some countries, developing the mechanisms to effectively comply with principles of due process may entail legal reforms and financial costs. On the other hand, if those adjustments are necessary, it is because the developing countries concerned lack a modern body of administrative law and implementation procedures, a *sine qua non* not only for the modernization of the administration of justice, but for strengthening democratic institutions in general. Within this context, transparency provisions in IIAs may be significant not only for the generation of a more predictable business climate in favor of foreign investors, but—more important from a development

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otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law.

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perspective—to foster a more legalistic and rule-oriented administrative practice, which is in the general interest of the population of the host country.

The emphasis of some IIAs on using transparency provisions to strengthen the principle of due process of law is also evidenced by some additional obligations. An example is the BIT between the United States and Uruguay (2005), which includes within the transparency provision additional explicit obligations on administrative procedures and the right of an impartial review and appeal of administrative decisions on investment-related matters. Once more, these kinds of obligations matter not only because of the more predictable investment climate they tend to generate, but also because of the institutional strengthening that their full compliance may entail for the entire citizenry of the countries concerned.

Innovations in ISDS Procedures

New generation BITs and investment chapters in RTAs also regulate in more detail ISDS procedures, providing greater guidance, both to the disputing parties and tribunals, with respect to the conduct of the arbitration proceedings. During the first part of the last decade, Chapter 11 of NAFTA influenced significantly the features of the investor-state dispute settlement provisions in many other IIAs. More recently, it is the experience with the increasing number of investment disputes that has triggered innovations included in new IIAs.

Traditionally, most IIAs have had very few general provisions on ISDS procedures. This trend changed with NAFTA, which for the first time regulated a series of aspects of arbitration proceedings. NAFTA's Chapter 11 devotes a whole section to ISDS procedures. New generation BITs and investment chapters in RTAs have continued with this trend and have even taken the evolution in rulemaking one step further. In fact, ISDS procedures are one of the areas where significant developments in IIAs have taken place over the last decade.

New generation IIAs have incorporated various innovative provisions directed to foster four general objectives: First, they have purported to provide greater control by the Contracting Parties over arbitration procedures; second, they promote the principle of judicial economy in investment-related disputes; third, they seek to ensure consistency among arbitral awards; and fourth, they promote greater legitimacy of ISDS within civil society. These objectives are derived from the experience on investment disputes that several countries of the region have gathered over the last decade. Each one of these patterns will be examined in greater detail.

Greater control of the contracting parties over arbitration procedures. New generation IIAs contain innovations geared toward promoting greater control of the Contracting Parties over arbitration procedures. The rationale behind this trend is to diminish the degree of discretion arbitral tribunals have in deciding how to conduct the arbitration proceedings, thereby making the latter more predictable, in addition to clarifying key substantive treaty provisions. This objective has been pursued through two different techniques.

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First, several countries have opted to increase the level of detail of procedural aspects of ISDS in order to clarify in advance certain issues that otherwise would have to be decided by arbitral tribunals. New generation IIAs draw from the experience of NAFTA and contain more detailed ISDS provisions.[24] Further, these agreements even go beyond NAFTA and contain clauses that clarify particular procedural aspects which have been subject to debate in ISDS practice over the last decade.

For instance, the Investment Chapter in the Free Trade Agreement between Singapore and the United States explicitly addresses one of the issues that have been discussed in the context of the application of other IIAs—namely, whether treaty-based arbitral tribunals have jurisdiction to deal with claims based solely on an investment contract. In this regard, the agreement between Singapore and the United States expressly provides in its Article 15.15 that an investor can submit a claim under that IIA on the basis of a breach of an investment agreement or an investment authorization:

> 1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:
>
> (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim:
>
> (i) that the respondent has breached
>
> (A) an obligation under Section B,
>
> (B) an investment authorization, or
>
> (C) an investment agreement; and
>
> (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach; and
>
> (b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim:
>
> (i) that the respondent has breached
>
> (A) an obligation under Section B,
>
> (B) an investment authorization, or
>
> (C) an investment agreement; and
>
> (ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach. . . . (emphasis added)

This greater involvement of the Contracting Parties in shaping the specific features of ISDS mechanisms demonstrates their interest in increasing the predictability and control over the execution of arbitration procedures.

24 Examples include, *inter alia*, the specific procedures to apply when submitting a notice of intent for arbitration, provisions to avoid the same dispute from being simultaneously addressed in more than one legal forum, specific procedures for the appointment of arbitrators and expert review groups, specification of the place of arbitration, measures for interim injunctive relief, preliminary objections, conduct of arbitral proceedings, and enforcement of awards.

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Another manner by which the Contracting Parties have sought to increase their control over arbitration proceedings has been the inclusion in new generation BITs or investment chapters in RTAs of provisions ensuring the involvement of the Contracting Parties in arbitration proceedings which address specific subject matters, such as financial services, the interpretation of nonconforming measures, or taxation measures. In all these cases, these IIAs contain provisions that grant specialized competent authorities of the Contracting Parties the right to make interpretations of certain matters or provisions of the agreement, which will be binding for the arbitral tribunal.

For example, Article 10.36 of the Investment Chapter of the Free Trade Agreement between South Korea and Chile provides that, when a respondent invokes a nonconforming measure as a defence to a claim, it will be, in principle, the Commission (comprised by the Ministers of both Contracting Parties) and not the arbitral tribunal that will interpret the nonconforming measure. That provision reads as follows:

> 1. Where a disputing Party asserts as a defence that the measure alleged to be a breach is within the scope of a reservation or exception set out in Annex I or Annex II, upon request of the disputing Party, the Tribunal shall request the interpretation of the Commission on the issue. The Commission, within 60 days of delivery of the request, shall submit in writing its interpretation to the Tribunal.
>
> 2. Further to paragraph 2 of Article 10.35, a Commission interpretation submitted under paragraph 1 shall be binding on the Tribunal. If the Commission fails to submit an interpretation within 60 days, the Tribunal shall decide the issue.

Another example of this trend is Article 17, paragraphs 1 and 2, of the 2004 Canadian Model BIT. It provides that where an investor submits a claim to arbitration related to financial services and the disputing Contracting Party, as a defence, invokes the general exception based on prudential reasons included in Articles 10(2) or 14(6) of the agreement, the arbitral tribunal:

> . . . shall, at the request of that Party, seek a report in writing from the Parties on the issue of whether and to what extent the said paragraphs are a valid defence to the claim of the investor. The tribunal may not proceed pending receipt of a report under this Article. . . . The Parties shall proceed . . . to prepare a written report, either on the basis of agreement following consultations, or by means of an arbitral panel. The consultations shall be between the financial services authorities of the Parties. The report shall be transmitted to the Tribunal, and shall be binding on the Tribunal.

Rather than relying on the judgment of the arbitral tribunal, the mechanism cited above aims to reserve for the competent authorities of the Contracting Parties—at least in the first instance—the right to decide whether a claim brought by an investor should be discarded on the grounds of a general exception based on prudential reasons.

The two examples cited above evidence a pattern in new generation IIAs, according to which the Contracting Parties intend to enhance their control over the interpretation of certain key provisions of the agreements. The underlying assumption is that the Contracting Parties are better suited than an arbitral tribunal to assess certain specific matters such as, inter alia, the interpretation of nonconforming measures or prudential measures for financial services.

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Promotion of judicial economy. To properly defend a case in ISDS proceedings entails a significant amount of time and resources for the parties involved in the dispute. Therefore, some countries recently agreed to include various procedural innovations in their IIAs that may be instrumental in fostering the principle of judicial economy in ISDS procedures.

Three particular mechanisms illustrate this trend. One is a specific provision dealing with potential "frivolous claims" submitted by an investor. Another element is the possibility to consolidate separate claims having a question of law or fact in common and arising out of the same events or circumstances. The third mechanism fostering judicial economy prevents a particular investment dispute from being addressed in more than one adjudication forum at the same time. While the first of these issues represents an innovation in recent IIAs, the other two mechanisms were originally included in NAFTA and have become a common feature among new generation agreements negotiated by the United States. Each of these aspects is explained in more detail.

Mechanism to avoid "frivolous claims." The significant increase in investment disputes over the last decade has raised the concern that investors may abuse the system. As in domestic litigation, investors may be eager to claim as many violations of the applicable IIA as possible in order to increase their chances to succeed. This may take a high toll in terms of time, effort, fees, and other costs, not only for the parties to the dispute but also for the arbitral tribunal.

It is within this context that several countries have advocated a procedure to avoid frivolous claims in investment-related disputes, i.e., claims that evidently lack a sound legal basis. Thus, several new generation IIAs include a provision introducing the possibility for the arbitral tribunal to apply an "admissibility test" to the claims submitted. Under this innovative approach, an arbitration tribunal shall address and decide as a preliminary question any objection raised by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be rendered. In deciding upon an objection under this procedure, the arbitration tribunal shall assume that the claimant's factual allegations in support of the claims are true and shall issue a decision or award on the objection on an expedited basis.

The experience from the dispute in *Methanex v. United States* had an important influence on this particular innovation in investment rulemaking. In that case, the tribunal addressed the distinction between the concepts of admissibility and jurisdiction.[25]

The United States challenged the admissibility of Methanex's claims on the basis that—even assuming that all facts alleged by Methanex were true—there could never be a breach of the substantive obligation provisions pleaded by the claimant.

25 Although numerous ISDS tribunals tend to consider the two concepts as being essentially synonymous, international legal doctrine has made a distinction between admissibility and jurisdiction. While "*jurisdiction is the power of the tribunal to hear the case; admissibility is whether the case itself is defective—whether it is appropriate for the tribunal to hear it.*" Waste Management, Inc. v. Mexico, Dissenting Opinion of Keith Highet, June 2, 2000, ICSID Case No. ARB(AF)/98/2, para. 58.

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Hence, according to the United States, Methanex's claims were bound to fail. The tribunal found that the United Nations Commission on Trade Law (UNCITRAL) Arbitration Rules do not grant arbitral tribunals with the authority to reject claims on the basis that they are not admissible.[26] Consequently, the tribunal concluded that it had no express or implied power to reject claims based on this type of objection to admissibility.

The introduction of a specific provision empowering arbitral tribunals to reject claims as inadmissible if lacking a legal basis is one of the significant innovations of new IIAs. Article 10.19, paragraphs 4 and 5, of the investment chapter of the Free Trade Agreement between the United States and Chile illustrates this approach; it has also been included in other investment chapters of several FTAs recently negotiated between the United States and other countries worldwide.[27] Article 10.19 provides:

> 4. Without prejudice to a tribunal's authority to address other objections as a preliminary question, such as an objection that a dispute is not within a tribunal's competence, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.25.
>
> (a) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial (or, in the case of an amendment to the notice of arbitration referred to in Article 10.15(6), the date the tribunal fixes for the respondent to submit its response to the amendment).
>
> (b) On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.
>
> (c) In deciding an objection under this paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.
>
> (d) The respondent does not waive any objection as to competence or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in the following paragraph.
>
> 5. In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 or any objection that the dispute is not within the tribunal's competence. The tribunal shall suspend any proceedings on the merits and issue a decision or

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26 It could be said that the same applies to arbitration under ICSID.

27 Such a provision is included in the FTAs between the United States and Singapore, Colombia, Peru, Central America, and Morocco.

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award on the objection(s), stating the grounds therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period of time, which may not exceed 30 days.

6. When it decides a respondent's objection under paragraph 4 or 5, the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorneys' fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.

The objective of the expedited procedure included in the provision cited above is to enable arbitral tribunals to reject a claim as inadmissible, thereby avoiding expenditure of time and resources in adjudicating a dispute generated by claims lacking any sound legal foundation. Further, the desire of the Contracting Parties to promote judicial economy is evidenced by the specific time frames provided in paragraph 5 of Article 10.19 above. It should also be noted that under this provision, not all claims that are inadmissible are necessarily frivolous. Such determination will fall under the discretion of the tribunal. Presumably, if a claim is found to be frivolous, this conclusion would have an impact on the award concerning costs and attorneys' fees.

Consolidation of claims. Another mechanism included in new generation IIAs in order to foster judicial economy—as well as to diminish the risk of inconsistent results—is a provision allowing the consolidation of separate claims that have a question of law or fact in common and arise out of the same events or circumstances. Most IIAs concluded by Mexico during the last decade, as well as the IIAs recently negotiated by the United States and the 2004 Canadian Model BIT, include provisions which authorize the formation of a special tribunal to assume jurisdiction over separate claims having the abovementioned features. Article 83 of the investment chapter of the FTA between Mexico and Japan (2004) illustrates this approach:

1. When a disputing party considers that two or more claims submitted to arbitration . . . have a question of law or fact in common, the disputing party may seek a consolidation order in accordance with the terms of paragraphs 2 through 9 below.

. . . .

4. A Tribunal established under this Article shall be established under the ICSID Convention or the ICSID Additional Facility Rules as may be amended, as appropriate, and shall conduct its proceedings in accordance with the provisions thereof, except as modified by this Section.

. . . .

8. A Tribunal established under this Article may, in the interests of fair and efficient resolution of the dispute, and after hearing the disputing parties, by order:

(a) assume jurisdiction over, and hear and determine together, all or part of the claims . . . or

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(b) assume jurisdiction over, and hear and determine one or more of the claims . . . the determination of which it believes would assist in the resolution of the others. . . .

The possibility to consolidate in a single arbitral proceeding two or more claims arising out of the same legal or factual matter is an instrument fostering judicial economy. It can spare a Contracting Party from simultaneously facing several disputes as a result of multiple challenges against the same contested measure.

Mechanism to avoid a dispute to be submitted to more than one dispute settlement forum: improving the "fork in the road." The increase in the number of investment disputes shows the importance of preventing a particular investment dispute from being addressed in more than one dispute settlement forum at the same time. Otherwise, the host state would be required to respond to the same claims more than once, and there would be the risk of inconsistent decisions. Of special concern is the possibility that the investor submits a dispute to the domestic courts of the host state and simultaneously or subsequently to international arbitration. "Fork in the road" provisions intend to avoid this risk. However, ISDS practice over the last decade has shown some weaknesses in these particular clauses.

Given the multiplicity of existing IIAs, and considering that the same set of measures implemented by the host State may affect numerous foreign investors, it is not uncommon that the same facts and circumstances are litigated by different investors in different tribunals. The contradictory outcomes in the *Lauder* cases are often cited as an illustration of this potential problem.[28] In these disputes, two different arbitration tribunals held that parallel proceedings relating to the same facts were admissible on grounds that nominally the parties and the two BITs involved were different.[29] The *Lauder* cases have illustrated the risk of lack of finality in a given investment dispute, leading to the possibility that, because the same set of facts and measures may apply, host countries could lose arbitration proceedings several times and thus be subject to multiple awards.

Most IIAs lack specific provisions addressing the possibility of consolidating different disputes arising from the same set of facts or measures. Given that under arbitration proceedings the parties to the dispute enjoy considerable discretion to agree on procedural matters, nothing would, in principle, prevent them from agreeing on consolidating two or more disputes in a single proceeding. However, once a dispute is submitted

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28 These disputes involved a common set of facts and measures, i.e., an alleged improper interference of the Czech government in the investors' investments in the television business. One such investor lost its case, but the other won an award of over $300 million. *See* UNCTAD, Investor-State Disputes Arising from Investment Treaties: A Review, UNCTAD Series on International Investment Policies for Development 19 (New York and Geneva, United Nations).

29 *See* Ronald S. Lauder v. Czech Republic, UNCITRAL, Final Award, September 3, 2001 (United States/Czech Republic BIT); CME Czech Republic v. Czech Republic, UNCITRAL, Partial Award, September 13, 2001; and The Czech Republic v. CME Czech Republic B.V, Court of Appeal, Stockholm, Sweden, Case No. T-8735–01 (42 International Legal Materials 919 (2003)).

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to arbitration, the acrimony between the parties involved in the dispute may inhibit them from agreeing on this kind of procedure.

Prevailing ISDS practice has found that lis *pendens* exists only in case of identity of *parties, object, and cause of action*.[30] Thus, arbitral awards have interpreted the fork in the road provision as resulting in a loss of access to international arbitration only where the dispute and the parties before the domestic courts are identical with the dispute and the parties in the international proceeding. This interpretation has made fork in the road provisions very difficult to invoke. For instance, it is easy to envisage a situation in which a shareholder initiates an arbitration to protect its rights under the IIA, while the investment (i.e., the subsidiary) initiates a domestic dispute to protect its contract or other legal rights, including those derived from the IIA.[31]

New generation BITs and investment chapters in RTAs do not use fork in the road clauses. Instead, these agreements follow a different approach to fulfill the same objective in a more effective manner. This approach is known in the investment literature as the "no U-turn," and it focuses on the measure that has triggered the dispute.

This approach provides the investor with the possibility to decide the venue for the resolution of the dispute even after the investor has submitted it to the administrative or judicial tribunals of the host country. The no U-turn concept allows the investor to opt for international arbitration as long as domestic tribunals have not rendered a final judgment on such dispute. Article XIII.3 of the BIT between Canada and Thailand (1997) illustrates this technique and provides that an investor may submit a dispute to arbitration only if:

> . . . the investor has waived its right to initiate or continue any other proceedings in relation to the measure that is alleged to be in breach of this Agreement before the courts or tribunals of the Contracting Party concerned or in a dispute settlement procedure of any kind.

The approach illustrated above also forecloses another situation in which the same dispute could be submitted to multiple fora. This would be the case if an investor first submitted the dispute to arbitration, and—depending on the outcome—then opted to submit it to local courts. Such a result would be prevented under the clause cited above, as, prior to submitting the claim to international arbitration, the investor would have to waive the right to continue or initiate any other proceeding before the national courts of the Contracting Party concerned or before any other forum.

Promotion of a consistent and sound jurisprudence on international investment law. A third category of innovations in investor-state arbitration provisions in new

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30 See, in this regard, Canfor Corp. v. United States of America, Terminal Forest Products Ltd. v. United States of America and Tembec Inc. et al. v. United States of America, Order of the Consolidation Tribunal, September 7, 2005, at http://naftaclaims.com/Disputes/USA/Softwood/Softwood-ConOrder.pdf.

31 Furthermore, under the prevailing interpretation of "fork-in-the-road" provisions, as ISDS jurisprudence has shown, it is also easy to envisage situations under which an investor may submit a claim under ISDS procedures despite the existence of a "domestic forum" clause in an investment contract between the investor and the host country.

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generation IIAs is geared toward ensuring a consistent and correct application of international law in arbitral awards. As previously explained, new generation IIAs have been negotiated in the context of a significant increase in investor-state disputes. These disputes have yielded awards that have not always been consistent, and, in some cases, have rendered controversial legal interpretations of the terms of the investment agreements and of international law in general. As investor-state arbitration is likely to continue increasing in the future, some new generation BITs and RTAs have included innovative provisions to foster a consistent and sound development of jurisprudence. This objective has been pursued mainly through two different means.

One has been to include in IIAs more detailed provisions on several key substantive issues, the interpretation of which has been controversial in arbitration proceedings. For example, the United States and Canada have recently modified the language of their model BITs and RTAs to clarify the content of the fair and equitable treatment standard and the concept of indirect expropriation. Both changes intend to limit the scope that arbitral tribunals might otherwise give to the relevant IIA provisions.

Another innovation aimed at preventing incorrect or inconsistent jurisprudence has been the proposal that arbitral awards be subject to appeal. The investment chapter of the Free Trade Agreement between Peru and the United States provides that within three years after entry into force of the agreement, the parties shall consider whether to establish an appellate body to review awards. In particular, Annex 10-D of the said treaty provides the following:

> Within three years after the date of entry into force of this Agreement, the Parties shall consider whether to establish an appellate body or similar mechanism to review awards rendered under Article 10.26 in arbitrations commenced after they establish the appellate body or similar mechanism.

The potential establishment of appellate mechanisms raises many issues that require profound discussion. There is currently no clarity regarding the particular features of such an appeal mechanism and its interaction with the existing arbitration conventions or IIAs negotiated by the Parties concerned. Furthermore, if the main purpose of an appellate mechanism is to ensure consistency in arbitral awards and in the development of international investment law, it should bring under its umbrella most—if not all—the existing IIAs. Such an outcome could not be achieved by an appellate mechanism established by one or a couple of BITs.

Promotion of legitimacy of investor-state arbitration within civil society. There is a fourth category of innovations that has emerged in new generation of IIAs. They are geared toward improving the legitimacy of investor-state arbitration within civil society. In particular, these agreements have added provisions intended to respond to concerns that have arisen over the years by some NGOs with respect to investor-state dispute resolution. One such concern relates to the limited transparency of these proceedings. In response to such concerns, the 2004 Canadian Model BIT as well as the IIAs recently negotiated by the United States include provisions fostering the transparency of arbitration proceedings.

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For instance, the IIAs negotiated between the United States, on the one hand, and Chile, Peru, Colombia, Central America, and Singapore, on the other, require the respondent in an investment dispute to transmit to the home state and to make available to the public certain documents, including the notice of arbitration, the memorials, the transcripts of hearings, and the awards of the tribunal. Transparency provisions in these IIAs also require that the hearings be open to the public, though provisions are made for the protection of confidential business information. However, these rules do not require the parties to make public any settlement discussions nor do they interfere with the confidentiality of the tribunal's deliberations.

The trend toward fostering transparency in ISDS procedures goes beyond allowing the public to be informed about the different stages of the arbitral proceedings. Several new IIAs, such as the 2004 Canadian Model BIT and IIAs negotiated by the United States also allow parties not involved in the dispute to submit briefs and authorize arbitral tribunals to consider submissions from any member of civil society. As a result of allowing civil society to participate in arbitral proceedings, Contracting Parties had to regulate in detail the procedures under which such "amicus curiae" briefs could be submitted and administered, attempting to prevent these submissions from negatively affecting the conduct of the arbitration. This explains the screening mechanism included in Article 39 of the 2004 Canadian Model BIT. It first establishes certain criteria under which the arbitral tribunal would decide on whether a nondisputing party may file a submission, and—if the authorization is granted—provides guidance to the tribunal as to the weight that such submission should have in the proceedings. In its relevant parts, Article 39 provides the following:

> 1. Any non-disputing party that is a person of a Party, or has a significant presence in the territory of a Party, that wishes to file a written submission with a Tribunal (the "applicant") shall apply for leave from the Tribunal to file such a submission. . . .
>
> 2. The applicant shall serve the application for leave to file a non-disputing party submission and the submission on all disputing parties and the Tribunal.
>
> 3. The Tribunal shall set an appropriate date for the disputing parties to comment on the application for leave to file a non-disputing party submission.
>
> 4. In determining whether to grant leave to file a non-disputing party submission, the Tribunal shall consider, among other things, the extent to which:
>
> (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
>
> (b) the non-disputing party submission would address a matter within the scope of the dispute;
>
> (c) the non-disputing party has a significant interest in the arbitration; and
>
> (d) there is a public interest in the subject-matter of the arbitration.
>
> 5. The Tribunal shall ensure that:
>
> (a) any non-disputing party submission does not disrupt the proceedings; and

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(b) neither disputing party is unduly burdened or unfairly prejudiced by such submissions.

6. The Tribunal shall decide whether to grant leave to file a non-disputing party submission. If leave to file a non-disputing party submission is granted, the Tribunal shall set an appropriate date for the disputing parties to respond in writing to the non-disputing party submission. By that date, the non-disputing Party may, pursuant to Article 34 (Participation by the Non-Disputing Party), address any issues of interpretation of this Agreement presented in the non-disputing party submission.

7. The Tribunal that grants leave to file a non-disputing party submission is not required to address the submission at any point in the arbitration, nor is the non-disputing party that files the submission entitled to make further submissions in the arbitration. . . .

The approach illustrated above demonstrates that transparency provisions serve important goals; however, they may also increase the burden on the parties to the dispute and limit their discretion. For example, parties may feel the need to submit additional materials responding to arguments made in the amicus curiae briefs. Public knowledge of the disputes may result in public pressure on the parties to settle or to refuse to settle certain disputes. Such pressure may undermine one of the main objectives of investor-state dispute settlement procedures: to foster a rule-oriented adjudication mechanism, where politics interfere as little as possible with the development of a sound international legal investment regime.

CONCLUSIONS

As it has been in this chapter, there has been a significant dynamism of investment rulemaking over the last decade in the context of BITs and investment chapters in RTAs. Contrary to other areas of public international law, over the last 10 years, the negotiation of international rules and disciplines in investment has been quite responsive to changing international economic and political context. The evolution in investment rulemaking has occurred at two different levels.

First, there is a gradual evolution in the rationale behind BITs, and, more evident in investment chapters of RTAs, toward providing international investment not only with the traditional guarantees of investment protection and treatment—such as national treatment, MFN, fair and equitable treatment, protection against unlawful expropriation, transfers, key managerial personnel, and dispute settlement—both State to State as well as investor-state—but also rights regarding the right of establishment into the host economy. The overwhelming majority of BITs negotiated over the last decade still refrain from giving any right of entry to international investors into the host country and subject it to the existing domestic legislation through the admission clause. However, the number of IIAs applied in the preestablishment phase, together with the number of countries starting to follow this approach in their negotiations, has significantly increased over the last decade. In fact, the majority of the investment chapters negotiated in the context of RTAs now tend to provide international investors with national and MFN treatment in the preestablishment phase. The evolution of IIAs

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toward promoting liberalization of investment flows stems from the deep transformations experienced by the world economy over the last 50 years, where investment has become the vehicle for international production and another mode to serve more integrated markets of goods and services.

The second evident trend in the normative evolution of BITs and investment chapters in RTAs is the significant impact that ISDS practice has had in adjusting and refining investment provisions. In the development of a new generation of IIAs, several governments, observing how previous IIAs are interpreted and applied by arbitral tribunals, have come up with new provisions and language which addresses most of the problems evidenced in the context of investment disputes. It could be said that new generation IIAs represent the response on the part of those governments to the various procedural and substantive issues raised in the context of ISDS practice over the period.

New generation BITs and investment chapters in RTAs have made the definition of investment more precise, have redrafted and clarified several provisions dealing with standards of protection, have improved and redefined the concept of transparency in the context of investment agreements, have clarified that investment protection and liberalization must not be pursued at the expense of other key public policy objectives, and have updated and modernized ISDS procedures, *inter alia*, fostering increased information and participation of civil society in those proceedings. Regardless of the particular merits of the mentioned modifications, the surge of new generation IIAs demonstrates a trend which is even more important from a systemic perspective, i.e., that governments are being responsive to the challenges posed by new realities.

The increase in the number of investment disputes is often associated with numerous challenges for developing countries. It is true that developing countries are confronted with important challenges as a result of the increase in investment-related litigious activity. However, the existence of such challenges should not obscure the fact that the intensification of ISDS is symptomatic of two extremely positive trends for developing countries.

One of them is the legalization of investment dispute resolution. Indeed, the fact that, until the last decade, there was a limited number of ISDS cases does not mean that previously there were no investment-related disputes: international investment-related disputes have existed since very long ago. What is certainly new is the fact that investors and their countries of origin, instead of relying on other means to solve their grievances, are increasingly relying on international law to solve them. In perspective, this is a remarkable development in the path toward a more stable, fair, and balanced international order. Indeed, nowadays, the use of "gun boat diplomacy" to deal with investment-related disputes seems barbarian. However, civil society tends to forget that just a century ago, that was the means through which investment-related disputes were often solved.

The legalization of the international investment system obviously serves the interests of all the involved parties, investors, and developed and developing countries. However, given that developing countries lack the economic, political, or military might of industrial nations, they should be most interested in pursuing the legalization of the international investment system, as the only means at their disposal to defend

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their interests in a world prone to conflict lies in the strengthening of the rule of law at the international level.

A second positive aspect evidenced by the increase in ISDS activity is that the trend is gradually motivating developing host countries to improve domestic administrative practices in order to avoid future cases. Indeed, the ISDS experience shows that, in addition to fostering the rule of law at the international level, it fosters it on the domestic front as well. Fostering greater rigor, discipline, and due process in the application of legislation is a goal which should be pursued in every country—developing as well as developed. ISDS procedures are instrumental in promoting this objective. Of course, to make that happen, important capacity building initiatives must be undertaken, in particular in developing countries. In this regard, further work is required on four different fronts.

First, governments of developing countries must learn how to use the international investment adjudication system. International investment law is a complex and specialized subject, with multiple sources and in constant evolution. Thus, to develop the domestic capacities of governments and the private sector of developing countries is paramount. The current level of dependence on foreign assistance for these countries to be able to adequately defend their interests in international arbitration cases is not fair or advisable for the health of the international investment system as a whole.

Further, having more capable and informed government officials in developing countries, who fully understood the content and implications of IIAs, is in the best interest not only of developing countries but also of foreign investors and developed countries as well. Better-prepared officials would likely increase the possibility of a better administration of domestic law and diminish the need of foreign investors to invoke ISDS procedures to defend their interests.

IIAs are important for developing countries not only because of their potential international impact in terms of attracting foreign direct investment (FDI) or sending positive signals to foreign investors, but, equally, because of the domestic impact these IIAs can have. IIAs can be instrumental in fostering key domestic reforms in developing economies—which are often postponed—in order to promote the modernization of their institutions and, in this way, to create incentives for fair and sustainable economic development. Although in the short-term, investment disputes may entail a significant financial burden for developing countries, it is important not to overlook the potential beneficial effect of ISDS in fostering domestic reform.

To a great extent, promotion of transparency, due process, and a strict application of the rule of law is the best way to avoid investment disputes. Indeed, for a developing country, the best way to win an investment dispute is not to have it in the first place. Further, the role of the rule of law in fostering economic development has been widely acknowledged in international economic literature. Through appropriate capacity building, developing countries could improve their discipline in the administration of investment-related laws and regulations and, in this way, not only avoid the possibility of being subject to investment disputes but also improve the general investment climate.

Another front of action is clearly civil society. It is likely that the interaction between national investment policies and IIAs will undergo a broader political debate.

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This would be a positive development in the sense that more awareness and information about the importance and role of IIAs, in general, and ISDS, in particular, could yield stronger and more coherent policies in the long run.

Furthermore, interaction between foreign investors and host States will likely continue to increase in the future. Within this context, rather than resisting the development of international regimes, there is need for making civil society understand the importance of those regimes in promoting a more rule-oriented and predictable international order and, as a result, a more stable, fair, and peaceful world in which to live.

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Chapter 2

The Energy Charter Treaty

Emmanuel Gaillard and Mark McNeill***

The Energy Charter Treaty (ECT) is a unique international instrument for the promotion of cross-border energy cooperation. It was opened for signature on December 17, 1994 and entered into force on April 16, 1998. Having languished in relative obscurity for several years, the Treaty is today regarded as a vitally important multilateral instrument for the promotion and protection of foreign investment in the energy sector. Indeed, considering its expansive investor protections and broad membership—it is signed by 52 states and the European Communities[1]—the ECT arguably is the most successful achievement to date of the long-standing international efforts to establish a comprehensive investment protection regime that started with the signing of the Havana Charter in 1948.

According to Article 2 of the Treaty, its purpose is to establish "a legal framework in order to promote long-term co-operation in the energy field [. . .] in accordance with the objectives and principles of the [Energy] Charter." While the Treaty covers a broad range of energy-related activities, including nondiscriminatory trade in energy materials, cross-border energy transit, competition, the environment, access to

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* Emmanuel Gaillard is a partner at Shearman & Sterling LLP and head of the International Arbitration Group of the firm. He is also a professor of law at Paris XII University.

** Mark McNeill is a partner at Shearman & Sterling LLP. He spent four years in the Office of the Legal Adviser of the U.S. Department of State where he represented the United States in investor-state arbitrations under the NAFTA and advised on the drafting of U.S. bilateral investment treaties.

1 At present, the ECT binds 50 out of its 53 signatories, including the Russian Federation and Belarus, which apply the Treaty on a provisional basis. In November 2006, the Energy Charter Conference approved the accession to the ECT of the Islamic Republic of Pakistan, paving the way for Pakistan to become the 51st party to the ECT. Likewise, the accession of The Islamic Republic of Afghanistan was approved at the Eighteenth Meeting of the Energy Charter Conference in December 2007.

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capital markets, and transfer of technology, its cornerstone is its protection of foreign investment.[2] The ECT contains investment protections that are commonly found in bilateral investment treaties (BITs), such as fair and equitable treatment; prohibition of discriminatory measures; most-favored-nation treatment; and payment of prompt, adequate, and effective compensation for any nationalization or expropriation. It also contains an important mechanism that allows private investors to enforce those protections against Contracting Parties through binding arbitration.

This chapter contains some brief remarks on the Treaty's genesis. Each subsequent section focuses on a different aspect of the Treaty's investment-related features, including the definitions of "Investor" and "Investment" in Article 1 of the ECT, the denial of benefits provision in Article 17(1), the Treaty's substantive investment protections in Part III, the dispute resolution mechanisms in Articles 26 and 27, the so-called "fork-in-the-road" provision in Article 26(3)(B)(i), the provision on provisional application in Article 45, and the carve-out for taxation in Article 21.[3]

Where useful, this chapter compares the Treaty's text with analogous provisions in other investment agreements. In particular, textual comparisons are made with the North American Free Trade Agreement (NAFTA)—a pivotal multilateral agreement negotiated nearly contemporaneously with the ECT—and the Dominican-Republic-Central America Free Trade Agreement (CAFTA)—a modern agreement whose investment protections are informed by over a decade of experience with investor-state arbitrations.

This chapter also addresses relevant arbitral decisions under the ECT and other agreements, including the award on jurisdiction and admissibility in the three arbitrations brought by the majority shareholders in Yukos Oil Corporation against the Russian Federation. This landmark decision–holding that the Russian Federation is bound by the Treaty despite the fact that the Treaty was not ratified by the Russian Duma, and clarifying a number of provisions of the ECT–was issued on November 30, 2009.[4]

THE MAKING OF THE ENERGY CHARTER TREATY

The end of the Cold War heralded an unprecedented opportunity for Western European states to forge stronger economic bonds with Eastern Europe and the Union of Soviet Socialist Republics (USSR) and to support those states in their transition to market economies. Western European states were concerned over the security of their energy supplies. Eastern European states were in dire need of capital and

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2 Energy Charter Treaty, A Reader's Guide, p. 19.

3 This article does not purport to exhaustively address the provisions of the ECT, which have been the subject of intensive academic scrutiny. See, in particular, the seminal work edited by the late Professor Thomas Wälde, The Energy Charter Treaty, An East-West Gateway for Investment and Trade (Kluwer Law Int'l, London/The Hague/Boston 1996).

4 Shearman & Sterling LLP represented the majority shareholders in these proceedings.

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technology to exploit their rich energy sources, particularly in Russia, Kazakhstan, and Azerbaijan.[5]

Against this backdrop, at the June 1990 meeting of the European Council in Dublin, the Dutch Prime Minister, Ruud Lubbers, proposed the idea of a "European Energy Community" to promote East-West cooperation in the energy sector.[6] The Commission of the European Communities undertook a study of how to implement this idea, proposing a "European Energy Charter" in February 1991. The Charter, which is essentially a nonbinding declaration of principles, was negotiated in 1991 among more than 50 states (including some non-European states such as Canada, the United States, Australia, and Japan) and the European Communities. It was signed at The Hague on December 17, 1991.

Before the Charter was even signed, however, the Charter Conference had already begun negotiating a "Basic Agreement"—which became the Energy Charter Treaty—to implement the principles and objectives of the European Energy Charter on a binding basis.[7] The ECT negotiations faced numerous hurdles, both between Eastern and Western states and among OECD members.[8] The negotiations came to a close in mid-1994, and the ECT was signed in Lisbon on December 17, 1994, with the objective "to ensure the creation of a 'level playing field' for energy sector investments throughout the Charter's constituency, with the aim of reducing to a minimum the non-commercial risks associated with energy-sector investments." Among the signatories to the 1991 European Energy Charter, only two states, Canada and the United States, did not sign the ECT.[9]

The resulting Treaty is a Byzantine collection of eight "Parts," fourteen "Annexes," five "Conference Decisions," and numerous "Understandings," "Declarations," and interpretative statements that were made by the chairman of the ECT Conference at the

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5 *See*, *e.g.*, R. Lubbers, *Foreword*, *in* THE ENERGY CHARTER TREATY, AN EAST-WEST GATEWAY FOR INVESTMENT AND TRADE xiii–xvii (T. Wälde ed., Kluwer Law Int'l, London/The Hague/Boston 1996).

6 Final Act of the European Energy Charter Conference.

7 *See* C. Bamberger et al., *The Energy Charter Treaty in 2000*, *in* ENERGY LAW IN EUROPE: NATIONAL EU AND INTERNATIONAL LAW AND INSTITUTIONS, section II.1 (M. Roggenkamp et al., eds., Oxford University Press 2001); *see also* T. Wälde, *International Investment under the 1994 Energy Charter Treaty—Legal, Negotiating and Policy Implications for International Investors within Western and Commonwealth of Independent States/Eastern European Countries*, 29(5) J. WORLD TRADE 5 (1995); THE ENERGY CHARTER TREATY, AN EAST-WEST GATEWAY FOR INVESTMENT AND TRADE 251, 271 *et seq*. (T. Wälde ed., Kluwer Law Int'l, London/The Hague/Boston 1996).

8 C. Bamberger et al., *The Energy Charter Treaty in 2000*, *in* ENERGY LAW IN EUROPE: NATIONAL EU AND INTERNATIONAL LAW AND INSTITUTIONS, section II.2. (M. Roggenkamp et al., eds., Oxford University Press 2001).

9 On why the United States ultimately declined to sign the Treaty, see W. Fox, *The United States and the Energy Charter Treaty: Misgivings and Misperceptions*, *in* THE ENERGY CHARTER *Treaty, An East-West Gateway for Investment and Trade* 194 *et seq*. (T. Wälde ed., Kluwer Law Int'l, London/The Hague/Boston 1996); Emmanuel Gaillard, *How does the so-called 'fork-in-the-road' provision in Article 26(3)(b)(i) of the Energy Charter Treaty work? Why did the United States decline to sign the Energy Charter Treaty?*, *in* INVESTMENT PROTECTION AND THE ENERGY CHARTER TREATY 215 *et seq* (G. Coop and C. Ribeiro eds., Juris Publishing 2008).

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time of the Treaty's adoption.[10] In addition, several of the Treaty's provisions are significantly more complex than analogous provisions in other investment agreements—a by-product of the competing interests among the 50-plus negotiating parties and the compromises that were necessary to bring the fragile negotiating process to a successful close.

"INVESTMENTS" AND "INVESTORS" COVERED BY THE ECT

All treaties that provide for the protection of foreign investment define the investments and investors that qualify for that protection. These definitions are key to determining the scope of application of the Treaty's rights and obligations, as well as determining the jurisdiction *ratione personae* of arbitral tribunals.[11] Article 1(6) of the ECT contains a broad and open-ended list of every conceivable right or interest that is in the nature of an investment:

> "Investment" means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:
>
> (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;
>
> (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;
>
> (c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;
>
> (d) Intellectual Property;
>
> (e) Returns;
>
> (f) any right conferred by law or contract or by virtue of any licenses and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.
>
> A change in the form in which assets are invested does not affect their character as investments and the term "Investment" includes all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the

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10 *See, e.g.*, C. Bamberger, *The Negotiation of the Energy Charter Treaty*, presentation at the "Investment Protection and the Energy Charter Treaty Conference," Washington, D.C., May 18, 2007 (describing the Treaty as "user-unfriendly").

11 *See generally* K. Yannaca-Small, *Definition of Investor and Investment, in* International Investment Agreements (OECD 2008); *See* Chapter 11 of the present book, K. Yannaca-Small, *Definition of "Investment": An Open-ended Search for a Balanced Approach;* B. Legum, *Defining Investment and Investor: Who is Entitled to Claim*?, 22 Arb. Int'l 521 (2006); Emmanuel Gaillard, *Investments and Investors Covered by the Energy Charter Treaty, in* Investment Arbitration and the Energy Charter Treaty 66 *et seq*. (C. Ribeiro ed., Juris Publishing 2006).

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> "Effective Date") provided that the Treaty shall only apply to matters affecting such investments after the Effective Date.
>
> "Investment" refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as "Charter efficiency projects" and so notified to the Secretariat.

Like the ECT, the CAFTA adopts a nonexhaustive definition of investment: "Investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristic of an investment, including. [. . .]"[12] The NAFTA, by contrast, contains a closed definition of "investment," with several express exclusions.[13] In practice, whether a treaty's definition of investment is open-ended or closed rarely makes a difference given the broad manner in which investment is typically defined. A more meaningful distinction arises from the fact that the ECT and the CAFTA cover investment agreements and investment authorizations, whereas the NAFTA–somewhat unusually among modern treaties containing investment protections–does not.

The main limiting factor in Article 1(6) of the ECT is that it covers only investments "associated with an Economic Activity in the Energy Sector." Article 1(5) defines Economic Activity in the Energy Sector as "an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products except those included in Annex NI, or concerning the distribution of heat to multiple premises."[14] What it means to be "associated with" such activity, however—and the necessary degree of such association that must exist for a dispute to fall under the ECT's dispute resolution provisions—is not clearly articulated in the Treaty.[15]

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12 Article 10.28 CAFTA.

13 Article 1139 NAFTA.

14 The Final Act of the European Energy Charter Conference provides the following examples of "economic activity in the energy sector":

> (i) prospecting and exploration for, and extraction of, e.g., oil, gas, coal and uranium;
>
> (ii) construction and operation of power generation facilities, including those powered by wind and other renewable energy sources;
>
> (iii) land transportation, distribution, storage and supply of Energy Materials and Products, e.g., by way of transmission and distribution grids and pipelines or dedicated rail lines, and construction of facilities for such, including the laying of oil, gas, and coal-slurry pipelines;
>
> (iv) removal and disposal of wastes from energy related facilities such as power stations, including radioactive wastes from nuclear power stations;
>
> (v) decommissioning of energy related facilities, including oil rigs, oil refineries and power generating plants;
>
> (vi) marketing and sale of, and trade in Energy Materials and Products, e.g., retail sales of gasoline; and
>
> (vii) research, consulting, planning, management and design activities related to the activities mentioned above, including those aimed at Improving Energy Efficiency.

15 *See* Emmanuel Gaillard, *Investments and Investors Covered by the Energy Charter Treaty*, *in* INVESTMENT ARBITRATION AND THE ENERGY CHARTER TREATY 66 *et seq*. (C. Ribeiro ed., Juris Publishing 2006).

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The tribunal in the Yukos arbitrations read Article 1(6)(b) of the ECT as containing the widest possible definition of an interest in a company with no indication that the drafters of the ECT intended to limit ownership to "beneficial" ownership, as suggested by the Russian Federation. The tribunal rejected the Russian Federation's arguments that the shareholdings in Yukos did not qualify as protected "Investment." It also noted that "the definition of investment in Article 1(6) of the ECT does not include any additional requirement with regard to the origin of capital or the necessity of an injection of foreign capital."[16]

Finally, by extending the definition of investment to any "right conferred by [. . .] contract" to undertake economic activities, Article 1(6)(f) appears to embrace ordinary sales transactions and trade-related activities. The arbitral tribunal in *Petrobart Ltd. v. The Kyrgyz Republic* confirmed this interpretation, concluding that the claimant's claim for payment under an ordinary sales agreement for gas condensate constituted a covered "investment" within the meaning of Article 1(6)(f).[17]

In contrast, some other treaties expressly exclude such transactions from the definition of investment. Article 1139 of the NAFTA, for example, excludes "claims to money that arise solely from [. . .] commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party."[18] In the *Canadian Cattlemen for Fair Trade* case, the NAFTA Chapter Eleven tribunal dismissed claims challenging the United States' imposition of a ban on the importation of cattle due to concerns over bovine spongiform encephalopathy (BSE, or Mad-Cow Disease).[19] The tribunal concluded that "NAFTA Chapter Eleven was not intended to cover simple cross-border trading interests" and that "something more permanent—such as a commitment of capital or other resources in the territory of a Party to economic activity in such territory—is necessary for a contractual claim for money based on cross-border trade to rise to the level of an investment."[20]

Like other treaties, the ECT also defines the type of "Investor" who qualifies for the Treaty's benefits. Article 1(7) provides:

> "Investor" means:
>
> (a) with respect to a Contracting Party:
>
> (i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law;

16 Hulley Enterprises Limited (Cyprus) v. The Russian Federation, Interim Award on Jurisdiction and Admissibility (November 30, 2009) (Yukos Interim Award), para. 431.

17 Petrobart Ltd. v. The Kyrgyz Republic, Case No. 126/2003, Arbitration Institute of the Stockholm Chamber of Commerce, Award, March 29, 2005.

18 Article 1139 also excludes "the extension of credit in connection with a commercial transaction, such as trade financing, other than [certain loans to an enterprise]." The CAFTA likewise provides in footnote 9 of Chapter 10 that "claims to payment that are immediately due and result from the sale of goods or services are not investments."

19 Canadian Cattlemen for Fair Trade v. United Sates, NAFTA Chapter Eleven/UNCITRAL, Award on Jurisdiction, January 28, 2008.

20 *Ibid*., paras. 142, 144.

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(ii) a company or other organization organized in accordance with the law applicable in that Contracting Party;

(b) with respect to a "third state," a natural person, company or other organization which fulfils, mutatis mutandis, the conditions specified in subparagraph (a) for a Contracting Party.

Accordingly, for a natural person to benefit from the Treaty, he or she must either be a citizen, national, or permanent resident of a Contracting Party. For a corporation to qualify for Treaty benefits, it need only be organized under the laws of a Contracting State. Article 1(7) imposes no further requirements with respect to shareholding, management, *siege social* or location of its business activities.

As the tribunal in the Yukos arbitrations noted, for example, "[o]n its face, Article 1(7)(a)(ii) of the ECT contains no requirement other than that the claimant company be duly organized in accordance with the law applicable in a Contracting Party."[21] Likewise, in *Plama v. Bulgaria*, the ECT tribunal held that "[t]he Claimant is an 'Investor of another Contracting Party' within the definition provided by Article 1(7)(a)(ii) ECT, being a company organized in accordance with the law applicable in Cyprus," and that it was "irrelevant who owns or controls the Claimant at any material time."[22]

DENIAL OF BENEFITS

The broad protections afforded to legal entities in Article 1 of the ECT are potentially qualified by the ability of a Contracting Party to exclude certain claims under

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21 *Yukos interim Award*. Para. 411.

22 Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction, February 8, 2005, 20(1) ICSID REV., p. 262, paras. 124 and 128. Similarly, in its partial award of March 17, 2006, the tribunal in *Saluka Investments BV (the Netherlands) v. The Czech Republic*, noted that it had "some sympathy for the argument that a company which has no real connection with a State party to a BIT [. . .] should not be entitled to invoke the provisions of that treaty," but that the treaty "required only that the claimant-investor should be constituted under the laws of the [. . .] The Netherlands, and it is not open to the Tribunal to add other requirements which the parties could themselves have added but which they omitted to add." In contrast, some other multilateral treaties, such as the ASEAN Agreement and the Colonia Protocol of the MERCOSUR Agreement, expressly limit their coverage to companies that are controlled or owned by investors in a contracting state. *See* Agreement among the Government of Brunei Darussalam, The Republic of Indonesia, Malaysia, The Republic of the Philippines, The Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments (1987) ("ASEAN Agreement"), Art. 1(2) (where company means "a corporation, partnership or other business association, incorporated or constituted under the laws in force in the territory of any Contracting Party wherein the place of effective management is situated"); Protocol of Colonia for the Promotion and Reciprocal Protection of Investments in MERCOSUR, Art. 1(2) (unofficial translation) ("The term 'investor' shall mean: [. . .] b) any legal person incorporated in accordance with the laws and regulations of one Contracting Party, and with its seat in the territory of said Contracting Party. c) all legal persons established in the territory where the investment is made, and which are effectively controlled, directly or indirectly, by legal or natural persons as defined [. . .]").

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Article 17(1). Article 17(1), entitled "Non-Application of Part III in Certain Circumstances," contains the ECT's so-called denial of benefits provision. It "reserves the right" of the Contracting Parties to deny the substantive treaty protections in Part III to "a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized." This provision, which derives from the U.S. treaty context, is intended to enable states which so desire to prevent nationals of a non-Contracting Party from opportunistically incorporating a "mailbox" company in a Contracting Party so as to indirectly benefit from the protection of the ECT.[23]

The tribunal in the *Plama* case shed important light on the operation of this provision. In considering Bulgaria's jurisdictional objections, the tribunal held that Article 17(1) contains a reservation of rights mechanism which needs to be exercised to be effective:

> In the Tribunal's view, the existence of a "right" is distinct from the exercise of that right [. . .] [A] Contracting Party has a right under Article 17(1) ECT to deny a covered investor the advantages under Part III; but it is not required to exercise that right; and it may never do so. The language of Article 17(1) is unambiguous. [. . .] The Tribunal has also considered whether the requirement for the right's exercise is inconsistent with the ECT's object and purpose. The exercise would necessarily be associated with publicity or other notice so as to become reasonably available to investors and their advisers. [. . .] By itself, Article 17(1) ECT is at best only half a notice; without further reasonable notice of its exercise by the host state, its terms tell the investor little; and for all practical purposes, something more is needed.[24]

The tribunal further held that the invocation of the right in Article 17(1) operates only prospectively from the date of invocation and not retrospectively. The tribunal relied on both the text and the object and purpose of the Treaty, noting as follows:

> The covered investor enjoys the advantages of Part III unless the host state exercises its right under article 17(1) ECT; and a putative covered investor has legitimate expectations of such advantages until that right's exercise. A putative investor therefore requires reasonable notice before making any investment in the host state whether or not that host state has exercised its right under Article 17(1) ECT. [. . .] In the Tribunal's view, therefore, the object and purpose of the ECT suggest that the right's exercise should not have retrospective effect.[25]

The tribunal thus concluded that Bulgaria's exercise of its right under Article 17(1) only affected the claimant's rights under Part III prospectively from the date of invocation. The tribunal thus proceeded to hear the merits of the case, reserving other issues relating to Article 17(1) to that phase.[26]

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23 P. Pinsolle, *The Dispute Resolution Provisions of the Energy Charter Treaty*, Int ALR 86 (2007).

24 Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction, February 8, 2005, paras. 155, 157.

25 *Ibid.*, paras. 161–62.

26 After the hearing of the case on the merits, the *Plama* tribunal held that Bulgaria could not rely on Article 17(1) of the ECT because the claimant was owned and controlled by a national of a

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The Yukos tribunal agreed with the core propositions in *Plama*. It first clarified that Article 17(1) does not implicate the tribunal's jurisdiction because it provides for the denial of the advantages of the substantive provisions in Part III of the ECT, and not the provisions for dispute settlement in Part V. The tribunal considered the issue to be one of "merits," although it addressed the application of Article 17(1) as a preliminary issue in light of the fact that both parties treated the issue as one of admissibility.[27]

The tribunal next determined that "Article 17(1) does not deny *simpliciter* the advantages of Part III of the ECT–as it easily could have been worded to do." Rather, Article 17(1) merely "'reserves the right' of each Contracting Party to deny the advantages of that Part to such an entity," which right must be exercised to be effective.[28]

Referring to the statements made by the Respondent in its written submissions, the arbitral tribunal considered that, to the extent the statements in the respondent's memorial could be considered to be a exercise of the Russian Federation's right under Article 17(1), it could only have *prospective* effect from that date. To treat the denial as retrospective, the tribunal opined, would be incompatible with the Treaty's object and purpose of promoting and protecting investments.[29]

Although the issue was moot given the tribunal's rulings noted above, the tribunal also rejected the Russian Federation's contentions that control of the claimants resided with individuals of Russian nationality, and that Russia was a "third state" for purposes of Article 17(1).[30] The tribunal found that "[t]he Treaty clearly distinguishes between a Contracting Party (and a signatory), on the one hand, and a third State, which is a non-Contracting Party, on the other," a conclusion that it found was supported by the *travaux préparatoires*, which "demonstrate that the term 'third state' was substituted for the term 'non-Contracting Party.'"[31]

Similar to the ECT, the NAFTA, CAFTA, and many U.S. BITs provide that the State Parties "may" deny the benefits of the treaty to an investor of another Party that is an enterprise of such Party where the enterprise has no substantial business activities in the territory of the Party in which it is incorporated, and persons of a non-Party, or of the

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Contracting Party to the ECT. Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award, August 27, 2008, para. 95.

27 *Yukos Interim Award*, paras. 440-42; *see, e.g.*, P. Pinsolle, *The Dispute Resolution Provisions of the Energy Charter Treaty*, Int ALR 86 (2007) (noting that an objection based on Article 17(1) of the ECT does not implicate the jurisdiction of the tribunal but rather the admissibility of the claim).

28 *Yukos Interim Award*, para. 455.

29 *Ibid.*, para. 457. The ECT tribunal in *AMTO v. Ukraine* likewise confirmed that a state seeking to exercise its right to deny benefits under Article 17(1) of the ECT would need to prove "the factual prerequisites" of that article. The *AMTO* tribunal further noted that the "substantial business activities" prerequisite "means 'of substance, and not merely of form.' It does not mean 'large,' and the materiality not the magnitude of the business activity is the decisive question." Limited Liability Company AMTO v. Ukraine, Case No. 080/2005, Arbitration Institute of the Stockholm Chamber of Commerce, Final Award, March 26, 2008, para. 69.

30 *Yukos Interim Award*, para. 537.

31 *Ibid.*, para. 543.

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denying Party, own or control the enterprise.[32] Unlike Article 17(1) of the ECT, however, the denial of benefits provision in the NAFTA, CAFTA, and many U.S. BITs subjects the right to deny treaty benefits to the requirement that the denying Party first notify and consult with the other Party or Parties, adding yet another hurdle to its effective invocation.[33]

SUBSTANTIVE INVESTMENT PROTECTIONS

Part III of the ECT sets forth the substantive rights and protections that Contracting Parties are obligated to accord to foreign investors and their investments. Article 10, entitled "Promotion, Protection and Treatment of Investments," contains some of the Treaty's most important and broad-reaching investment protections. Paragraph (1) of that article provides as follows:

> Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.

This provision makes clear that Contracting Parties are not merely forbidden from taking unreasonable actions to harm foreign investors and their investments; they are affirmatively obligated to create the conditions necessary for those investments to exist and to thrive.

Debate has surrounded how the fair and equitable treatment standard in paragraph (1) differs from "constant protection and security" and "unreasonable or discriminatory measures." The arbitral tribunal in *Petrobart*, for example, simply assumed that fair

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32 Prior to the 1990s, denial of benefits provisions in U.S. BITs provided, like Article 17(1) of the ECT, that each Party "reserves the right" to deny the treaty benefits to certain enterprises.

33 *See* NAFTA Art. 1113(1) ("Subject to prior notification and consultation in accordance with Articles 1803 (Notification and Provision of Information) and 2006 (Consultations), a Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such Party and to investments of such investors if investors of a non-Party own or control the enterprise and the enterprise has no substantial business activities in the territory of the Party under whose law it is constituted or organized."); *see also* CAFTA Art. 10.12(1); Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment (signed Nov. 2005), Art. 17; Treaty Between the United States of America and the Republic of Zaire Concerning Reciprocal Encouragement and Protection of Investment (signed Aug. 1984), Art. I(b)(ii).

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and equitable treatment was redundant with those other standards.[34] While these standards may overlap to some degree, that Article 10(1) lists them separately suggests that the drafters considered them to be distinct, at least conceptually. The protections in Article 10(1)—particularly the duty to refrain from unreasonably impairing an investor's enjoyment of its investment—are in any case exceptionally broad in their formulation.

Also noteworthy is the obligation to accord investments treatment in accordance with international law, "including treaty obligations." An Understanding in the Final Act of the European Energy Charter Conference clarifies that this reference excludes "decisions taken by international organizations, even if they are legally binding, or treaties which entered into force before 1 January 1970." Read literally, this provision seemingly allows an investor or a Contracting Party to submit a claim under the ECT based on the alleged breach of an entirely different treaty, such as a trade agreement or a human rights convention, so long as the alleged breach implicates the "treatment" of an investment (and the relevant treaty postdates 1969). In this respect, the ECT is distinguishable from some other treaties that expressly limit the treatment obligations to those accorded under customary—but not *conventional*—international law.[35]

The last sentence of Article 10(1) of the ECT contains what is often referred to as an "umbrella clause," and obliges a Contracting Party to observe "any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party." This provision permits a breach of an ordinary contract to be treated as a breach of the ECT. This particular umbrella clause is unusual in that it allows Contracting Parties, at the time of signing, to withhold their consent to arbitrate disputes arising under this provision by listing themselves in Annex IA.[36]

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34 Petrobart v. The Kyrgyz Republic, Arbitration Institute of the Stockholm Chamber of Commerce, Case No. 126/2003, Award, March 29, 2005, p. 76 ("The Arbitral Tribunal does not find it necessary to analyse the Kyrgyz Republic's action in relation to the various specific elements in Article 10(1) of the Treaty but notes that this paragraph in its entirety is intended to ensure a fair and equitable treatment of investments."). On fair and equitable treatment generally, see K. Yannaca-Small, *Fair and Equitable Treatment Standard in International Investment Law*, *in* INTERNATIONAL INVESTMENT LAW: A CHANGING LANDSCAPE 73 (OECD Publishing 2005); Chapter 16 of the present book*: Fair and Equitable Treatment: An Evolving Standard*?

35 Such is the case, for instance, with the NAFTA and the CAFTA. Article 1105(1) of the NAFTA requires the host state to accord investments of investors of another Party "treatment in accordance with international law, including fair and equitable treatment and full protection and security." In July 2001, the NAFTA Free Trade Commission, which comprises cabinet-level representatives from each of the three NAFTA Parties, clarified that Article 1105(1) requires treatment in accordance with customary international law but does not permit an investor to file a claim based on the alleged breach of "a separate international agreement." *See* Statement on NAFTA Article 1105 and the Availability of Arbitration Documents, July 31, 2001, B(3) ("A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)."). The CAFTA includes a similar clarification in Article 10.5(3).

36 *See* ECT Annex IA ("List of Contracting Parties Not Allowing an Investor or Contracting Party to Submit a Dispute Concerning the Last Sentence of Article 10(1) to International Arbitration (in Accordance with Articles 26(3)(C) and 27(2))"). Only three Contracting Parties,

It has been suggested that the reference in Article 10(1) to "any obligations [. . .] *entered into*" limits this clause's coverage to *contractual* obligations, whereas umbrella clauses in other treaties that refer more generally to all obligations "assumed" by the state may extend to unilateral undertakings, such as obligations under foreign investment legislation.[37] The tribunal in *SGS Pakistan*, however, considered the similar language "commitments entered into" in the Switzerland-Pakistan BIT to be broad enough to embrace unilateral administrative acts.[38] Consistent with that decision, the phrase "entered into" in Article 10(1) of the ECT does not necessarily limit the state's obligation to contracts but rather extends to all types of general arrangements that may be "entered into" in a general sense, including investment authorizations, licenses, and permits.

Article 10(7) of the ECT establishes the better of national or most-favored-nation (MFN) treatment.[39] Article 10(2) clarifies that national treatment and MFN treatment obligations apply only with respect to investments that have already been made in the territory of a Contracting Party. With respect to the "Making of Investments" (defined as "establishing new investments, acquiring all or part of existing investments or moving into different fields of Investment activity"), however, Contracting Parties need only "endeavor" to accord the better of national treatment or MFN. This type of obligation is often referred to as a "soft-law" or "best efforts" obligation.[40] In contrast, the NAFTA, CAFTA and several U.S. BITs apply binding national treatment and MFN treatment obligations to the entire lifecycle of an investment, starting with its "establishment" or "acquisition."[41]

Article 10(4) of the ECT envisioned that a supplementary treaty would extend binding national treatment and MFN obligations to the preinvestment phase. This compromise solution was necessitated by, on the one hand, the insistence by the United States that investors have preestablishment rights, and on the other hand, objections by Russia and other transitional states that did not yet have preinvestment laws in place and felt

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Australia, Hungary, and Norway, have exercised that option. Although Canada is listed in Annex IA, it did not sign the ECT.

37 *See*, *e.g.*, K. Yannaca-Small, *Interpretation of the Umbrella Clause in Investment Agreements* 10-1 (OECD 2006); Chapter 19 of the present book: K. Yannaca-Small: *What about this "Umbrella Clause"*?

38 SGS Société Générale de Surveillance, S.A. v. Pakistan, ICSID Case No. ARB/01/13, Decision on Jurisdiction, August 6, 2003, (2003) 18 ICSID Rev.-FILJ. 307, 361 *et seq*.

39 ECT Art. 10(7) ("Each Contracting Party shall accord to Investments in its Area of Investors of other Contracting Parties, and their related activities including management, maintenance, use, enjoyment or disposal, treatment no less favourable than that which it accords to Investments of its own Investors or of the Investors of any other Contracting Party or any third state and their related activities including management, maintenance, use, enjoyment or disposal, whichever is the most favourable.").

40 Paragraph (6)(b) allows a Contracting Party at any time to "make a voluntary commitment to accord to Investors of other Contracting Parties, as regards the Making of Investments in some or all Economic Activities in the Energy Sector in its Area," the better of national treatment or MFN treatment by listing such commitments in Annex VC of the Treaty. To date, no Contracting Party has listed any such commitments in Annex VC.

41 Articles 1102(1), 1103(1) NAFTA; Article 10.3, 10.4 CAFTA.

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disadvantaged by OECD countries that were seeking to "grandfather" their own exceptions to national treatment. Negotiations on this supplementary treaty began in 1996 but were halted in 2002 pending the outcome of discussions in the World Trade Organization regarding a multilateral framework for foreign direct investment.[42]

Article 13 of the ECT contains protections against unlawful expropriations or nationalizations. Paragraph (1) of that article provides:

> Investments of Investors of a Contracting Party in the Area of another Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation [. . .] except where such Expropriation is:
>
> (a) for a purpose which is in the public interest;
>
> (b) not discriminatory;
>
> (c) carried out under due process of law; and
>
> (d) accompanied by the payment of prompt, adequate and effective compensation.

Article 13 adopts the familiar "Hull Formula" for prompt, adequate, and effective compensation, first articulated in 1936 by U.S. Secretary of State Cordell Hull in response to Mexico's nationalization of U.S. petroleum companies. By referring to "measures having effect equivalent to naturalization or expropriation," Article 13 also protects against "indirect" or "regulatory" expropriations, or interferences by the state that have the effect of gradually eroding the investor's property interests.

Article 13 of the ECT is not distinguishable in any significant respect from the expropriation provision in Article 1110 of NAFTA. The CAFTA, however, reflects a more cautious approach with respect to foreign investors' rights to challenge a host state's nondiscriminatory regulatory actions that are ostensibly taken in the public interest. Annex 10-C of the CAFTA provides that "[e]xcept in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."[43]

DISPUTE SETTLEMENT

Article 26 of the ECT sets out the procedures for an investor of a Contracting Party to submit a dispute to arbitration under the Treaty relating to an investment in the area of another Contracting Party. Article 26(1) specifies that it applies to:

> Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an

42 *See* Energy Charter Secretariat Web site, section on "Supplementary Treaty."

43 Annex 10-C of the CAFTA further provides that the economic impact of a regulation alone does not establish that an indirect expropriation has occurred and that consideration must be given as well to the character of the government action at issue. The annex also clarifies that "[a]n action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in investment."

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alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably [. . .].

If the dispute cannot be settled amicably, the investor may submit it to binding dispute resolution pursuant to the remainder of Article 26. By specifying that a dispute must concern a breach of an investment protection in Part III, Article 26 is potentially narrower than some other arbitration agreements that cover, for example, "all disputes arising out of an investment."[44]

Under Article 26(2), the investor may choose between submitting its claim (i) "to the courts or administrative tribunals of the Contracting Party to the dispute," (ii) "in accordance with any applicable, previously agreed dispute settlement procedure," or (iii) in accordance with the remainder of Article 26. The provision for "any applicable, previously agreed dispute settlement procedure" leaves open the possibility that an investor and a state might enter into an *ad hoc* agreement that would embrace disputes arising out of the ECT as well as other instruments or agreements, although the umbrella clause in Article 10(1) will render the use of that mechanism limited in practice.[45] Article 26(3)(b)(i) contains a so-called "fork-in-the-road" provision that potentially bars an investor's claim that was previously submitted to the local courts or administrative tribunals, or in accordance with any applicable, previously agreed dispute settlement procedure. That provision is addressed in further detail in the following section.

The investor is also afforded a wide choice under Article 26(4) of submitting the dispute to (i) the International Centre for Settlement of Investment Disputes (ICSID), (ii) the ICSID Additional Facility, (iii) an *ad hoc* tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), or (iv) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce (SCC). The investor's choice among these institutions and rules can have a significant impact on its claim. For example, an investor that chooses ICSID arbitration must satisfy the requirements of the Washington Convention (including the requirement under Article 25 that there exists a legal dispute arising directly out of an investment), and any challenge to the arbitral award must be made before an *ad hoc* committee and cannot be made before the local courts of the state in which the arbitration takes place. The ECT does not designate an appointing authority in the event the claimant opts for *ad hoc* arbitration under the UNCITRAL rules. As a result, pursuant to the UNCITRAL rules themselves, the secretary-general of the Permanent Court of Arbitration must nominate the appointing authority.[46]

Finally, Article 26(8) provides that "[a]n award of arbitration concerning a measure of a sub-national government or authority of the disputing Contracting Party shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy granted." No similar option is accorded with respect to measures taken at the national level. This provision suggests that Contracting Parties may be bound to comply with

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44 For further discussion of this point, see Emmanuel Gaillard, *Treaty-based jurisdiction: broad dispute resolution clauses*, 68 N.Y. L.J. vol. 234, (2005). *See also* P. Pinsolle, *supra* n. 23, p. 82.

45 *See* P. Pinsolle, *supra* n. 23, p. 83.

46 *See* Articles 6(2), 7(2) UNCITRAL.

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any award for "other remedies"—including the remedy of specific performance—with respect to government measures taken at the national level. In theory, then, an ECT tribunal could order the repeal of national legislation or of a judicial decision taken at the national level.[47] This contrasts with NAFTA and CAFTA, which do not distinguish between national and subnational measures, and both provide that a tribunal may "make a final award against a Party" only for "monetary damages and any applicable interest," or for "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."[48]

Article 27 contains the Treaty's state-to-state dispute resolution mechanism. It provides for UNCITRAL arbitration in the event Contracting Parties cannot settle their differences through diplomacy. Paragraph (2), however, removes from the purview of Article 27 any dispute concerning the interpretation or application of Article 6 (Competition) or Article 19 (Environmental Aspects), as well as any claims under the umbrella clause in Article 10(1) with respect to states that opted not to apply that clause. Two additional exceptions are found in Article 28: "A dispute between Contracting Parties with respect to the application or interpretation of Article 5 [Trade-Related Investment Measures] or 29 [Interim Provisions on Trade-Related Matters] shall not be settled under Article 27 unless the Contracting Parties parties to the dispute so agree." Accordingly, while Article 27 may in principle be broader than Article 26 in that it is not expressly limited to investment-related disputes, it contains several noteworthy exceptions to its scope of application. In contrast, there are very few exceptions to the state-to-state dispute resolution mechanism contained in Chapter 21 of NAFTA, the most notable being for antidumping and countervailing duty matters, which are subject to a dedicated dispute resolution regime in a separate chapter of the treaty.[49]

FORK IN THE ROAD

Like many treaties containing investment protections, the Energy Charter Treaty includes a "fork-in-the-road" provision that may require a claimant to make an irrevocable choice of forum for its claim.[50] Specifically, Article 26(3)(b)(i) potentially bars an

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47 Arbitral tribunals constituted under similarly worded BITs have confirmed their belief that they are empowered to order such relief. In Enron v. Argentina, for example, the tribunal stated that "[a]n examination of the powers of international courts and tribunals to order measures concerning performance or injunction and of the ample practice that is available in this respect, leaves this tribunal in no doubt about the fact that these powers are indeed available." Enron Corp. and Ponderosa Assets, LP v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on Jurisdiction, January 14, 2004, para. 79; *see also* Goetz and others v. Burundi, ICSID Case No. ARB/95/3, Award, February 10, 1999, (2000) 15 ICSID Rev.-FILJ 457, 516.

48 Article 1135(1) NAFTA; Article 10.26(1) CAFTA.

49 Article 2004 NAFTA.

50 Emmanuel Gaillard, *How does the so-called 'fork-in-the-road' provision in Article 26(3)(b)(i) of the Energy Charter Treaty work? Why did the United States decline to sign the Energy*

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investor from submitting its claim to arbitration if the following conditions can be cumulatively demonstrated: (i) "the Investor party to the dispute"[51] (ii) "concern[ing] an alleged breach of an obligation of the [Contracting Party to the dispute] under Part III" of the ECT[52] (iii) has "previously submitted the dispute"[53] (iv) "to the courts or administrative tribunals of the Contracting Party to the dispute" or to "any applicable, previously agreed dispute settlement procedure."[54]

Article 21(3)(b)(i), however, is not available to all Contracting Parties but only those that made a declaration that they wish to be listed in Annex ID, entitled "List of Contracting Parties not allowing an Investor to Resubmit the same dispute to International Arbitration at a later stage under Article 26 (in accordance with Article 26(3)(b)(i))." Contracting Parties *not* listed in Annex ID have extended their unconditional consent to arbitrate a dispute under the Treaty, even if the same dispute has already been submitted elsewhere.[55]

Under Article 26(3)(b)(i), the mere "submission" of the dispute to the relevant forum can result in a forfeiture of the arbitral claim. In contrast, certain other treaties, including NAFTA and CAFTA, contain so-called "no U-turn" provisions that allow the prior submission of the dispute to another forum but require the investor to irrevocably waive the right to "continue" that proceeding as a condition to submitting a claim to treaty arbitration.[56]

Finally, Article 26(1) defines the relevant "dispute" narrowly as one that "concern[s] an alleged breach of an obligation of the [Respondent] under Part III" of the ECT. Accordingly, it bars only a prior dispute in which the claimant alleged a breach of the Energy Charter Treaty itself and not some other source of law. In contrast, the NAFTA and CAFTA require the claimant to broadly waive all proceedings referring to the same "measure" at issue in the treaty arbitration.[57] In practice, given the narrow scope

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Charter Treaty?, *in* INVESTMENT PROTECTION AND THE ENERGY CHARTER TREATY 215 *et seq*. (G. Coop & C. Ribeiro eds., Juris Publishing 2008).

51 Article 26(2) ECT.

52 *Ibid.*, Article 26(1).

53 *Ibid.*, Article 26(3)(b)(i).

54 *Ibid.*, Article 26(2)(a) & (b).

55 The arbitral tribunal in *Petrobart Ltd. v. The Kyrgyz Republic*, for example, confirmed that the claimant could not be barred from submitting a claim to arbitration under the ECT by virtue of the "fork-in-the-road" provision in Article 26(3)(b)(i) because "the Kyrgyz Republic chose not to be listed in Annex ID of the Treaty." Petrobart Ltd. v. The Kyrgyz Republic, Arbitration Institute of the Stockholm Chamber of Commerce Arbitration, Case No. 126/2003, Final Award, March 29, 2005, p. 56. Slightly fewer than half of the Energy Charter Treaty's signatories opted to retain their rights under Article 26(3)(b)(i) and are listed in Annex ID. Those signatories are Australia, Azerbaijan, Bulgaria, Croatia, Cyprus, the Czech Republic, the European Communities, Finland, Greece, Hungary, Ireland, Italy, Japan, Kazakhstan, Mongolia, Norway, Poland, Portugal, Romania, the Russian Federation, Slovenia, Spain, Sweden, and Turkey.

56 Article 1121(1)(b) NAFTA; Article 10.18(2)(b) CAFTA.

57 NAFTA Art. 1121(1)(b) & 2(b) (providing that a claimant may submit a claim to arbitration only if it waives its right to pursue "any proceeding with respect to the measure of the disputing Party that is alleged to be a breach [of the NAFTA]"); CAFTA Art. 10.18(2)(b) (similarly requiring waiver of "any proceeding with respect to any measure alleged to

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of Article 26(1) of the ECT, it will likely be rare that Contracting Parties will successfully invoke that article to bar a claim.

In the Yukos arbitrations, for example, the tribunal rejected the Russian Federation's argument that the claimants' claims were barred under 26(3)(b)(i) of the ECT because various other proceeding had been brought by other entities before the Russian courts and the European Court of Human Rights. The tribunal held that the Russian Federation has failed to satisfy the so-called "triple identity test" under 26(3)(b)(i), which requires a claimant to demonstrate "identity of parties, cause of action and object of the dispute."[58]

The tribunal also rejected the Russian Federation's argument that the tribunal should look beyond the triple identity test in this case because accepting jurisdiction would effectively mean that the tribunal would sit in judgment over the various Russian courts siezed of the proceedings referred to by the respondent. The tribunal held that the purpose of the claim was not to review any decisions by Russian courts, but rather "to determine whether Respondent breached Claimant's rights under the ECT."[59]

PROVISIONAL APPLICATION

Provisional application is a widely used device in international treaty practice by which states give effect to a treaty before it has entered into force.[60] Article 45 of the ECT thus provides, in pertinent part:

> (1) Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.
>
> (2)(a) Notwithstanding paragraph (1) any signatory may, when signing, deliver to the Depository a declaration that it is not able to accept provisional application. The obligation contained in paragraph (1) shall not apply to a signatory making such a declaration. Any such signatory may at any time withdraw that declaration by written notification to the Depository.

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constitute a breach [of the CAFTA]."). As the NAFTA tribunal in *Waste Management* explained with respect to pending domestic proceedings, "when both legal actions have a legal basis derived from the same measures, they can no longer continue simultaneously." Waste Management, Inc. v. United Mexican States, Case No. ARB(AF)/98/2, Award, June 2, 2000, (2003) ICSID Rev.-FILJ 214, 235–36. The United States–Chile Free Trade Agreement arguably contains an even broader waiver requirement, conditioning jurisdiction on the investor's forfeiture of its right to pursue any claim "with respect to the *events* alleged to give rise to the claimed breach" of the Treaty. United States–Chile FTA, Art. 10.17(2)(b) (emphasis added).

58 *Yukos Interim Award*, para. 592.

59 *Ibid.,* para. 598–99.

60 Article 25(1) of the Vienna Convention on the Law of Treaties 1969 allows for the provisional application of treaties in stipulating: "A treaty or a part of a treaty is applied provisionally pending its entry into force if: (a) the treaty itself so provides; or (b) the negotiating states have in some other manner so agreed."

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(b) Neither a signatory which makes a declaration in accordance with subparagraph (a) nor Investors of that signatory may claim the benefits of provisional application under paragraph (1).

(3)(a) Any signatory may terminate its provisional application of this Treaty by written notification to the Depository of its intention not to become a Contracting Party to the Treaty. Termination of provisional application for any signatory shall take effect upon the expiration of 60 days from the date on which such signatory's written notification is received by the Depository.

(b) In the event that a signatory terminates provisional application under subparagraph (a), the obligation of the signatory under paragraph (1) to apply Parts III and V with respect to any Investments made in its Area during such provisional application by Investors of other signatories shall nevertheless remain in effect with respect to those Investments for twenty years following the effective date of termination, except as otherwise provided in subparagraph (c).

(c) Subparagraph (b) shall not apply to any signatory listed in Annex PA. A signatory shall be removed from the list in Annex PA effective upon delivery to the Depository of its request therefor.

Contracting Parties thus "agree" to apply the ECT provisionally unless they make a declaration that they are "unable to accept" provisional application. Signatories may terminate provisional application by giving written notification to the depository, and termination then becomes effective 60 days later. As an indication of the importance of provisional application, any terminating party is still bound to honor the Treaty's investment protections and dispute resolution obligations with respect to existing investments for an additional 20 years, unless the signatory opts out of that obligation by listing itself in Annex PA.[61]

To date, four arbitral tribunals have addressed Article 45 of the ECT. In its Decision on Jurisdiction of February 8, 2005, the arbitral tribunal in *Plama*, for example, clarified that the application of the ECT on a provisional basis extends to the investor-state mechanism in Article 26:

> Article 45(1) ECT provides that each signatory agrees to apply the treaty provisionally pending its entry into force for such signatory; and in accordance with Article 25 of the Vienna Convention, it follows that Article 26 ECT provisionally applied from the date of a state's signature, unless that state declared itself exempt from provisional application under Article 45(2)(a) ECT.[62]

In its final award of March 29, 2005, the tribunal in *Petrobart* addressed the issue whether a company incorporated in Gibraltar could submit a claim against the Kyrgyz Republic where the United Kingdom had not listed Gibraltar as a territory applying the Treaty provisionally at the time the United Kingdom ratified it (although it had done so at the time it signed the ECT).[63] The tribunal concluded that provisional application

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61 The only states listed in Annex PA include The Czech Republic, Germany, Hungary, Lithuania, Poland, and Slovakia.

62 Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction, February 8, 2005, 20(1) ICSID Rev., para. 140.

63 Petrobart Ltd. v. The Kyrgyz Republic, Arbitration Institute of the Stockholm Chamber of Commerce Arbitration, Case No. 126/2003, Final Award, March 29, 2005.

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nonetheless continued in Gibraltar and that an investor from a state such as Gibraltar that applies the Treaty provisionally is entitled to submit a claim to arbitration under Article 26 of the ECT.[64]

In its decision on jurisdiction of July 6, 2007, the tribunal in *Ioannis Kardassopoulos v. Georgia*[65] shed further light on Article 45 of the ECT. In that case, the claimant, a Greek national, alleged that the Republic of Georgia had expropriated his concession for the construction of energy pipelines and infrastructure. The respondent relied on Article 1(6) of the ECT, which accords jurisdiction only over matters affecting investments after the "effective date," which is defined as the later of the dates on which the ECT entered into force for Greece or Georgia. In both cases, that was the date the Treaty itself entered into force, April 16, 1998.[66] The respondent argued, *inter alia*, that because, on the claimant's own case, the alleged expropriation was consummated before the effective date, the tribunal lacked jurisdiction *ratione temporis* over the claims.[67]

The tribunal first rejected the respondent's contention that provisional application was merely "aspirational" in nature. While recognizing that provisional application was "not the same as entry into force," the tribunal held that provisional application under Article 45(1) of the ECT obliged signatories to apply the whole Treaty as if it had entered into force:

> It is "this Treaty" which is to be provisionally applied, *i.e.*, the Treaty as a whole and in its entirety and not just a part of it; and use of the word "application" requires that the ECT be "applied." Since that application is to be provisional "pending its entry into force" the implication is that it would be applied on the same basis as would in due course result from the ECT's (definitive) entry into force, and as if it had already done so. It follows that the language used in Article 45(1) is to be interpreted as meaning that each signatory State is obliged, even before the ECT has formally entered into force, to apply the whole ECT as if it had already done so.[68]

The tribunal observed that, in the context of provisional application, interpreting "entry into force" (and therefore the "effective date") in Article 1(6) literally to refer only to *definitive* entry into force under Article 44 of the ECT would "strike at the heart of the clearly intended provisional application regime."[69] The tribunal resolved this seeming conundrum by ascribing an "effective date" to provisional application—i.e., the later of the dates on which the ECT became provisionally applicable in both Georgia and Greece.[70]

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64 *Ibid.*, pp. 62–63.

65 Ioannis Kardassopoulos v. Georgia, ICSID Case No. ARB/05/18, Decision on Jurisdiction, July 6, 2007.

66 *Ibid.*, para. 72.

67 *Ibid.*, paras. 71–73.

68 *Ibid.*, paras. 210–11.

69 *Ibid.*, para. 222.

70 *Ibid.*, para. 223. The tribunal noted that the parties' arguments concerning reciprocity were irrelevant and that the need to consider the laws of both states arises directly from Article 1(6). *Ibid.*, para. 226.

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The tribunal next rejected the claimant's argument that Georgia's failure to make a declaration under Article 45(2) is an acknowledgment that provisional application is consistent with its laws.[71] The tribunal noted that a Contracting Party may have reasons other than an inconsistency between provisional application and its domestic law for making an Article 45(2) declaration. It also held that a state that had such an inconsistency was entitled to rely on the "to the extent" clause in Article 45(1) without the need to make a declaration under Article 45(2), and indeed that there was no definitive link between Article 45(1) and 45(2):

> There is no necessary link between paragraphs (1) and (2) of Article 45. A declaration made under paragraph (2) may be, but does not have to be, motivated by an inconsistency between provisional application and something in the State's domestic law; there may be other reasons which prompt a State to make such a declaration. Equally, a State whose situation is characterized by such inconsistency is entitled to rely on the proviso to paragraph (1) without the need to make, in addition, a declaration under paragraph (2). The Tribunal is therefore unable to read into the failure of either State to make a declaration of the kind referred to in Article 45(2) any implication that it therefore acknowledges that there is no inconsistency between provisional application and its domestic law.[72]

The tribunal nevertheless rejected the respondent's position that provisional application of the ECT was inconsistent with Georgian law. Specifically, the tribunal rejected the respondent's attempt to rely on a domestic law addressing provisional application that had come into force *after* the actions at issue and two other laws that provide simply that international treaties must enter into force to prevail over domestic Georgian law.[73]

The negotiating history to the ECT, however, suggests that the negotiators recognized the potential conflict between provisional application in Article 45(1) and the "effective date" in Article 1(6). On November 8, 1994, the head of the legal subgroup circulated an internal memorandum to the rest of the subgroup proposing that the following understanding be included in the Treaty to clarify that provisional application was effective from the date of signature and was therefore not subject to any "effective date":

> WITH RESPECT TO ARTICLES 1(6) AND 45(1)
>
> With regard to matters affecting Investments, it is intended, notwithstanding the provisions of Article 1(6) with respect to Effective Date, that the Treaty apply provisionally under Article 45(1) for a signatory which has not made a declaration in accordance with Article 45(2)(a), as if that signatory and the other signatories were Contracting Parties and the dates of their respective signatures were the dates of the Treaty's entry into force for them.

Subsequently, on November 29, 1994, the legal subgroup issued a Final Report to the Charter Conference (distributed as Message 278L) stating its belief that no

71 *Ibid.*, paras. 22–28.

72 *Ibid.*, para. 228.

73 *Ibid.*, paras. 229–39.

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Understanding was necessary because the language in Article 45 made sufficiently clear that the "effective date" in Article 1(6) was not applicable to provisional application:

> We were asked to consider the need for a new Understanding to avoid any doubt that the ECT is intended to apply to investment during the period of provisional application in accordance with Article 45(1), notwithstanding the "Effective Date" in Article [1(6)]. A recently published law review article that was based on an early draft of the ECT questioned whether the "Effective Date" would preclude such application. Since that article was written, however, paragraph (3)(b) has been added to Article 45; in our opinion, the addition of paragraph (3)(b) to Article 45 eliminates any doubt that the drafters of the ECT intended it to apply provisionally to investment in accordance with Article 45(1), notwithstanding the "Effective Date."

This aspect of the *travaux préparatoires* should make clear in any future disputes in which a similar issue arises that the drafters did not intend provisional application of the ECT to be subject to the "effective date" provision in Article 1(6).

Finally, in its interim award on jurisdiction and admissibility of November 30, 2009, the tribunal in the Yukos arbitrations rejected the Russian Federation's challenge to jurisdiction based on Article 45(1) of the ECT.

The tribunal first concluded that a signatory State's reliance on the "to the extent" language in Article 45(1)—labeled the "Limitation Clause" by the tribunal—did not require the submission of a declaration under Article 45(2):

> Article 45(1), while establishing a binding obligation for each signatory to apply the ECT provisionally, on its face limits the scope of that obligation through the Limitation Clause beginning with "to the extent." Nothing in the language of Article 45 suggests that the Limitation Clause in Article 45(1) is dependent on the mandatory making of a declaration under Article 45(2). To the contrary, as argued by Respondent, the use of the word "may" rather than "shall" in relation to the making of a declaration makes clear that a declaration under Article 45(2)(a) is permissive, not obligatory. Furthermore, the use of the word "[n]otwithstanding" to introduce Article 45(2) plainly suggests that the declaration in Article 45(2)(a) can be made whether or not there in fact exists any inconsistency between "such provisional application" of the ECT and a signatory's constitution, laws or regulations.[74]

In this regard, the tribunal found significant the fact that six states (Austria, Luxembourg, Italy, Romania, Portugal and Turkey) relied on Article 45(1), or the ability to opt out of provisional application for inconsistency with their domestic legal regime, without delivering a formal declaration to the Depository under Article 45(2).[75] The tribunal "acknowledge[d] that the preparatory work of the Treaty could lead to a finding of linkage between Article 45(1) and 45(2)," but concluded that the Vienna Convention on the Law of Treaties permits recourse to such supplementary means of

74 *Yukos Interim Award*, para. 262.

75 *Ibid.*, para. 265.

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interpretation only where the application of the general rule of interpretation leaves the treaty's meaning ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable—which the tribunal concluded was not the case here.[76] Finally, the tribunal noted that its interpretation was in harmony with the conclusion reached by the ICSID tribunal in *Kardassopoulos*.[77]

The tribunal next concluded that the Russian Federation could rely on Article 45(1) of the ECT even though it had never served any prior notice under that provision that it could not apply the Treaty provisionally, and indeed had *supported* provisional application during the Treaty negotiations:

> The Tribunal accepts that, throughout the ECT negotiations, great emphasis was put on transparency by different actors, including the Russian Federation. However, the fact remains that, at the end of the day, when the negotiations were concluded and the ECT signed by the Russian Federation, Article 45(1) did not expressly require any form of declaration or notification in order to allow a signatory to invoke the Limitation Clause. Transparency did not trump the clear inconsistency provision of Article 45(1) [. . .] [T]he Tribunal cannot read into Article 45(1) of the ECT a notification requirement which the text does not disclose and which no recognized legal principle dictates. The Tribunal therefore concludes [. . .] that the Russian Federation may, even after years of stalwart and unqualified support for provisional application and, until this arbitration, without ever invoking the Limitation Clause, claim an inconsistency between the provisional application of the ECT and its internal laws in order to seek to avoid the application of Part V of the ECT.[78]

Applying the standard established by the International Court of Justice in the *North Sea Continental Shelf Cases*, the tribunal concluded that the Russian Federation was not estopped from relying on Article 45(1) by virtue of its support for provision application of the ECT during the negotiations because that support "never 'clearly' excluded the possibility that Respondent was in fact relying on its interpretation of the operation of the Limitation Clause in Article 45(1) which would in any event exclude or limit provisional application of the Treaty."[79]

The tribunal, however, rejected the Russian Federation's position that the "to the extent" language in Article 45(1) required a "piecemeal" approach calling for an analysis of the consistency of each provision of the ECT with the Constitution, laws and regulations of the Russian Federation. The tribunal held that, "by signing the ECT,

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76 *Ibid.*, paras. 266–68.

77 *Ibid.*, para. 269.

78 *Ibid.*, paras. 282–84.

79 *Ibid.,* paras. 286–88. The ICJ noted in paragraph 30 of the North Sea Continental Shelf Cases:

> [I]t appears to the court that only the existence of a situation of estoppel could suffice to lend substance to [the contention that the Federal Republic was bound by the Geneva Convention on the Continental Shelf] [. . .] , —that is to say if the Federal Republic were now precluded from denying the applicability of the conventional régime, by reason of past conduct, declarations, etc., which not only clearly and consistently evidence acceptance of that régime, but also had caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice.

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the Russian Federation agreed that the Treaty *as a whole* would be applied provisionally pending its entry into force unless *the principle* of provisional application itself were inconsistent 'with its constitution, laws or regulations.'"[80]

The tribunal analyzed the text of Article 45(1) as follows:

> [T]he key to the interpretation of the Limitation Clause rests in the use of the adjective "*such*" in the phrase "*such provisional application*." "Such" [. . .] means "that or those; having just been mentioned," [. . .] [or] "of the character, quality, or extent previously indicated or implied." The phrase "such provisional application," as used in Article 45(1), therefore refers to the provisional application previously mentioned in that Article, namely the provisional application of "this Treaty."[81]

The tribunal concluded that "the provisional application of this Treaty" must mean the provisional application of the "*entire* Treaty" and not "some parts of the Treaty," and that the "to the extent" language in Article 45(1) therefore presented an "all-or-nothing" proposition.[82]

According to the tribunal, the alternative interpretation advanced by the Russian Federation was contrary to the object and purpose of the ECT, the public international law principle of *pacta sunt servada*, and indeed the very purpose of provisional application:

> The alternative—that the question hinges on whether, in fact, each and every provision of the Treaty is consistent with a signatory's domestic legal regime—would run squarely against the object and purpose of the Treaty, and indeed against the grain of international law. Under the *pacta sunt servanda* rule and Article 27 of the VCLT, a State is prohibited from invoking its internal legislation as a justification for failure to perform a treaty. In the Tribunal's opinion, this cardinal principle of international law strongly militates against an interpretation of Article 45(1) that would open the door to a signatory, whose domestic regime recognizes the concept of provisional application, to avoid the provisional application of a treaty (to which it has agreed) on the basis that one or more provisions of the treaty is contrary to its internal law. Such an interpretation would undermine the fundamental reason why States agree to apply a treaty provisionally. They do so in order to assume obligations immediately pending the completion of various internal procedures necessary to have the treaty enter into force. Allowing a State to modulate (or, as the case may be, eliminate) the obligation of provisional application, depending on the content of its internal law in relation to the specific provisions found in the Treaty, would undermine the principle that provisional application of a treaty creates binding obligations.[83]

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80 *Ibid.,* para. 301 (emphasis in original).

81 *Ibid.*, para. 304 (emphasis in original).

82 *Ibid.*, paras. 308, 311.

83 *Ibid.*, paras. 312–14. Interestingly, the tribunal also relied on principles of transparency and predictability—noting in particular the unfair surprise that would results were a signatory state allowed to raise alleged "inconsistencies" after an arbitral dispute has arisen—notwithstanding its conclusion that such considerations did not prevail in respect of the broader question whether formal notice was required to invoke the "to the extent" clause:

> Provisional application as a treaty mechanism is a question of public international law. International law and domestic law should not be allowed to combine, through the

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The tribunal's conclusion was further supported by state practice. In particular, the tribunal noted that the six states referenced above that had expressly relied on the "to the extent" language in Article 45(1) all declared that they could not apply the *entire* Treaty. As the tribunal remarked, "not one of [them] relied on the Limitation Clause in Article 45(1) for the interpretation now posited by Respondent, namely the selective or partial provisional application of the ECT based on the non-application of only those individual provisions that are claimed to be inconsistent with a signatory's domestic law."[84]

Finally, the tribunal concluded that the principle of provisional application *per se* was consistent with Russian law, a point that was hardly challenged by the Respondent.[85] The tribunal in particular relied on Article 23(1) of the Russian Federal Law on International Treaties of 1995, which states that "[a]n international treaty or a part thereof may, prior to its entry into force, be applied by the Russian Federation provisionally if the treaty itself so provides or if an agreement to such effect has been reached with the parties that have signed the treaty."[86] Finally, the tribunal observed that there are currently some 45 treaties being applied provisionally by the Russian Federation, which again was not disputed.[87]

On August 20, 2009, the Russian Federation notified the Portuguese Republic, as the ECT Depository, of its intention not to become a party to the ECT by invoking Article 45(3)(a) of the Treaty. Article 45(3)(a) provides that termination of provisional application takes effect 60 days after notification, or on October 19, 2009.[88] Accordingly, the tribunal held that the Russian Federation was bound to accord treaty protections to qualifying foreign investments for a period of 20 years from that date:

> [P]ursuant to Article 45(3)(b) of the Treaty, investment-related obligations, including the obligation to arbitrate investment-related disputes [. . .] remain in force for

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> deployment of an "inconsistency" or "limitation" clause, to form a hybrid in which the content of domestic law directly controls the content of an international legal obligation. This would create unacceptable uncertainty in international affairs. Specifically, it would allow a State to make fluctuating, uncertain and un-notified assertions about the content of its domestic law, after a dispute has already arisen.

Ibid., para. 315.

84 *Ibid.*, para. 321. The tribunal further observed that the preliminary lists maintained by the ECT Secretariat to identify states that intended to opt out of provisional application describes the listed states as those "which will not apply the Treaty provisionally in accordance with Article 45(1)"—again suggesting an all-or-nothing proposition for provisional application. *Ibid.*, para. 322.

85 *Ibid.*, para. 330. The tribunal held that this determination "must be made in the light of the constitution, laws and regulations *at the time of signature* of the ECT" on the basis that "[a]ny other interpretation would allow a State to modify its laws after having signed the ECT in order to evade an obligation that it had assumed by agreeing to provisional application of the Treaty." *Ibid.,* paras. 343–44 (emphasis in original).

86 *Ibid.*, para. 332.

87 *Ibid.*, para. 337. The tribunal also noted that the Russian Federation had confirmed that provisional application was consistent with Russian law in response to the a question posed in the context of a study commissioned by the Committee of Legal Advisers on Public International Law of the Council of Europe. *Ibid.*, para. 336.

88 *Ibid.*, para. 338.

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> a period of 20 years following the effective date of termination of provisional application. In the case of the Russian Federation, this means that any investments made in Russia prior to 19 October 2009 will continue to benefit from the Treaty's protection for a period of 20 years–*i.e.*, until 19 October 2029.[89]

TAXATION CARVE-OUT

Like other investment treaties, the ECT contains a carve-out to the Treaty's coverage for taxation. Article 21 of the ECT is remarkable, first of all, for its complexity. It runs for two and a half pages and distinguishes between several categories of taxation, including "Taxation Measures other than those on income or on capital," "Taxation Measures aimed at ensuring the effective collection of taxes," and "advantages accorded by a Contracting Party pursuant to the tax provisions of any convention, agreement, or arrangement described in subparagraph 7(a)(ii)." By comparison, tax exclusions in other treaties tend to be simple affairs. Article 7(b) of the U.K.-Belarus BIT, for example, provides in a single sentence that the treaty's national treatment and MFN provisions do not extend to any treatment, preference, or privilege arising under "any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation."[90]

Article 21's signature feature is its definition of the "Taxation Measures" that are excluded from the Treaty's coverage. Paragraph (1) of the article contains the basic exclusion for "Taxation Measures":

> Except as otherwise provided in this Article, nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties. In the event of any inconsistency between this Article and any other provision of the Treaty, this Article shall prevail to the extent of the inconsistency.

"Taxation Measures" are then defined in Paragraph (7) as "provisions" of domestic tax law or tax conventions. By limiting the scope of the exclusion in Paragraph (1) to "provisions," Article 21 preserves each Contracting Party's right to enact tax legislation but does not apply to the implementation or enforcement of such legislation or treaties. It also ensures the primacy of provisions of tax conventions over potentially conflicting provisions of the ECT. In contrast, some other investment treaties accord the term "taxation measure" a significantly broader definition. NAFTA and CAFTA, for example, both define "measures" to include "any law, regulation, procedure, requirement or practice." That definition appears to govern the term "taxation measure" in the respective taxation provisions.

This distinction between a narrow and broad definition of "taxation measure" appears to have been of significance for the arbitral tribunal in *EnCana Corporation v.*

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89 *Ibid.*, para. 339.

90 *See also* ASEAN Agreement, Art. V ("The Provision of this Agreement shall not apply to matters of taxation in the territory of the Contracting Parties. Such matters shall be governed by Avoidance of Double Taxation between Contracting Parties and the domestic laws of each Contracting Party.").

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Republic of Ecuador. The treaty at issue in that case, the Canada-Ecuador BIT, defined "taxation measures" broadly to include any "law, regulation, procedure, requirement, or practice." The tribunal expressly noted that "[h]aving regard to the breadth of the defined term 'measure,' there is no reason to limit Article XII(1) to the actual *provisions* of the law which impose a tax."[91] Rather, the tribunal concluded that such term should be interpreted broadly to include "any executive act [. . .] implementing" those provisions. Based on that interpretation, the tribunal excluded part of the claimant's claim under Article XII(1) of the BIT. In light of the tribunal's observations concerning the scope of Article XII(1), it is very possible the tribunal would have allowed the excluded claim to proceed had that article been limited to taxation "provisions," like Article 21 of the ECT.[92]

The parties to the Yukos arbitration extensively briefed the issues concerning the scope of Article 21 of the ECT, whether the measures at issue fell within that article, and whether the article relates to jurisdiction or admissibility. The tribunal concluded that "the background to, and motivation behind, the Russian Federation's measures that gave rise to the present arbitration, be they 'Taxation Measures' or not, go to the heart of the present dispute," and it could not "rule on this crucial issue in a vacuum," and joined those issues to the merits phase of the arbitration.[93]

CONCLUSION

Critics of the Energy Charter Treaty often focus on the Treaty's perceived textual flaws. One leading commentator has referred to it as "everything but a model of clarity."[94] One need only consider, however, the failure of all other efforts—most notably the Multilateral Agreement on Investment—to create multilateral investment rules to understand what a remarkable achievement is the ECT. The Treaty's importance is now well recognized, and it will surely have an enduring impact on the field of investment arbitration, and the energy sector generally.

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91 EnCana Corporation v. Republic of Ecuador, LCIA Case No. UN3481, UNCITRAL (Canada/Ecuador BIT), Award, February 3, 2006, para. 142.

92 *Ibid.*, paras. 141–43. (emphasis added).

93 *Yukos Interim Award*, paras. 583–84.

94 Thomas Wälde, *Energy Charter Treaty Based Investment Arbitration*, 1(3) TDM (2004).

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Chapter 3

International Dispute Settlement Mechanisms—Choosing Between Institutionally Supported and *Ad Hoc*; and Between Institutions

*Ucheora Onwuamaegbu**

Part I of this chapter introduces the three institutions under whose auspices treaty-based investor-state arbitration proceedings have most commonly been conducted: the International Centre for Settlement of Investment Disputes (ICSID or the Centre), the International Court of Arbitration of the International Chamber of Commerce (ICC), and the Arbitration Institute of the Stockholm Chamber of Commerce (SCC). Following a general overview of the three institutions, the chapter examines certain procedural issues that may be considered by parties in deciding among them, assuming that consent exists. The intention is not to identify all the differences between the institutions but to highlight certain provisions in their arbitration rules that best demonstrate the main differences between them.[1]

Part II of this chapter examines the Rules of the United Nations Commission on International Trade Law (UNCITRAL) under which the majority of *ad hoc* investor-state arbitrations have so far been conducted and draws certain contrasts between them and the rules of the institutions earlier discussed.[2]

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* Senior Counsel, International Centre for Settlement of Investment Disputes (ICSID). The author is grateful to Tomás Solis and Marat Umerov for their assistance, and research, and to Anne Marie Whitesell and Lee Caplan for their comments. However, the views expressed herein are the author's alone as are any inaccuracies that may appear.

1 Institutions routinely amend their arbitration rules, but the rules herein discussed are the versions in effect as at May 2009.

2 For another recent comparison of arbitration mechanisms under the ICSID Convention, the SCC Rules, and the UNCITRAL Rules, see Juliet Blanch et al., *Access to Dispute Resolution Mechanisms under Article 26 of the Energy Charter Treaty*, *in* INVESTMENT PROTECTION AND THE ENERGY CHARTER TREATY 1 *et seq.* (Graham Coop and Clarisse Ribeiro eds., JurisNet 2008).

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PART I: INSTITUTIONALLY SUPPORTED ARBITRATION

Over the decades, international arbitration has evolved as the preferred method for resolving disputes arising from cross-border investments, particularly those involving States. Such arbitration could be *ad hoc*, typically under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) or institutional, under the auspices of one of the various institutions that administer international arbitration. Due to the confidential nature of the proceedings, it is not always easy to identify how many investor-state disputes are in arbitration at any given time. From available information, however, ICSID is by far the forum of choice for institutionally supported investor-state arbitration. Other institutions that administer international proceedings relating to investment or commercial disputes include the ICC, the SCC, the London Court of International Arbitration (LCIA), the International Centre for Dispute Resolution (ICDR) of the American Arbitration Association (AAA), and the Permanent Court of Arbitration (PCA) in The Hague.[3] These disputes could equally be administered or otherwise conducted with the help of the numerous other arbitration institutions that exist today, some of which are more national or regional than international in the types of cases they handle.[4]

Arbitration institutions provide the structural framework within which proceedings are conducted. They do this through their respective sets of arbitration rules which govern parties and tribunals in the conduct of the proceedings. The arbitration rules of the different institutions cover matters from the filing of the request for arbitration to the issuance of an award and its correction. Arbitral institutions generally help move the process forward through the labyrinth of procedural steps that parties encounter in the arbitration process. In particular, arbitration institutions may be involved in the appointment and replacement of arbitrators. They control the finances of the cases,

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3 *See* R. Doak Bishop et al., Foreign Investment Disputes: Cases, Materials and Commentary 12 (Kluwer Law International 2005), for a discussion of other bodies that from time to time have to deal with investment disputes, including some public international institutions such as the International Court of Justice, the Inter-American Commission and Court on Human Rights, and the European Court of Human Rights. With regard to the latter institution, see*, e.g.*, the February 19, 2009 Judgment of the Grand Chamber of the ECHR in *Kozacioğlu v. Turkey* (no. 2334/03). *See also* August Reinisch and Loretta Malintoppi, *Methods of Dispute Resolution*, *in* The Oxford Handbook of International Investment Law 691 (Oxford University Press 2008).

4 A sample of such institutions include Cairo Regional Centre for International Commercial Arbitration (CRCICA), China International Economic and Trade Arbitration Commission (CIETAC), Commercial Arbitration Centre for the States of the Co-operation Council for the Arab States of the Gulf (GCC Commercial Arbitration Centre) in Bahrain, Lagos Regional Centre for International Commercial Arbitration (LRCSCA), Singapore International Arbitration Center (SIAC), Kuala Lumpur Regional Centre for Arbitration (KLRCA), Swiss Chambers' Court of Arbitration and Mediation, International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC), and Arbitration Center of the American Chamber of Commerce for Brazil. For a comprehensive list of international and national arbitral and ADR institutions, see Related Arbitration Links Web page of the International Council for Commercial Arbitration, *at* http://www.arbitration-icca.org/related-links.html#04.

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manage the transmittal of documents between and among the parties and tribunals, and generally ensure that the proceedings are conducted in accordance with the procedural rules agreed upon by the parties. This could in some instances entail providing advice to tribunals on procedure and jurisprudence or assistance with the drafting and review of decisions and awards or portions theerof. The breadth of the services provided varies widely and could depend on the rules and policies of the institution and, even within an institution, could vary from case to case depending on the agreement of the parties, the available resources, and competencies of the participants.

The extent to which resort is had to a particular institution for investor-state arbitration is in great part dependent on the number of investment instruments in which the institution is agreed as a forum. From available statistics, most of the investment-related treaties in existence today provide for the possibility of arbitration under the auspices of ICSID or *ad hoc* under the UNCITRAL Rules.[5] Indeed, of the 318 international investment agreement-based cases known to have been commenced as of the end of 2008, 202 were filed with ICSID.[6] Eighty-three were filed under the UNCITRAL Rules, 17 under the SCC Rules,[7] and five under the ICC Rules. Another five were conducted *ad hoc*, with the applicable rules not publicly identified.[8]

International Centre for Settlement of Investment Disputes

The International Centre for Settlement of Investment Disputes (ICSID), based in Washington, D.C., U.S.A, is one of the five international organizations that make up the World Bank Group.[9] Established by a multilateral treaty, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which came into effect in 1966, ICSID primarily administers the resolution by conciliation or arbitration of investment disputes between one of its member Governments and a foreign investor who is a national of another member.[10] Since 1978, ICSID, through its Additional Facility Rules, is also able to

5 *Latest Developments in Investor-State Dispute Settlement*, IIA MONITOR No. 1 (2009), INTERNATIONAL INVESTMENT AGREEMENTS, UNCTAD/WEB/DIAE/IIA/2009/6 (UN Conf. on Trade and Dev., New York and Geneva).

6 By May 2009, ICSID had registered approximately 290 cases. *See* List of ICSID Cases, *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ListCases.

7 According to the SCC Web site, the statistics on investment cases at the end of 2008 were as follows: 19 BIT cases, 5 ECT cases, and 3 by agreement of the parties. *See* SCC Statistics 2008, *available at* http://www.sccinstitute.com. It is possible that some of the cases may have been filed on the basis of different sources of consent.

8 IIA MONITOR, *supra* note 5, at 2.

9 The others are the International Bank for Reconstruction and Development (IBRD), International Development Association (IDA), International Finance Corporation (IFC), and the Multilateral Investment Guarantee Agency (MIGA). ICSID and MIGA are the only nonlending arms of the Group.

10 By the end of the first quarter of 2009, ICSID had only registered 5 conciliation cases in its over 42 years of existence, as compared to 274 arbitration cases. The discussion here will therefore focus on arbitration proceedings at the Centre.

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administer the arbitration of disputes between parties, of which one is neither an ICSID member nor a national of such a State, or disputes which do not arise directly out of an investment. ICSID is also permitted by these Additional Facility Rules to administer conciliation proceedings in similar circumstances to those described for Additional Facility arbitration and also to administer fact-finding proceedings.[11]

While membership of ICSID is open to all governments that are members of the International Bank for Reconstruction and Development (IBRD),[12] not all such governments have ratified the Convention to become its Contracting Parties. As of 2009, ICSID had a membership of over 143 countries.[13]

The Centre has an Administrative Council, made up of a representative of each member country and chaired by the President of the World Bank and a Secretariat, headed by a Secretary-General. The Administrative Council performs such functions as approving the Centre's budget, approving changes to its Regulations and Rules, and electing the Secretary-General and Deputy Secretary-General. The Council is otherwise not involved in the day-to-day functioning of the Centre, except that its Chairman may be called upon to perform functions specified by the Convention. These typically relate to the appointment and disqualification of arbitrators. The Secretariat, with its staff of experienced lawyers, is responsible for the administration of the proceedings brought to the Centre.

In addition to the ICSID Convention and the Rules of Procedure for Arbitration Proceedings, ICSID arbitration is also conducted in accordance with the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings and the Administrative and Financial Regulations.[14]

Unlike proceedings before other fora, ICSID proceedings are free from the interference of courts in the locality where they are conducted, except that the parties may, for example, by agreement seek provisional or interim measures from domestic fora.[15] Similarly, remedies applicable to ICSID awards are all provided for in the Convention and Rules.[16] Whereas other forms of arbitration may rely on the application of other instruments, such as the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), for the same effect, the Convention

11 No Additional Facility conciliation or fact-finding proceeding had been presented to the Centre as at the end of the first quarter in 2009. Those Rules are not addressed in this writing.

12 Indeed, membership of each of the other World Bank organizations, i.e., IDA, IFC, and MIGA, is conditioned upon membership of the IBRD. However, pursuant to its Article 67, the ICSID Convention is also open for signature, albeit by invitation of the Administrative Council, to non-IBRD member States which are also Parties to the Statute of the International Court of Justice.

13 *See* the information on the ICSID member states, *available at* http://icsid.worldbank.org/ICSID/Index.jsp.

14 The Rules of the Centre are available in English, Spanish, and French, all texts being equally authentic.

15 ICSID Arbitration Rule 39(6) allows disputing parties to request "any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding" provided that "they have so stipulated in the agreement recording their consent."

16 *See generally* ICSID Convention, Articles 49–55.

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also provides for automatic recognition of ICSID awards in member countries upon the presentation of a copy of the award certified by the Secretary-General.[17]

The role of the ICSID Secretariat in the arbitration process is generally considered to be extensive in comparison to what is available at other institutions. Most notably, the Centre's Administrative and Financial Regulation 25 provides for the appointment of a secretary in each case by the Secretary-General and specifies in broad terms the role of the secretary in assistance to the tribunal.[18] The specific functions of the secretary otherwise vary from case to case. The tribunal may, for instance, rely on the secretary for advice on jurisprudence and practice of the Centre, as well as for routine correspondence with the parties and administrative arrangements for its sessions. The secretary also administers the finances of the case, which involves assessing the needs for the case in consultation with the tribunal president, routinely obtaining payment from the parties and disbursing the same and rendering a final account to the parties at the end of the proceeding.

A few other unique aspects of the ICSID system, which differentiate it from the other institutions, deserve particular mention. Some commentators consider that the perception that comes with ICSID's membership in the World Bank Group could make most countries comply with their ICSID obligations "so as not to give offense to the World Bank."[19] In reality, however, there is no structural link between a country's participation in ICSID and its relationship with the World Bank. The operational guidelines of the World Bank that restrict lending in extreme cases of financial default or expropriation could well apply to any form of arbitration, not just ICSID.[20] Indeed, in such cases, the World Bank limits its role to "improving communications between the disputing parties"[21] and "may seek to promote prompt and adequate settlements, either negotiated between the parties on a mutually satisfactory basis or arrived at through mediation, conciliation, arbitration, or judicial determination."[22] In this regard, the Bank may remind the parties of the availability of "the various internationally

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17 ICSID Convention, Article 54.

18 According to Regulation 25, "[t]he Secretary-General shall appoint a Secretary for each Commission, Tribunal and Committee. The Secretary may be drawn from among the Secretariat from the Centre, and shall in any case, while serving in that capacity, be considered as a member of its staff. He shall (a) represent the Secretary-General and may perform all functions assigned to the latter by these Regulations or the Rules with regard to individual proceedings or assigned to the latter by the Convention, and delegated by him to the Secretary; (b) be the channel through which the parties may request particular services from the Centre; (c) keep summary minutes of hearings, unless the parties agree with the Commission, Tribunal or Committee on another manner of keeping the record of the hearings; and (d) perform other functions with respect to the proceeding at the request of the President of the Commission, Tribunal and Committee."

19 *See* R. Doak Bishop et al., *supra* note 3, at 11.

20 *See generally* World Bank Operational Manual OP 7.40—Disputes over Defaults on External Debt, Expropriation, and Breach of Contract, July 2001.

21 *Ibid.*

22 *Ibid.*

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recognized forms of conciliation or arbitration, including conciliation or arbitration under the auspices of [ICSID]."[23]

The Status, Immunities and Privileges provisions of the ICSID Convention provide that members of the Centre, as well as arbitrators, parties and their agents, counsel, advocates, witnesses and experts, shall enjoy immunity from legal process with respect to acts performed in the exercise of their functions. They are also to enjoy certain travel and tax free privileges.[24] Finally, the primary purpose of the Convention is said to be "to provide additional inducement and stimulate a larger flow of private international investment."[25] Hence, the jurisdiction of the Centre extends only to legal disputes "arising directly of an investment."[26]

International Court of Arbitration of the International Chamber of Commerce Based in Paris

The International Chamber of Commerce, based in Paris, France, was established in 1919 with the stated aim of promoting trade and investment and opening markets for goods and services and the free flow of capital. "The objective of its founders was to create an institution that would foster reconciliation and peace [after the First World War] through the promotion of international commerce. But in order to achieve that goal, the ICC's founders recognized the need for the gradual harmonization of international trade practices and legislation and the development of internationally recognized commercial instruments and mechanisms, including mechanisms for the resolution of international disputes."[27]

The International Court of Arbitration (the ICC Court) is the arbitration body attached to the ICC.[28] Founded in 1923, the Court is independent of the ICC, and its function is "to ensure the application of the Rules of Arbitration of the [ICC], and it has all the necessary powers for that purpose."[29] It was founded "in order to place at the disposal of financiers, manufacturers and business men of all countries an international organization capable of settling international commercial disputes 'without recourse to formal legal procedure.'"[30] The ICC Court is also empowered to administer under its rules disputes that are not of an international nature.[31] Indeed, only a small fraction of the cases administered by the ICC relate to disputes between foreign

23 *Ibid.*
24 *See* ICSID Convention, Articles 18–24.
25 Report of the World Bank Executive Directors on the ICSID Convention, para. 12.
26 ICSID Convention, Article 25.
27 Yves Derains & Eric A. Schwartz, A Guide to the ICC Rules of Arbitration (Kluwer Law International 2005).
28 Article 1(1) of ICC Arbitration Rules.
29 Article 1(1), Statutes of the International Court of Arbitration.
30 *Ibid.*
31 Article 1(1), ICC Rules of Arbitration.

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investors and governments.[32] Such cases are more likely to concern and invoke provisions in a contract rather than a treaty.

The ICC Court is composed of a Chairman, Vice-Chairmen, and other Members and Alternate Members who are appointed by the ICC World Council for renewable terms of three years.[33] The Court functions in committees comprising the Chairman and at least two other members of the Court and in plenary sessions once per month to which all Court members are invited.

The Court is assisted in its work by a Secretariat composed of a Secretary-General, a Deputy Secretary-General, and case administration teams of Counsel, Deputy Counsel, and administrative support staff. The Secretariat provides day-to-day case management services, functioning as the link between parties, arbitrators, and the Court. It issues notes and other documents for the information of the parties and arbitrators "or as necessary for the proper conduct of proceedings."[34]

With the assistance of the Secretariat, the Court has a general oversight function in the arbitration process. In particular, its functions extend to the appointment of arbitrators and determination of challenges, as required. For appointments, it is assisted by one of the approximately 90 ICC national committees in existence in different countries, whose recommendations it may or may not accept. It does not have to appoint arbitrators from a preexisting list. The Court fixes the fees of arbitrators at the end of the proceeding, on the basis of a published scale, calculated with reference to the amount in dispute. In fixing the arbitrators' fees, the Court also considers the diligence of the arbitrators, the time spent, the speed of the proceedings, and the complexity of the dispute. The Court also scrutinizes and approves all awards to be issued by ICC arbitral tribunals. It may require modifications of form or draw the arbitrators' attention to points of substance, but in doing so, the Court does not interfere with the arbitrators' liberty of decision.[35] Another specific aspect of the ICC Rules is the requirement for the tribunal to draw up Terms of Reference at the outset of the proceeding.[36] This document typically will set out the procedural parameters for the case, including such issues as the place of arbitration, names and addresses of the parties, and their

32 *See generally* International Court of Arbitration, Dispute Resolution Services *at* http://www.iccwbo.org/court/arbitration. Only in 10.7 percent of the 663 requests for arbitration filed with the ICC Court in 2008 was a State or parastatal entity a party.

33 According to the ICC Web site, "[t]he ICC World Council is the equivalent of the general assembly of a major intergovernmental organization[, t]he big difference being that the delegates are business executives and not government officials. There is a federal structure, based on the Council as ICC's supreme governing body. National committees name delegates to the Council, which normally meets twice a year. Ten direct members—from countries where there is no national committee—may also be invited to participate in the Council's work." How ICC Works Web page *at* http://www.iccwbo.org/id96/index.html.

34 ICC Arbitration Rules, Appendix II, Internal Rules of the International Court of Arbitration, Article 5(2).

35 *See generally* International Chamber of Commerce: The world business organization *at* http://www.iccwbo.org/.

36 ICC Arbitration Rules, Article 18.

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representatives, etc.[37] In addition, it will also include "a list of the issues to be determined," unless the tribunal considers it inappropriate.

The ICC Rules of Arbitration of January 1, 1998, contain 35 articles covering definitions and the commencement of the arbitration; the arbitral tribunal; the arbitral proceedings; awards, costs and miscellaneous provisions; and three appendixes containing the Statute of the Court and its Internal Rules as well as provisions on the arbitration costs and fees.[38]

The Arbitration Institute of the Stockholm Chamber of Commerce

The Arbitration Institute of the Stockholm Chamber of Commerce (SCC Institute) is a part of the Stockholm Chamber of Commerce, though independent, which provides administrative services in relation to the settlement of disputes.[39] Based in Stockholm, Sweden, it is empowered to administer domestic and international disputes in accordance with its own rules or other procedures or rules agreed by the parties.[40]

The structure of the SCC is more similar to that of the ICC than to the structure of ICSID. The Institute is composed of a Board of Directors and a Secretariat. The Secretariat is responsible for the day-to-day administration of arbitrations, including taking decisions delegated to it by the board.[41] The board, which is appointed by the Board of Directors of the Stockholm Chamber of Commerce, is composed of a chairperson, a maximum of three vice-chairpersons, and a maximum of 12 other members. It takes its decisions by majority, with the chairperson having the deciding vote in the event of a tie, and a quorum is formed by only two members. The chairperson or a vice-chairperson may take decisions on behalf of the board in urgent matters, but a committee of the board may otherwise be appointed to take specific decisions on behalf of it.[42]

The SCC Arbitration Rules of January 1, 2007, contain 48 articles governing the initiation of proceedings, the composition of the arbitral tribunal, the proceedings before the arbitral tribunal, awards and decisions, and confidentiality, as well as two appendixes covering the organization of the SCC Institute and costs.[43] The 2007 SCC Rules include several new aspects as distinct from the old set of rules. The extent of the amendments can be seen in the inclusion of modern aspects not yet seen in the Arbitration Rules of the ICC and of ICSID. Article 2, for instance, makes reference to the possibility of service of process

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37 In ICSID cases, such information will normally be found in the minutes of the first session of the tribunal.

38 The ICC Rules are available in Arabic, Brazilian Portuguese, Chinese, Czech, Dutch, English, French, German, Polish, Russian, Spanish, Thai, and Turkish. In case of conflict, the English and French texts prevail.

39 SCC Arbitration Rules, Appendix I, Article 1.

40 SCC Rules, Appendix I, Article 2.

41 SCC Rules, Article 8.

42 SCC Rules, Appendix I, Articles 3, 4, 7.

43 The SCC Rules are available in Arabic, Chinese, English, French, German, Russian, and Swedish. In case of conflict, the English text prevails.

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e-mail in recognition of the fact that this is now a popular mode of communication in modern society.[44]

In addition to its regular arbitration rules, the SCC also has a special set of rules for expedited arbitration proceedings which also came into effect on January 1, 2007. The expedited rules are designed to offer a speedy and cost-efficient process for "minor disputes regarding less complex issues and involving a smaller amount in dispute."[45] In those proceedings, the tribunal consists of a sole arbitrator and has to render its award, which need not be reasoned unless requested by a party, within three months. The schedule and extent of written submissions are also limited, and a hearing will only be held if requested by a party and deemed necessary by the tribunal.

Commencement of Proceedings and the Role of the Institution in the Initial Determination of Jurisdiction

Unlike the ICC and SCC Rules, the ICSID Convention and Rules draw a distinction between the institution of proceedings and commencement of proceedings. This is noteworthy since under the ICSID Rules, the deadlines for certain procedural steps, including for the constitution of the arbitral tribunal, are calculated from the date of institution of proceedings, whereas other deadlines, including those related to the first session of the tribunal, are calculated from the commencement of the proceeding.[46] Also, the nationality eligibility requirement for an individual party is determined not only with reference to the date of the consent to arbitration of the disputing parties but also as of the date that the request for arbitration is registered.[47]

Under the ICC Rules, an arbitral proceeding is deemed to be commenced on the day that a request for arbitration is submitted to the Secretariat by the party seeking to have recourse to arbitration under those Rules.[48] Similarly, the SCC Rules provide that arbitration proceedings commence with the filing of a request for arbitration with the SCC Institute.[49] On the other hand, an ICSID arbitration proceeding is only deemed to have been instituted on the day that the request for arbitration is registered by the Centre.[50] This is to be distinguished from the date of commencement of the proceeding, which is deemed to be the date on which the Secretary-General notifies the parties that all members of the tribunal have accepted their appointments.[51]

44 Article 2(i), (vi) requires that contact details of the parties and their counsel, as well as of the arbitrator appointed by the claimant, be included in the request for arbitration.

45 *See generally* http://www.sccinstitute.com.

46 ICSID Arbitration Rule 13(1).

47 ICSID Convention, Article 25(2)(a).

48 ICC Arbitration Rules, Article 4(1), (2).

49 SCC Arbitration Rules, Article 4.

50 ICSID Institution Rule 6(2). The parties may however agree on a different event as constituting the institution of proceedings. *See*, *e.g.*, CAFTA, Article 10.16.4, which provides that the proceeding shall be deemed to be initiated on the day that the request for arbitration is received by the Centre.

51 ICSID Arbitration Rule 6(1).

The process leading up to ICSID's registration of a request for arbitration consists of a review or screening process during which an assessment is made by the ICSID Secretariat to determine whether the dispute is not manifestly outside the jurisdiction of the Centre and thus is eligible for registration under Article 36 of the Convention and Institution Rule 6.

During the screening process, the Secretariat may pose written questions to the requesting party regarding information contained in or missing from the request, and the responses received will be considered to be supplemental to the request as originally filed.[52] Although the Centre sends to the responding party copies of the request and of all correspondence exchanged with the requesting party, the decision whether or not to register the request is required to be taken only "on the basis of the information contained in the request."[53] Although not required to, the Centre may invite the requesting party to address any issues raised by the responding party prior to registration of the request for arbitration, and any pertinent response would equally be considered supplemental to the request. This exchange of communications between the parties and the Centre at the registration phase does not entail an adversarial proceeding.

There is no appeal or other recourse available in regard to the ICSID Secretary-General's decision to refuse registration of a request for arbitration. Neither is the lodging fee paid upon the filing of a request for arbitration refundable even in the event of nonregistration.[54] A requesting party may, however, resubmit a previously rejected request upon the payment of another lodging fee, although this will not make much sense if the request is not modified to address the problematic aspects. A responding party that feels that a request was erroneously registered, or that it would not have been registered had the Secretary-General been able to consider issues of legal merit in the decision process may now apply for summary dismissal of the case under Arbitration Rule 41(5) introduced with the April 2006 amendments to the Rules.[55] Thus, in addition to the determination of prima facie jurisdictional threshold by the Centre prior to the registration of a request for arbitration at ICSID, Arbitration Rule 41(5) also provides for the summary dismissal of a case which is found to be manifestly without legal merit. Independently of the Arbitration Rules, parties may provide for such mechanism on their own, for example, in the instrument recording their consent to arbitration.[56]

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52 All such communications are copied to the responding party.

53 *See* ICSID Convention, Article 36; ICSID Institution Rule 6.

54 The fees paid upon the filing of a request for arbitration under the Arbitration Rules of the ICC and SCC are similarly nonrefundable in any event. Under both sets of Rules, however, such sums may be credited to the Claimant against its share of advance payments in the course of the proceeding. The ICSID Rules are silent in this regard. *See infra* section on Costs.

55 *See* Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan (ICSID Case No. ARB/07/25), Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules, May 12, 2008, *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded; and Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/08/3), Procedural Details, *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending.

56 *See*, *e.g.*, Article 10.19:4-6 of the United States-Chile Free Trade Agreement, which entered into force on January 1, 2004.

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While the SCC Rules do not provide for a formal process of review to determine whether the case could be instituted, Articles 5 and 6 provide that a copy of the request for arbitration is to be provided to the respondent, who is then required to file an answer. The SCC board may, however, request additional information concerning the request from the claimant and may dismiss the case if the request for further details is not complied with. Likewise, the board may, after the request for arbitration and answer have been filed, decide to dismiss the case, in whole or in part if, "i) the SCC Institute [manifestly] lacks jurisdiction over the dispute; or ii) the Advance on Costs is not paid. . . ."[57] The decision on the SCC Institute's manifest lack of jurisdiction over the dispute relates to the question of whether or not the parties have agreed to arbitrate their disputes under its auspices.[58]

Similarly, under the ICC Rules, if the respondent does not file an answer, or if any of the parties raises any objection as to the existence, validity, or scope of the arbitration agreement, the ICC Court may decide that the arbitration shall proceed if "it is prima facie satisfied that an arbitration agreement under the Rules may exist."[59] This is without prejudice to the power of the arbitral tribunal to determine its own jurisdiction.[60] If the Court determines that the arbitration cannot proceed, any party has the right to apply to a court with jurisdiction to determine that a binding arbitration agreement exists.[61]

Aside from the previously discussed basis for dismissal of requests, under both the ICC and SCC Rules, a request for arbitration will be dismissed if the relevant filing fee is not received by the institution after the expiration of a deadline set for the purpose.[62] Under the ICSID Rules, beyond sending an acknowledgment to the requesting party, nothing else is to be done with respect to the request until the prescribed lodging fee has been received.[63] Consequently, the Centre will not even send the request to the respondent if the payment is not received.[64]

Appointment and Disqualification of Arbitrators

Pursuant to the ICSID Convention and Rules, the arbitral tribunal shall consist of a sole arbitrator or any other uneven number of arbitrators. In the absence of agreement of the parties on the number of arbitrators and the method of their appointment, the tribunal will consist of three arbitrators, one appointed by either side, and the third, who shall preside over the tribunal, appointed by agreement of the parties. Any arbitrator not

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57 SCC Arbitration Rules, Articles 9(i), 10.

58 *See* Annette Magnusson & Patricia Shaughnessy, *The 2007 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce*, 3 Stockholm Int'l Arb. Rev. 46–47 (2006).

59 SCC Arbitration Rules, Article 6.2.

60 *Ibid*.

61 *Ibid*.

62 ICC Arbitration Rules, Article 3 and Appendix II(I); ICC Arbitration Rules, Article 4(4).

63 ICSID Institution Rule 5(1)(b).

64 As at January 2009, the fees for filing requests for arbitration under the different systems were, ICSID: US$25,000; SCC: € 1875, of which € 375 is VAT; and ICC: US$2500.

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appointed by the parties, shall upon the application of either party be appointed by the Chairman of the ICSID Administrative Council. Such appointments by the Centre are required to be made from the Centre's Panel of Arbitrators, consisting mostly of persons designated by Contracting States of ICSID.[65]

An application for disqualification of an arbitrator is to be decided by the other arbitrators or by the Chairman of the ICSID Administrative Council. Vacancies on the tribunal are to be filled in the same manner as the original appointment, except that where the vacancy is created by a resignation, and the resignation is not accepted by the remaining arbitrators, the vacancy shall be filled by the Chairman of the ICSID Administrative Council.[66]

The ICC Rules only envisage the possibility of a tribunal consisting of a sole arbitrator or of three arbitrators, unless the parties have agreed otherwise.[67] If the parties had previously agreed on a three-member tribunal, each party shall nominate an arbitrator in the request and answer, respectively. The chairman shall be appointed by the ICC Court unless the parties had agreed on another procedure.[68] Nominations made by the parties to the arbitral tribunal shall be subject to confirmation by the Secretary-General of the ICC. If the Secretary-General considers that a nominee should not be confirmed or if there is an objection by one of the parties, the matter is submitted to the ICC Court for decision.[69] Otherwise, where the parties fail to make a nomination pursuant to a previously agreed method or fail to reach agreement on the constitution of the tribunal, the appointments are made by the ICC Court upon proposals made by the ICC National Committees.[70] The Court may reject the nomination from a national committee or seek another proposal from the same or other national committee that it deems appropriate.[71]

Challenges to ICC arbitrators are decided by the ICC Court after the parties and arbitrators have been afforded the opportunity to comment.[72] The Court may also, of its own initiative, replace an arbitrator who it decides "is prevented *de jure* or *de facto* from fulfilling his functions" or that is "not fulfilling his functions in accordance with the Rules or within the prescribed time limits."[73] In replacing an arbitrator, the Court may at its discretion decide not to follow the original nomination process. It may also decide not to replace an arbitrator if the proceeding has been closed. The decision of

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65 ICSID Convention Article 13. Each Contracting State may designate to the Panel up to four persons, who need not be its nationals, and the Chairman of the Administrative Council may designate up to ten persons of differing nationalities. Article 14 of the Convention provides that the members of the Panel shall be persons of high moral character and recognized competence, especially in the field of law, or also in the fields of commerce, industry, or finance, who may be relied upon to exercise independent judgment.

66 ICSID Convention, Article 57; ICSID Arbitration Rules 7–12.

67 ICC Arbitration Rules, Article 8(1).

68 ICC Arbitration Rules, Article 8(4).

69 ICC Arbitration Rules, Article 9(1), (2). *See also* Yves Derains & Eric A. Schwartz, *supra* note 27, at 168.

70 The Court may also make appointments from a country with no National Committee if it deems it appropriate and the parties do not object.

71 ICC Arbitration Rules, Article 9(6).

72 ICC Arbitration Rules, Article 11.

73 ICC Arbitration Rules, Article 12(2).

the Court on the appointment, confirmation, challenge, or replacement of an arbitrator shall be final "and the reasons for such decisions shall not be communicated."[74]

Like the ICSID and ICC Rules, the SCC Rules allow the parties freedom to agree on the number of arbitrators and the method of their appointment. If the parties are not able to agree, the tribunal shall consist of three arbitrators, but the SCC Board, considering the complexity of the case, could decide for it to be submitted to a sole arbitrator.[75] The Rules provide for the board to be the appointing authority in the event that either party fails to appoint an arbitrator or if they fail jointly to appoint a sole arbitrator, where applicable.[76] In the event that the parties have not agreed on a time period to make the appointments, the time period shall be set by the board. If the parties fail to make an appointment within the time period set by the board, the appointment is made by the latter.[77] In making appointments, the board is required to take into account the circumstances of the case, the applicable law, the seat and language of the arbitration, and the parties' nationality.[78]

Under the SCC Rules, an arbitrator may be challenged by a party if "circumstances exist which give rise to justifiable doubts as to the arbitrator's impartiality or independence or if he/she does not possess qualifications agreed by the parties."[79] An arbitrator must resign if the challenge is agreed by both parties. Otherwise, the challenge is to be decided by the SCC board. Article 16(1)(iii) provides the possibility for the board to release an arbitrator from appointment in the event of a resignation or a successful challenge or where the arbitrator is "otherwise prevented from fulfilling his/her duties or fails to perform his/her functions in an adequate manner."[80] Arbitrators are to be replaced in the same manner of their appointment, unless otherwise deemed appropriate by the Board.[81]

Interim Measures

Under Article 32 of the SCC Rules the tribunal may grant "any interim measures it deems appropriate." In so doing, the tribunal may also require the requesting party to provide "appropriate security in connection with the measure." The Rules equally recognize that parties may also apply to judicial authorities for interim measures. Likewise, Article 23 of the ICC Rules provides that upon the application of a party, a tribunal may "order any interim or conservatory measure it deems appropriate," possibly on condition of a security being provided. Applications for the granting or implementation of such measures could also be made to a competent judicial authority, either before the file is transmitted to the tribunal or "in appropriate circumstances even thereafter."

74 ICC Arbitration Rules, Article 7(4).
75 SCC Arbitration Rules, Article 12.
76 SCC Arbitration Rules, Article 13(2).
77 SCC Arbitration Rules, Article 13(1).
78 SCC Arbitration Rules, Article 13(5), (6).
79 SCC Arbitration Rules, Article 15(1).
80 SCC Arbitration Rules, Article 16(1)(iii).
81 SCC Arbitration Rules, Article 17.

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Under the ICSID Convention and Rules, interim measures are only available from the tribunal, unless the parties had agreed otherwise in their instrument of consent. It is therefore not uncommon for arbitration clauses in recent investment-related treaties to contain provisions in this regard. Such measures may be recommended by the tribunal upon the application of a party or on its own initiative. Indeed, the tribunal may recommend measures outside of those requested by the parties, but the measures will in any event be for the preservation of the rights of the parties.[82] An interim measures application may be filed with the ICSID Secretariat prior to the constitution of a tribunal. In such instances, the Secretary-General will establish a schedule for the filing of observations by the parties which, together with the request will be considered by the tribunal "promptly upon its constitution."[83]

Consolidation

Article 11 of the SCC Rules provides that upon the submission of a Request for Arbitration concerning a legal relationship in respect of which an arbitration between the same parties is already pending, the SCC Board may, at the request of a party and after consulting the parties and the tribunal, include the claims contained in the Request for Arbitration in the pending proceedings.[84]

Similarly, the ICC Rules provide that the ICC Court may, at the request of a party, decide to include the claims contained in a new Request in a pending proceeding provided that the parties and legal relationship in respect of which arbitration proceedings exist are the same.[85] However, once the Terms of Reference have been signed or approved by the Court, claims may only be included in the pending proceedings by leave of the tribunal as provided in Article 19 of the ICC Rules.[86]

The ICSID Rules, on the other hand, do not contain specific provisions for consolidation of proceedings, but consolidation may nevertheless occur by agreement of the parties. Indeed, provisions are increasingly being introduced into the various arbitration systems through procedural provisions in treaties.[87] In any event, there are instances in which *de facto* consolidation can occur in ICSID cases.[88]

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82 *See generally* ICSID Convention, Article 47; ICSID Arbitration Rule 39.

83 ICSID Arbitration Rule 39(5).

84 This is one of the provisions introduced when the SCC Rules were amended in 2006.

85 ICC Rules, Article 4.6.

86 ICC Rules, Article 19 provides: "After the Terms of Reference have been signed or approved by the Court, no party shall make new claims or counterclaims which fall outside the limits of the Terms of Reference unless it has been authorized to do so by the Arbitral tribunal, which shall consider the nature of such new claims or counterclaims, the stage of the arbitration and other relevant circumstances."

87 *See*, *e.g.*, Dominican Republic–Central American Free Trade Agreement (CAFTA), Article 10.25.

88 *See* Ucheora Onwuamaegbu, *Using Treaties to Define Rules of Procedure in Investor-State Arbitration*, *in* THE FUTURE OF INVESTMENT ARBITRATION 82–83 (Catherine A. Rogers & Roger P. Alford eds., Oxford University Press 2009).

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Seat of Arbitration, Language of Proceedings, and Applicable Law

Under all three sets of Rules, the seat of arbitration and the language of proceedings are left to the agreement of the disputing parties. However, in the absence of agreement of the parties, the SCC Rules provide that the seat of the arbitration is to be determined by the SCC Board, while the language of the arbitration and the applicable law is to be determined by the tribunal.[89] Under the ICC Rules, in the absence of agreement of the parties, the place of arbitration is fixed by the ICC Court, and the language is determined by the tribunal, consideration being given to the language of the contract among other factors.[90] The applicable law is determined by the tribunal, where no agreement exists between the parties, taking into account "the provisions of the contract and the relevant trade usages."[91] For ICSID proceedings, in the absence of agreement of the parties, the Seat of the Centre in Washington, D.C., shall be the place of proceedings,[92] it being understood that the place of an ICSID proceeding does not have the same implications as for ICC and SCC cases due to the self-contained nature of the ICSID process. Proceedings could be conducted in any two of the Centre's three languages, namely, English, French and Spanish;[93] and the applicable law shall be the law of the State party to the dispute and any applicable rules of international law.[94]

All three sets of Rules permit the tribunal to decide *ex aequo et bono* but only if expressly authorized to do so by the parties.[95] They also permit proceedings to take place at locations outside of the seat of arbitration, if the parties do not disagree.[96] It is also usually permissible for tribunals alone to meet at locations they decide.

Tribunal's Experts

The SCC Rules in Article 29 provide that the tribunal may of its own accord, and after consulting the parties, seek expert opinion on specific issues it would have identified. Likewise, Article 20 of the ICC Rules allows tribunals to appoint experts after having consulted the parties. The ICSID Rules contain no such express authorization for tribunals to consult experts of their own accord. This has, however, been done by different tribunals but only upon prior consultation with, and approval of, the parties.[97]

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89 SCC Arbitration Rules, Articles 20–21.

90 ICC Arbitration Rules, Articles 14, 16.

91 ICC Arbitration Rules, Article 17.

92 ICSID Convention, Article 63; Administrative and Financial Regulation 26; Arbitration Rule 13.

93 ICSID Arbitration Rule 22.

94 ICSID Convention, Article 42.

95 ICSID Convention, Article 42; ICC Arbitration Rules, Article 17(3); SCC Arbitration Rules, Article 22(3).

96 ICSID Convention, Article 63 and ICSID Arbitration Rule 13(3); ICC Arbitration Rules, Article 14.2; SCC Arbitration Rules, Article 27(2).

97 *See*, *e.g*., LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic (ICSID Case No. ARB/02/1), Award, July 25, 2007, para. 6.

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Transparency and Third-party Participation

The fact of the existence of a case at ICSID is public information. ICSID Administrative and Financial Regulation 22 provides that information about the registration of all requests for arbitration and an indication of the date and method of termination of each proceeding shall be published. The Centre does this in part by maintaining lists of pending and concluded cases on its Web site, which is publicly available. The lists include such information as the subject matter of the dispute, date of constitution of the tribunal, composition of the tribunal, and the status or outcome of the proceeding.[98] More detailed information is available in the separate register required to be maintained for each case and open for inspection by the public, with excerpts available for a fee determined on a case-by-case basis by the Centre.[99] Otherwise, arbitrators undertake in the declarations that they sign at the beginning of the proceeding to keep confidential all information they acquire in the course of participation in the proceeding.[100] The Centre will not publish the award in a case, except with the consent of the parties.[101] It is, however, required to "promptly include in its publications excerpts of the legal reasoning of the Tribunal."[102] The parties are not particularly bound by any specific confidentiality rules but are generally expected to refrain from doing anything that could aggravate or exacerbate the dispute or otherwise undermine the integrity of the process.[103] ICSID hearings may at the discretion of the tribunal be open to the public, "[u]nless either party objects."[104] The tribunal may also accept written submissions from third parties "[a]fter consulting both parties."[105]

Neither the ICC Rules nor those of the SCC provide for the level of public access seen in ICSID proceedings. Therefore, except where agreed by the parties or required by law, for example, in mandatory filings required of companies in different jurisdictions, the fact of the existence of a particular dispute before either forum would remain confidential as would details and outcome of the proceeding.[106] The ICC Rules provide

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98 Similar information is also published in the Centre's quarterly newsletter and in its Annual Report.

99 ICSID Administrative and Financial Regulation 23(1) provides that each Register shall contain "all significant data concerning the institution, conduct and disposition of each proceeding, including in particular the method of constitution and the membership of each Commission, Tribunal and Committee. . . . [A]lso . . . with respect to each award, all significant data concerning any request for the supplementation, rectification, interpretation, revision or annulment of the award, and any stay of enforcement."

100 ICSID Arbitration Rule 6(2).

101 ICSID Convention, Article 48(5); ICSID Administrative and Financial Regulation 22(2)(b); Arbitration Rule 48(4).

102 ICSID Arbitration Rule 48(4).

103 *See generally* Margrete Stevens, *Confidentiality Revisited*, 17(1) News from ICSID (Washington, D.C., ICSID 2000).

104 ICSID Arbitration Rule 32(2).

105 ICSID Arbitration Rule 37(2).

106 Details of arbitration cases could, otherwise, enter into the public domain in instances where applications are made in national courts, for instance, for provisional measures or for enforcement and or execution of an award.

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that the "work of the [ICC] Court is of a confidential nature which must be respected by everyone who participates in that work in whatever capacity."[107] Article 46 of the SCC Rules provides that "[u]nless otherwise agreed by the parties, the SCC Institute and the Arbitral tribunal shall maintain the confidentiality of the arbitration and the award." Neither set of Rules contains any provision dealing with submissions by third parties but, as with the question of confidentiality, the disputing parties could on their own agree how such matters may be dealt with by the relevant tribunal.

The Award and Post-award Remedies

Under the ICC Rules, the final award of the tribunal is to be rendered within six months from the date of terms of reference.[108] The deadline may be extended by the ICC Court of its own accord or upon a reasoned request from the tribunal. Where there is more than one arbitrator on the tribunal, the award is to be made by majority or, failing a majority, by the chairman of the tribunal alone.[109] No award shall be rendered until it has been approved by the Court as to its form. Thus, before signing the award, the tribunal is to submit it in draft to the Court, which "may lay down modifications as to the form of the [a]ward and, without affecting the Arbitral Tribunal's liberty of decision, may also draw its attention to points of substance."[110]

Similarly, under the SCC Rules, the final award is to be made within six months from the date on which the arbitration was referred to the tribunal.[111] The deadline may also be extended by the board of its own accord or upon "a reasoned request" from the tribunal. The board may, however, delegate its decision on the extension of time for rendering an award to the Secretariat.[112] The fact that an award is not signed by all members of the tribunal shall not be fatal to the award so long as the reason for the omission of the signature is stated in the award.[113] Neither will the failure of an arbitrator to participate in deliberations on an issue without valid cause preclude the other members of the tribunal from deliberating.[114]

Article 48 of the ICSID Convention makes it possible for the award of an ICSID tribunal to be issued by majority decision. Indeed, the award only needs to be signed by those arbitrators that voted for it, while an arbitrator may attach a separate opinion or statement of dissent to the award.[115]

In terms of post-award remedies, the ICC Rules provide for correction and interpretation of the award. A tribunal may within 30 days of its award, of its own initiative or upon the application of a party, make a correction to the award to address clerical,

107 ICC Arbitration Rules, Appendix I, Article 6.
108 ICC Arbitration Rules, Article 24.
109 ICC Arbitration Rules, Article 25(1)–(2).
110 ICC Arbitration Rules, Article 27.
111 SCC Arbitration Rules, Article 37
112 SCC Arbitration Rules, Appendix I, Article 7.
113 SCC Arbitration Rules, Article 36(3).
114 SCC Arbitration Rules, Article 36(5).
115 ICSID Convention, Article 48(4); Arbitration Rule 47(2)–(3).

computational, or typographical errors. It can also issue an interpretation of its award upon the application of a party within 30 days of the award. The decision to correct or interpret the award will also be submitted in draft to the ICC Court for scrutiny and approval prior to its issuance.[116] The SCC Rules also contain provisions on correction and interpretation of awards.[117] They, in addition, provide for an additional award to be issued by the tribunal at the request of a party made within 30 days of the award, in respect of "claims presented in the arbitration but not determined in the award."[118]

The post-award remedies available under the ICSID Convention from the same tribunal that issued the award are supplementation and rectification of the award. These two remedies are available, respectively, for deciding any issues omitted in the award, or for rectifying any clerical, arithmetical, or similar errors in the award. Such remedies are available upon the application of the parties, which must be accompanied by a lodging fee and be made within 45 days of the award.[119]

The other post-award remedies available under the ICSID Convention are interpretation, revision, and annulment. All three can be invoked by a party upon the payment of the prescribed fee. Interpretation is available for disputes between the parties as to the meaning or scope of the award, and revision is available on the basis of discovery of some fact of such a nature as decisively to affect the award, provided that the fact was unknown to the applicant or the tribunal when the award was rendered, and the applicant's ignorance was not due to negligence. Where possible, the application for interpretation or revision will be submitted to the same tribunal that rendered the award. Otherwise, a tribunal will be constituted in accordance with the same method as the initial tribunal.[120] There is no deadline for applications for interpretation, but an application for revision must be filed within 90 days of the discovery of the fact, and in any event, within three years of the rendering of the award.[121]

Either party may seek annulment of an ICSID award, in whole or in part, on the basis that (a) the tribunal was not properly constituted, (b) the tribunal manifestly exceeded its powers, (c) there was corruption on the part of a tribunal member, (d) there has been a departure from a fundamental rule of procedure, or (e) the award failed to state the reason on which it was based. The application must be made within 120 days of the rendering of the award, but in the case of corruption of a tribunal member, the 120 days start to run from the discovery of the corruption. It is decided by a three-member *ad hoc* committee, appointed by the chairman of the ICSID Administrative Council from the ICSID panel of arbitrators, whose members cannot be of the same nationality as the disputing parties or the arbitrators that rendered the award and cannot have been designated to the Panel by the State party to the dispute or the State whose national is a party to the dispute.[122]

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116 ICC Arbitration Rules, Article 29.

117 SCC Arbitration Rules, Article 41.

118 SCC Arbitration Rules, Article 42.

119 ICSID Convention, Article 49(2); Arbitration Rule 49.

120 ICSID Arbitration Rule 51(3).

121 ICSID Convention, Articles 50–51.

122 ICSID Convention, Article 52.

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Enforcement of the award may be stayed pending determination of an application for interpretation, revision, or annulment.[123] Indeed, if requested, the Secretary-General will provisionally stay enforcement of the award pending the reconstitution of the tribunal or constitution of the *ad hoc* committee.[124]

Costs

Aside from the initial fee paid to file the Request for Arbitration, the cost of the arbitration proceeding would normally consist of the fees and administrative charges of the institution, the fees and expenses of the arbitrators, and the cost of legal representation of the parties, including the cost of expert witnesses.

The ICSID Convention provides that the charges for the use of the Centre's facilities will be determined by the Secretary-General,[125] while the fees and expenses of the tribunal members are determined in line with the Centre's published schedule of fees and expenses. The tribunal may, however, reach a different agreement with the parties over the rate of remuneration of its members,[126] except that any request by arbitrators to the parties for a higher amount than the prevailing rate of remuneration must be made through the Secretary-General.[127]

Following the constitution of the tribunal, the Centre, typically in the person of the designated secretary of the tribunal, in consultation with the president of the tribunal, estimates the expenses to be incurred in the proceeding during the ensuing three to six months and requests initial payment from the parties.[128] Additional advance payments are requested as necessary in the course of the proceeding.[129] Unless otherwise agreed by the parties or decided by the tribunal, advance payments for running the proceeding are to be paid in equal shares by the parties,[130] without prejudice to the tribunal's final decision on the cost of the proceedings pursuant to Article 61(2) of the Convention.[131] A proceeding will be discontinued if payment is not made by the parties for the conduct of the case.[132]

Under the ICC Rules, the claimant is responsible for a provisional advance payment which may be requested by the Secretary-General to cover the costs of the arbitration until the terms of reference have been drawn up.[133] The Court is required, as soon as

123 ICSID Convention, Articles 50(2), 51(4), 52(5).
124 ICSID Arbitration Rule 54(2).
125 ICSID Convention, Article 59.
126 ICSID Convention, Article 60(2).
127 ICSID Administrative and Financial Regulation 14(1).
128 ICSID Administrative and Financial Regulation 14(3)(a)(i).
129 ICSID Administrative and Financial Regulation 14(3)(a)(ii).
130 ICSID Administrative and Financial Regulation 14(3)(d).
131 Article 61(2) provides that unless otherwise agreed by the parties, the tribunal assesses the expenses incurred by each party with respect to the proceeding and decides how and by whom those expenses, the fees and expenses of the tribunal, and the charges of the Centre are to be paid.
132 ICSID Administrative and Financial Regulation 14(3)9d).
133 ICC Rules, Article 30(1).

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practicable, to fix the advance on costs in an amount "likely to cover the fees and expenses of the arbitrators and the ICC administrative costs" using a scale provided in Appendix III to the Rules, which depends on the amount of the claim.[134] The amount, which is to be paid in equal shares by the parties, may be readjusted at any time during the arbitration,[135] and the proceeding may be suspended by the Secretary-General and ultimately discontinued by the Court for nonpayment of the advance on costs.[136]

It is possible for bank guarantees to be posted in lieu of immediate payment of the portion of advances exceeding a limit that is predetermined by the Court or to cover the advances not paid by the other side. The terms governing the bank guarantees are established by the Secretariat.[137] Other than fees and expenses of the arbitrators which are fixed by the Court, the tribunal in the final award fixes the cost of the arbitration and which side bears the cost burden.[138]

In the case of the SCC, aside from the costs incurred separately by the parties, a topic addressed under Article 44 of the SCC Arbitration Rules, Article 43 defines the costs of the arbitration as consisting of: the fees of the arbitral tribunal;[139] the administrative fee of the SCC Institute; and the expenses of the arbitral tribunal and the SCC Institute. Unless otherwise agreed, the tribunal apportions the costs of the arbitration between the parties, "having regard to the outcome of the case and other relevant circumstances."[140] The same considerations are also relevant when the tribunal is deciding whether one party is to pay "any reasonable costs incurred by another party, including costs for legal representation."[141]

The SCC board makes an estimate of the costs of the arbitration, i.e., the fees and expenses of the tribunal and the SCC Institute, as well as the administrative fee of the Institute. The parties are required to pay an advance on the costs in equal shares, except where counterclaims or set-offs are submitted, in which case payment may be assessed in different proportions.[142] In the course of the proceeding, additional advances may be assessed by the tribunal and ordered by the board. Article 45(6) authorizes the board to receive part of the advance payment in the form of a bank guarantee or other form of security. A case may be dismissed in whole or in part for failure of the parties to make

134 Article 31(2) of the ICC Rules allows the Court in exceptional circumstances to fix the fees of the arbitrators higher or lower than would have been assessed using the scale.

135 Pursuant to Appendix III, Article 1(10), the readjustments could be to take into account factors such as fluctuation in the amount in dispute, changes in the amount of the estimated expenses of the arbitrators or the evolving difficulty or complexity of the proceeding.

136 ICC Rules, Article 30.

137 ICC Rules, Appendix III, Articles 5, 6, 8, 9.

138 ICC Arbitration Rules, Article 31(3).

139 Pursuant to Appendix II(II), the Board determines the fees of the Chairperson or sole arbitrator, based on the amount in dispute, calculated in accordance with the formula in a table annexed to the appendix to the Rules; and the co-arbitrators each receive 60 percent of the total fee paid to the Chairperson, unless the Board determines a different apportionment of the fees between the arbitrators.

140 SCC Arbitration Rules, Article 43(5).

141 SCC Arbitration Rules, Article 44.

142 SCC Rules, Article 45(3).

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advance payments as requested.[143] The board's decisions on advances on costs, dismissal for nonpayment of registration fee, and fixing of arbitration costs, may be delegated to the secretariat, and such decisions are final.[144]

PART II: *AD HOC* DISPUTE SETTLEMENT: UNCITRAL ARBITRATION RULES[145]

The United Nations Commission on International Trade Law (UNCITRAL) is a subsidiary organ of the United Nations General Assembly, established in 1966 by Resolution of the General Assembly, with the stated objective of "promotion of the progressive harmonization and unification of the law of international trade."[146] The Commission was created as a vehicle for reducing or removing disparities in national laws governing international trade. Such disparities are deemed to create obstacles to the flow of trade and can be eroded by the harmonization and unification of the law of international trade.[147] It was considered that the Commission could achieve its international trade law harmonization and unification objective by, *inter alia*, "[p]reparing or promoting the adoption of new international conventions, model laws and uniform laws. . . ."[148] According to the Commission, "harmonization" could be understood as "the process through which domestic laws may be modified to enhance predictability in cross-border commercial transactions," while "unification" would be "the adoption by States of a common legal standard governing particular aspects of international business transactions."[149] Since its inception, the Commission has worked in different areas, including International Commercial Arbitration and Conciliation, International Sale of Goods and Related Transactions, Insolvency, International Payments, International Transport of Goods, Electronic Commerce, Procurement and Infrastructure Development, and Penalties and Liquidated Damages.[150]

On April 28, 1976, the Commission adopted a set of arbitration rules (the UNCITRAL Arbitration Rules). The Rules were drafted by member countries of UNCITRAL but with "extensive consultation with arbitral institutions and centres of international commercial

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143 SCC Rules, Articles 10, 45(4).

144 SCC Rules, Appendix I, Article 7.

145 At the time of writing, the UNCITRAL Arbitration Rules were undergoing revision. The process for amending the Rules is much more public than for the Rules of the institutions discussed in the preceding Part of this Chapter. Any amendments resulting from such a process could be of benefit to arbitration institutions, which could ultimately adopt similar changes, as they see fit, without the need to go through the same process.

146 UN General Assembly Resolution 2205(XXI) of December 17, 1966.

147 *See generally* Origin, Mandate and Composition of UNCITRAL, *available at* http://www.uncitral.org/uncitral/en/about/origin.html.

148 UN Resolution 2205(XXI), *supra* note 146, Article II(8)(c).

149 *See generally* FAQ—Origin, Mandate and Composition of UNCITRAL, *available at* http://www.uncitral.org/uncitral/en/about/origin_faq.html.

150 The Commission is composed of 60 member States appointed by the General Assembly for periods of six years, with the terms of half of the members expiring every three years, representing different geographical areas and legal systems of the world.

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arbitration." In its ensuing resolution recommending the use of the Rules, the UN General Assembly stated its conviction that "the establishment of rules for ad hoc arbitration that are acceptable in countries with different legal, social and economic systems would significantly contribute to the development of harmonious international economic relations."[151]

The UNCITRAL Rules are the most popular arbitration rules for *ad hoc* international arbitration proceedings, but they have also, by agreement of the parties, been employed in various administered proceedings.[152] The Rules were originally intended for the arbitration of disputes arising out of commercial relationships.[153] They have, however, been used for disputes from other forms of endeavor, including international investments. They have been used especially in investor-state arbitrations, mostly as a result of their inclusion in numerous investment-related treaties, both bilateral and multilateral, including the North American Free Trade Agreement (NAFTA) and the Energy Charter Treaty (ECT). Indeed, recent efforts to amend the UNCITRAL Rules include proposals for provisions to address peculiarities of investor-state arbitration and to adapt them for use in such cases.[154]

The UNCITRAL Arbitration Rules have also been adopted by standing tribunals, such as the Iran/U.S. Claims tribunal, and formed the basis for the rules of others, such as the United Nations Compensation Commission. Other sets of Arbitration Rules which have been identified as having been inspired by the UNCITRAL Rules include the London Court of International Arbitration (LCIA) Rules, as adopted in 1981; the Stockholm Chamber of Commerce (SCC) Arbitration Rules, as adopted in 1988; and the Arbitration Rules of the Singapore Arbitration Centre (SIAC), as adopted in 1997.[155] The Swiss Chambers of Commerce and Industry of Basel, Bern, Geneva, Ticino, Vaud, and Zurich, in July 2004, adopted Rules of International Arbitration based on the UNCITRAL Arbitration Rules, subject to two main types of changes and additions, which are said to have been purposely kept at a minimum. These changes and additions were "required to adapt the UNCITRAL Arbitration Rules to institutional arbitration" and to reflect "modern practice and comparative law in the field of international arbitration."[156]

Commencement of Proceedings Under the UNCITRAL Arbitration Rules

An arbitration proceeding under the UNCITRAL Arbitration Rules is initiated by the claimant sending a Notice of Arbitration to the respondent, at his habitual residence,

151 UN Resolution 31/98 of December 15, 1976.

152 *See*, *e.g.*, Glamis Gold. Ltd v. The United States of America (An Arbitration Under Chapter 11 of the North American Free Trade Agreement), *available at* http://www.state.gov/s/l/c10986.htm, which, although a proceeding conducted under the UNCITRAL Rules, was, by agreement of the disputing parties and the tribunal, taken to ICSID to administer.

153 UN Resolution 31/98, *supra* note 151.

154 *See* Revision of the UNCITRAL Arbitration Rules, A Report by Jan Paulsson & Georgios Petrochilos, www.uncitral.org.

155 *See ibid*., at 2.

156 *See* Swiss Rules of International Arbitration, *available at* https://www.sccam.org/sa/en/rules.php.

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place of business, or mailing address, or, if none of these can be found after making reasonable inquiry, then at the addressee's last-known residence or place of business. The proceeding is deemed to commence on the day the notice is delivered to the respondent.[157] By contrast, the ICC Rules provide that the date of commencement of the proceeding is the date on which the request for arbitration is received by the ICC Secretariat.[158] The ICSID Rules, on the other hand, consider the date of the registration of the request by the Secretary-General to be the date of institution of the proceeding.[159] ICSID proceedings are otherwise deemed to commence upon the constitution of the tribunal.[160]

Appointment and Disqualification of Arbitrators

The UNCITRAL Arbitration Rules provide for the possibility of one or three arbitrators and specify the method of their appointment in the absence of prior agreement by the parties. In contrast to the ICSID, ICC, and SCC Rules, the UNCITRAL Arbitration Rules do not designate an appointing authority; rather, the Secretary-General of the Permanent Court of Arbitration at The Hague is designated as the authority to whom the parties could apply to designate the appointing authority where none has been agreed by the parties.[161]

An arbitrator can be challenged under the UNCITRAL Rules "if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence."[162] Challenges are to be decided by the authority that appointed the arbitrator or by an appointing authority designated in the same manner as provided for the appointment of arbitrators.[163] Any hearings held prior to the replacement of a sole or presiding arbitrator shall be repeated but, if it is any other arbitrator that is replaced, repetition of the hearing shall be at the discretion of the tribunal.[164]

Proceedings

The UNCITRAL Arbitration Rules stress the principle of equality of treatment of the parties and allow them a full opportunity to present their case.[165] The tribunal, in the absence of agreement by the parties, determines the language of the proceedings and

157 UNCITRAL Arbitration Rules, Articles 2, 3.
158 ICC Arbitration Rules, Article 4(2).
159 ICSID Institution Rule 6(2).
160 ICSID Arbitration Rule 6(1).
161 UNCITRAL Arbitration Rules, Article 6(2).
162 UNCITRAL Arbitration Rules, Article 10.
163 UNCITRAL Arbitration Rules, Article 12.
164 UNCITRAL Arbitration Rules, Article 14. Note that under ICSID Arbitration Rule 12, a newly appointed arbitrator "may . . . require that the oral procedure be recommenced, if this had already been started."
165 UNCITRAL Arbitration Rules, Article 15.

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also determines the place of arbitration, having regard to the circumstances of the case.[166] In this regard, the Rules differentiate between the "place where the arbitration is to be held" and the particular places at which different aspects of the work of the tribunal may be carried out. The place of arbitration, also, does not necessarily determine the applicable law. In the absence of agreement by the parties, the tribunal "shall apply the law determined by the conflict of laws rules which it considers applicable."[167]

The Rules provide for a written procedure comprised of a Statement of Claim and a Statement of Defense, including a counterclaim or set-off, and allow the tribunal to decide on other submissions it considers necessary.[168] They also contain provisions on evidence and burden of proof, which rests on the party putting forward a claim or defense.[169] Also specified is the possibility of hearings, although there is no express requirement for the tribunal to consult with the parties prior to scheduling a hearing. The tribunal is only required to "give the parties adequate advance notice of the date, time and place" of the hearing.[170]

Although there are no express provisions requiring confidentiality of proceedings under the UNCITRAL Arbitration Rules, hearings are to be held *in camera* unless otherwise agreed by the parties. The Rules also provide specifically that the tribunal may require the exclusion of a witness during the testimony of other witnesses.[171] There are no provisions in the UNCITRAL Rules for participation of nondisputing parties in the proceedings, although this may be agreed separately by the parties.[172] Likewise, the award may only be publicized with the consent of both parties[173] There are, however, numerous treaties in existence which make it mandatory for awards to be made public, as well as for pleadings and other material from the proceeding to be made available to the public.[174]

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166 For detailed considerations of a tribunal in determining the place of arbitration in the absence of agreement of the parties, see United Parcel Service of America Inc. v. Government of Canada (An Arbitration Under Chapter 11 of the North American Free Trade Agreement), Decision of the Tribunal on the Place of Arbitration, October 17, 2001, *available at* http://www.state.gov/documents/organization/6032.pdf.

167 UNCITRAL Arbitration Rules, Article 33.

168 UNCITRAL Arbitration Rules, Articles 18–20, 22.

169 UNCITRAL Arbitration Rules, Article 24(1).

170 By contrast, ICSID hearings are held in Washington, D.C., unless the parties agree otherwise. *See* ICSID Convention, Article 62; ICSID Administrative and Financial Regulation 26(1).

171 UNCITRAL Arbitration Rules, Article 25(4). In ICSID proceedings, it is common practice for most witnesses to be allowed to attend or observe the hearing after their testimony. It is also not uncommon for a witness who himself is also the claimant or its owner, if a juridical person, to be allowed to remain in the hearing all through the proceeding.

172 *See*, *e.g.*, NAFTA Article 1128 (providing for submissions by other NAFTA Parties, which are not party to the dispute in question). *See also* Article 10.19:2 United States/Chile FTA (providing that "[t]he non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Agreement").

173 UNCITRAL Arbitration Rule 32(5). This is different from the ICSID Convention and Rules, which expressly impose such confidentiality obligations on the tribunal and the Centre, but not on the parties.

174 NAFTA Chapter 11 proceedings provide good examples of this. *See*, *e.g.*, NAFTA Claims *at* www.naftaclaims.com.

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The tribunal may, at the request of either party, take any interim measures that it "deems necessary in respect of the subject-matter of the dispute." As under the ICC and SCC Rules, there is express provision under the UNCITRAL Rules allowing such applications also to be addressed to judicial authorities.[175] The tribunal is entitled, in any event, to require security for the costs of interim measures.[176]

A proceeding under the UNCITRAL Rules may be terminated upon the default of the claimant to prosecute its case or if the parties reach settlement or the proceeding otherwise becomes unnecessary or impossible.[177]

With regard to post-award remedies specified in the UNCITRAL Rules, either party may, within 30 days of receipt of the award, request its interpretation by the tribunal; request the correction of any computational, clerical, typographical or other similar errors; or request the tribunal to make an additional award addressing claims omitted in the award.[178] In adopting the UNCITRAL Rules for their proceeding, the disputing parties thereby also "undertake to carry out the award without delay."[179]

Pursuant to Article 40 of the UNCITRAL Rules, the costs of the arbitration are in principle to be borne by the unsuccessful party.[180] However, the tribunal may in its discretion apportion the costs between the parties. The costs of the proceeding are specified to include the fees of the arbitrators, which are to be determined in accordance with the provisions of the Rules. The costs are otherwise said to include the expenses of the arbitrators, costs of expert advice and other assistance required by the tribunal, the successful party's legal costs, and fees and expenses of the appointing authority and expenses of the Secretary-General of the PCA.[181]

Other UNCITRAL Texts

Alongside the arbitration rules are other texts of UNCITRAL which are designed to facilitate the arbitral process. Such texts include the 1982 Recommendations to assist arbitral institutions and other interested bodies with regard to arbitrations under the UNCITRAL Arbitration Rules and the 1996 UNCITRAL Notes on Organizing Arbitral Proceedings. Also worthy of note is the 1985 UNCITRAL Model Law on International Commercial Arbitration (amended in 2006).

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175 UNCITRAL Arbitration Rules, Article 26(3).

176 UNCITRAL Arbitration Rules, Article 26(2).

177 UNCITRAL Arbitration Rules, Articles 28, 32, 34.

178 UNCITRAL Arbitration Rules, Articles 35–37. Notably, Article 40(4) of the UNCITRAL Arbitration Rules provides that no fees may be charged by a tribunal for interpretation or correction or completion of its award under Articles 35–37.

179 UNCITRAL Arbitration Rules, Article 32(2).

180 *See*, *e.g.*, S.D. Myers, Inc. v. Government of Canada (A NAFTA Arbitration Under the UNCITRAL Arbitration Rules), Final Award (concerning the apportionment of costs between the Disputing Parties), December 30, 2002, *available at* http://naftaclaims.com/Disputes/Canada/SDMyers/SDMyersAwardCosts.pdf.

181 UNCITRAL Arbitration Rules, Articles 38–40.

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The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly known as the "New York Convention") is a product of UNCITRAL. Although it predates the Arbitration Rules, the Convention has come to play an important role in the enforcement of international arbitral awards of tribunals operating under different arbitration rules, whether *ad hoc* or institutional. This excludes, of course, ICSID Convention awards which rely only on the Convention for their enforcement. In 2006, UNCITRAL adopted a recommendation regarding the interpretation of Article II (2) (agreement in writing) and Article VII (1), of the New York Convention (reliance on other laws and treaties for award enforcement), to promote nonrestrictive readings of those provisions.

CONCLUDING REMARKS

The choice facing disputing parties between *ad hoc* and institutional arbitration, or between the different arbitration institutions, is often severely restricted by the parameters of their prior written consent. Each of the arbitration institutions has aspects that distinguish it from the others, and it is for parties and counsel to consider these carefully, in the context of the particular circumstances of the case, in deciding which institution to recommend to clients. As different sets of Arbitration Rules continue to evolve, it is likely that the main differences between them will continue to diminish. In particular, the institutions whose Rules were initially framed for commercial disputes may find it necessary to introduce provisions that would be more tailored for arbitration of disputes between investors and States. In this regard, ICSID is arguably best suited to adapt more easily for all forms of disputes between governments and foreign investors in view of its underlying mandate, as well as its position as an international organization.

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PART II

Practical Guide to the Key Procedural Issues

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Chapter 4

An Overview of Procedure in an Investment Treaty Arbitration

*Barton Legum**

INTRODUCTION

What is the procedure in this treaty arbitration? What should I expect? Whether the client is a high-ranking official in a Ministry of Justice or General Prosecutor's office, a businessman or a member of a multinational corporation's legal department, these questions are inevitably among the first posed in a case.

There is tremendous variability in the procedure of investment arbitrations. Arbitrations range from cases that take many years to conclude to cases that are heard within a year or two. The experience in one case may not hold for another.

However, there are a number of common elements and fixed variables. An understanding of these elements and variables allows the reader to draw conclusions as to how a specific arbitration will likely play out. This is the understanding that this chapter attempts to convey, with a practical focus on the principal strategic decisions in such a case.

OVERVIEW OF THE OVERVIEW

As is the case with other forms of international arbitration, investment treaty arbitration is a hybrid of civil-law and common-law procedure. Like many civil-law systems,

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* Partner, Head of the Investment Treaty Arbitration Practice at Salans, Paris, France. From 2000–04, Mr. Legum served as Chief, NAFTA Arbitration Division, Office of the Legal Adviser, United States Department of State. In that capacity, he served as lead counsel for the United States Government in arbitrations under the investment chapter of the North American Free Trade Agreement. The United States won every case decided under his tenure.

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investment arbitration places great emphasis on the written submissions that precede the hearing. Each party makes its case in the written submissions, which present all of the evidence it relies upon to establish its case. Similar to civil-law proceedings, the oral hearing in many ways merely supplements these written submissions.

However, as in common-law proceedings, the hearings are often multiday affairs that feature cross-examination of witnesses by counsel and active questioning by the arbitral tribunal. The nature and variety of these hearings resemble more those of common-law proceedings than civil-law ones.

From a practical perspective, the activity in an investment-treaty arbitration can be divided into five, sequential phases: (1) the preparation of the case, (2) the written submissions, (3) the hearing, (4) posthearing activity, and (5) the decision and its aftermath.

PREPARATION OF THE CASE

For present purposes, preparation of the case includes the period from the inception of the dispute to the first procedural session with the arbitral tribunal. It is in many respects the most important phase of the case. During this time, the parties select the counsel to represent them, conduct an initial analysis of the case, select the arbitrators, and decide on the specific procedure for the arbitration. Each of these decisions is critical. Many parties make the mistake of devoting insufficient resources to this period of the case and these decisions. This mistake is difficult to overcome later in the procedure.

The Beginning

The preparation period begins for the claimant when it realizes that there is a serious problem—or potential problem—with a foreign investment and that an investment treaty may either provide a possible solution or assist in a political or negotiated resolution of the issue. In some instances, the investor recognizes the problem years before a dispute emerges and seeks early advice on international investment law. The advice at this stage may help to resolve the dispute before arbitration ever becomes necessary. In other cases, the advice may help to better prepare the case for arbitration. In still other cases, the problem with the foreign investment develops suddenly, and the investor seeks advice only shortly before the arbitration is commenced.

For the respondent State, the preparation period commences—or at any rate *should* commence—when the relevant ministry receives the first communication that identifies a potential dispute under an investment treaty. In some instances, this will occur when a high-ranking official of the government receives a letter from the investor or its counsel. In others, this will occur when a formal notice of intention to submit a claim to arbitration is communicated. In many instances, the preparation period for the State will begin only once the request for arbitration is received.

Because investment-treaty arbitration is a relatively recent development, many States do not have internal procedures for dealing with these cases. It is now perhaps

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more the rule than the exception for there to be lack of clarity as to which ministry is responsible for the file, where funding for defense of the case will come from, what procedures must be followed to retain competent counsel, and what budget will pay for any eventual adverse award. Long periods of apparent inactivity on the State side of the case often result while these issues are sorted out internally. The resultant delays can leave the State with a compressed period for preparation. Unless the State retains highly experienced counsel, this compressed preparation time can place the State at a significant disadvantage.

Initial Case Assessment

After counsel is retained by both sides, each party generally conducts a legal and factual assessment of the case. The principal documents relevant to the case are collected and, often, translated. Witnesses are interviewed. A chronology of events is prepared, and the facts are analyzed in terms of the substantive and jurisdictional standards of the investment treaty. If time permits, counsel will often prepare a confidential memorandum setting out initial views on the case and prospects for success for discussion with the client.

For the claimant, this initial case assessment serves as the basis for its strategy in deciding whether to bring the claim at all, framing its claim in the request for arbitration, selecting arbitration rules (if the treaty provides a choice of rules), deciding whom to appoint as the first arbitrator, and negotiating detailed procedures with the respondent. For the respondent, the case assessment serves as the basis for its strategy in appointing the second arbitrator and agreeing on the presiding arbitrator, deciding whether to propose multiple phases for jurisdiction, liability and damages, and determining what detailed procedures to negotiate with the other side and propose to the tribunal. The higher the quality and accuracy of the case assessment, the better-founded these crucial decisions by each party will be.

The Request for Arbitration

The document that commences the arbitration proceedings is referred to as the Request for Arbitration under the ICSID Rules[1] and the Notice of Arbitration under the UNCITRAL Rules.[2] In neither case is this document a definitive and complete statement of the claims asserted: in the ICSID system, that function is reserved for the

1 Convention on the Settlement of Investment Disputes Between States and Nationals of other States art. 36 [hereinafter ICSID Convention]; ICSID Rules of Procedure for Arbitration Proceedings 1 [hereinafter ICSID Rules].

2 United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules art. 3 [hereinafter UNCITRAL Rules].

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claimant's memorial[3] and in the UNCITRAL system, for the statement of claim.[4] Instead, the request or notice provides certain basic information about the claims, the parties, and the basis for arbitral jurisdiction.[5] Because it is the first document concerning the case that the arbitral tribunal will see, however, many claimants devote time and energy to making this document as persuasive as possible.

UNCITRAL arbitrations begin as soon as the Notice of Arbitration is received by the respondent.[6] ICSID arbitrations, by contrast, commence only when the Secretary-General of ICSID registers the request.[7]

There are a number of substantive and formal requirements for requests for arbitration under the ICSID Rules.[8] Some investment treaties impose additional formal preconditions to arbitration.[9]

Historically, it has taken ICSID between two and six months to register requests for arbitration. The Secretariat has recently introduced internal reforms to reduce that period to between three weeks and two months, with some exceptional cases requiring longer.

Selection of Arbitration Rules

Many investment treaties allow the investor a choice of which arbitration rules will govern the arbitral procedure. The most common choice is between the ICSID Rules and the UNCITRAL Rules,[10] although a minority of treaties alternatively provide a choice of the ICC or SCC Rules.[11] A detailed comparison of these rules is beyond the scope of this chapter, but the principal practical differences will now be summarized.

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3 ICSID Rule 31(1), (3).

4 UNCITRAL Rules art. 18.

5 *See* ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings 2 [hereinafter ICSID Institution Rules]; UNCITRAL Rules art. 3(3).

6 UNCITRAL Rules art. 3(2).

7 ICSID Institution Rule 6(2).

8 *See generally* ICSID Institution Rule 2.

9 *See, e.g.*, NAFTA art. 1121(1) (entitled "Conditions Precedent to Submission of a Claim to Arbitration") ("A disputing investor may submit a claim under Article 1116 to arbitration only if: (a) the investor consents to arbitration in accordance with the procedures set out in this Agreement; and (b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.").

10 *E.g.*, 2004 US Model BIT art. 24(3); Germany and Argentina Bilateral Investment Treaty art. 10(4); Mozambique and Uganda Bilateral Investment Treaty art. 9(2).

11 *E.g.*, Oman and Austria Bilateral Investment Treaty art. 10; Norway and Russia Bilateral Investment Treaty art. 8; Energy Charter Treaty art. 26(4)(c).

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Cost. Arbitration under the ICSID Rules is significantly less expensive, in general, than arbitration under the UNCITRAL Rules. ICSID has a set fee schedule that establishes hourly fees for tribunal members at a rate that is one-half to one-third of market rates for top arbitrators.[12] The UNCITRAL Rules allow the arbitrators to set their own fees, and they understandably tend to do so based on market rates.[13]

In addition, the ICSID Secretariat provides a range of services at nominal cost. These include hearing rooms at World Bank buildings with facilities for simultaneous interpretation, case scheduling and docket maintenance, and substantial case management and general secretarial services.[14]

UNCITRAL arbitrations, by contrast, are *ad hoc* in the sense that there is no institution that administers the arbitration.[15] All of the services just mentioned must be organized and paid for by the parties and the arbitrators in UNCITRAL arbitrations, and these costs add to the expense of the proceedings.[16]

Jurisdictional requirements. The ICSID Convention provides jurisdiction only over the class of disputes delimited in Article 25 of that Convention.[17] For an arbitration to proceed, it must satisfy not only the jurisdictional requirements of the investment treaty but also the additional requirements of the ICSID Convention.[18] By contrast, the UNCITRAL Rules impose no additional requirements for jurisdiction, with the result that a tribunal will have jurisdiction over any claim meeting the requirements of the investment treaty. A claimant anticipating a substantial jurisdictional objection may prefer the UNCITRAL Rules to those of ICSID—for merely by selecting the UNCITRAL Rules, the claimant eliminates all jurisdictional objections based on the requirements of Article 25 of the ICSID Convention.

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12 ICSID Administrative and Financial Regulations reg. 14; ICSID Schedule of Fees, *available at* http://icsid.worldbank.org (follow "Cases" then "Schedule of Fees" in left-hand navigation pane).

13 *See* UNCITRAL Rules art. 39, commentary.

14 *See* ICSID "Dispute Settlement Facilities," http://icsid.worldbank.org (follow "About ICSID," then "Dispute Settlement Facilities" in left-hand navigation pane).

15 UNCITRAL Rules preface (stating in part that the rules are "for *ad hoc* arbitration . . . acceptable in countries with different legal, social and economic systems"). A number of institutions routinely administer UNCITRAL arbitrations for a fee, including ICSID, the Permanent Court of Arbitration, and others.

16 *See* UNCITRAL Rules arts. 38, 39.

17 ICSID Convention art. 25(1) ("The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.").

18 *See ibid.*; Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (March 18, 1965) 22–33 (describing the ICSID jurisdictional requirements of consent, nature of the dispute, parties to the dispute, notification by contracting states, arbitration as exclusive remedy, and claims by the investor's state).

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Enforcement and review mechanisms. The ICSID Convention has a unique system for review and enforcement of arbitral awards. Under the Convention, a special arbitral tribunal called an "*ad hoc* committee" decides on applications for annulment of an award.[19] An ICSID award is not subject to any review in national courts.[20] Instead, the national courts of Contracting States are obligated to enforce ICSID awards as if they were a judgment of a court of first instance.[21] By contrast, UNCITRAL awards are subject to annulment or set-aside proceedings in the national court of the place of arbitration and to limited review in proceedings to enforce the award elsewhere.[22]

Transparency. The ICSID Rules provide for a public docket describing the cases registered and significant case developments.[23] They also provide for publication of at least excerpts of the reasoning of ICSID awards and set a presumption that *amicus curiae* submissions will be accepted and that hearings will be open to the public.[24] By contrast, the UNCITRAL Rules provide a presumption that hearings will be private and do not address other questions of transparency.[25]

Selection of the Arbitrators

"*Tant vaut l'arbitre, tant vaut l'arbitrage*," the French international arbitration community aptly observes: "an arbitration is worth no more than the arbitrator." Selection of arbitrators is one of the most important decisions in the case.

In investment treaty arbitration, the claimant names the first arbitrator, the respondent names the second arbitrator, and then either the two parties or the two arbitrators agree on the third and presiding arbitrator.[26] If the tribunal is not constituted within a stated period of time, then the ICSID Secretariat or another designated authority may appoint the remaining arbitrator or arbitrators.[27]

There are a number of different approaches to selection of arbitrators in investment treaty cases. Some practitioners believe that all that matters is appointing seasoned and respected arbitrators. Others take a more nuanced approach, attempting to match the arbitrator appointed to the specific needs of the case. For example, if a party considered that the case depended upon an understanding of the commercial realities of the

19 ICSID Convention art. 52(3).
20 *Ibid.,* art. 53(1).
21 *Ibid.,* art. 54(1).
22 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, "The New York Convention," arts. III, V, VI (New York, June 10, 1958).
23 ICSID Administrative and Financial Regulations reg. 22.
24 ICSID Rules 32(2), 37(2), 48(4).
25 *See* UNCITRAL Rules art. 25(4). UNCITRAL is at this writing considering whether to adopt provisions for greater transparency in investment treaty arbitrations under a revised set of UNCITRAL rules. *See* UNCITRAL, Report of the Working Group on Arbitration and Conciliation on the work of its forty-eighth session (New York, Feb. 4–8, 2008) paras. 54–69.
26 *See* ICSID Convention art. 37(2); ICSID Rules 3 & 4; UNCITRAL Rules art. 7.
27 ICSID Convention, art. 38. *See also* UNCITRAL Rules, arts. 6(2), 7(2)–(3).

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investment, an arbitrator with a commercial background might be desirable. If instead the party considered the case to depend upon intimate familiarity with how government works, an arbitrator with significant government experience might be helpful. For practitioners taking this approach, an arbitrator appropriate for one case might not be desirable for another case.

The First Session with the Tribunal

The first session with the arbitral tribunal usually takes place six to twelve weeks after the tribunal has been constituted, i.e., after the date when all of the arbitrators confirm their appointment.[28] It is at this session that the procedure for the arbitration is organized.[29] The counsel for the two parties generally attempt to agree on as many aspects of the procedure as possible before the first session, reserving the discussion at that session only for disputed items. It is possible later to change the procedure decided at the first session, but it is not easy.

It is widely said, and it is true, that arbitration is a flexible process. The advantage of this flexibility is that it is possible to design a procedure that is perfect for the specific needs of the case at hand. The difficulty is that if a party does not have a clear idea of what those needs are, the party can wind up agreeing to a procedure at the first session that does not at all suit *its* needs for proving *its* case.[30] A party that has performed a comprehensive and thoughtful case assessment, and is assisted by experienced counsel, will not find itself in such a position.

The principal procedural issues that arise at the first session are 1) language of the proceedings; 2) place of arbitration; 3) confidentiality of information relating to the arbitration; 4) scheduling of written submissions; 5) collection of documentary evidence; and 6) how to organize testimonial evidence, both before and at the

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28 *See* ICSID Rule 13(1) (“The Tribunal shall hold its first session with 60 days after its constitution or such other period as the parties may agree.”).

29 ICSID Rule 20.

30 Example: a respondent State plans to defeat an investment treaty claim based on an allegation that the investment was made illegally. The investor proposes a simple procedure, where each side provides the other with the documents it intends to rely on, followed rapidly by a memorial, a counter-memorial and the main hearing. The respondent agrees.

In preparing its counter-memorial, however, the respondent realizes that, under the applicable law, it must show bad faith by the investor to support a finding of illegality. The documents in the respondent’s possession suggest that the investor was ill-informed, but they do not show bad faith. The documents that might support such a finding would be in the investor’s files—but the agreed procedure does not provide the respondent with access to any documents in those files other than those that the investor will rely on at the hearing.

If the respondent proceeds under the agreed procedure, the result is fairly clear: the respondent has little chance of proving its case. If the agreed procedure had contemplated requests for documents along the lines of the IBA Rules on the Taking of Evidence in International Commercial Arbitration, the situation might be different. But it will be difficult, if not impossible, to add in a document request procedure given the tight timetable the respondent agreed to. The procedure the respondent agreed to, in this example, does not serve its case.

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evidentiary hearing.[31] A detailed treatment of each of these issues is beyond the scope of this chapter, and they are discussed in more detail in Chapter 5. Of these, scheduling, document production, and the hearing—items 4, 5, and 6—are the issues that are disputed recurrently and will now be briefly discussed.

Multiple-phase cases. In investment treaty arbitration, the principal issue is often whether the case will be heard in multiple phases. It is possible for a case to be briefed in a single phase, where all issues in the case—jurisdiction, admissibility of the claim, liability, and damages—are determined at once. The advantage of this approach is that it is often the most rapid and cost-effective way to resolve the dispute. However, this observation will not hold true *if* the respondent can successfully assert a challenge to the tribunal's jurisdiction or if a decision on one issue in the case can simplify or eliminate later proceedings.[32]

Jurisdictional issues in investment treaty cases tend to be complex. Clever counsel can often devise a potential objection to jurisdiction. Moreover, the abstraction of consent to arbitration without any preexisting contract with the investor—aptly called "arbitration without privity"[33]—is difficult for officials in ministries of justice to accept. There is often a strong political imperative for respondents to treat claims as frivolous. The combination of these factors explains the fact that objections to jurisdiction are commonplace in investor-state cases.

The objections are rarely successful. A recent, broad-based survey finds the objections to be successful in less than one out of every five cases in which they are advanced.[34] The prevalence and lack of success of jurisdictional objections, combined with the current prevailing practice to hold a separate phase on jurisdiction, means that investment arbitrations are often multiple-phase proceedings.

Multiple-phase proceedings are more costly and take longer to resolve than single-phase proceedings. A study of investment treaty cases resolved in 2007 concluded that most cases were resolved in three to four years or less. However, one-third of the cases took four years or more to resolve.[35] Each of these longer cases, I would venture, was a case heard in multiple phases.

Time and cost aside, there can be attractive intellectual and strategic reasons to opt for separate liability and damages phases. Damages often involve issues distinct from the merits, with relatively little overlap in witnesses, evidence, or argument.

31 *See* ICSID Rules 20(1); UNCITRAL Notes on Organizing Arbitral Proceedings paras. 2–3, 6–7, 9–10, 13.

32 *See, e.g.*, UNCITRAL Notes on Organizing Arbitral Proceedings para. 76.

33 Jan Paulsson, *Arbitration without Privity*, 12 ICSID Review—F.I.L.J. 232 (1995).

34 Richard E. Walck, *Current Statistics on Investment Treaty Arbitration*, at 7 (May 2, 2007) (finding, in survey of over 200 investment treaty awards, that jurisdictional objections were successful in only 16 percent of the cases where they were advanced).

35 Linda A. Ahee & Richard E. Walck, *Investment Arbitration Update as of December 31, 2007*, at 6 (of 29 cases resolved in 2007, 5 were resolved in under 1 year;1 was resolved in 1–2 years; 4 were resolved in 2–3 years; 8 were resolved in 3–4 years; 5 were resolved in 4–5 years; and 6 were resolved in more than 5 years) (http://www.gfa-llc.com/images/Investment_Arbitration_Update_12-31-07.pdf) (last visited on 10 September 2009).

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Often expert evidence is required to prove damages. Expert evidence is expensive. And many arbitrators and counsel do not find damages to be particularly interesting. Some will readily agree to a separate damages phase in the hope and expectation that the parties will negotiate a settlement if the tribunal rules that the respondent is liable.

Disclosure of evidence. The other scheduling issue that frequently receives heated debate at the first session is disclosure of evidence. When a party believes that evidence important to its case may be found in the files of the other party, it will sometimes press for a period of disclosure of evidence before the first written submission is made.[36] The advantage of this approach is that it allows the written submissions to be made on a fully formed factual record. The disadvantage of this approach is that disclosure of evidence in investment treaty cases is often a messy affair that gives rise to frequent procedural disputes and delays.

In my experience, governments—even ones in developed countries—are not particularly good at record keeping. Clerical staff are not as well paid or trained as in private enterprise. There are often few internal incentives for them to take time away from overwhelming existing duties to access what records there are.

Investors often have little appreciation for how bad the conditions for record keeping and retrieval are in many government agencies. The investor's typical reaction to a paltry production in response to a disclosure request is suspicion and a demand for relief from the tribunal. Intervention by the tribunal requires time. More time still is required for the respondent to respond to the tribunal's order. Delay, cost, and frustration are the typical results of disclosure requests in investment arbitrations. Occasionally, however, disclosure results in critical evidence that would not otherwise be available.

In many cases, there is no disclosure as such but merely the submission by each party of evidence supporting its case. In others, there is disclosure but only in between the regularly scheduled written submissions of the parties.

After the first session, the tribunal enters a procedural order (sometimes in the form of minutes of the session) that sets the procedure for the rest of the case or at least the next phase of the case. The next act, save those cases where there is an initial period of disclosure, is the written submissions.

THE WRITTEN SUBMISSIONS

The written submissions in investment treaty arbitrations generally take the form of four substantial pleadings: the memorial, the counter-memorial, the reply, and the rejoinder.[37] The arbitral rules require only the first two of these pleadings to be submitted.[38] The majority of investment treaty cases, however, deploy all four of the pleadings.

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36 *See* UNCITRAL Notes on Organizing Arbitral Proceedings para. 13.

37 ICSID Rule 31(1).

38 *Ibid.* (". . . and, if the parties so agree or the Tribunal deems it necessary," the reply and the rejoinder will also be required).

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The practice is for the memorial and counter-memorial to present the entirety of the arguments and the evidence offered by each party in support of its case in chief. The pleadings are often lengthy, ranging on average from 75 to 150 pages in length or more. They are typically accompanied by annexes containing multiple witness statements and documentary evidence, as well as copies of the legal authorities on which the pleading relies.

The reply and the rejoinder are responsive pleadings, limited in content to responding to the points and evidence offered in the immediately preceding pleading. They are accompanied by responsive witness statements, documentary evidence, and legal authorities.

Because of the substantial effort required to prepare these pleadings, it is common for several months to be allocated to each party for preparation of the memorial and counter-memorial and a number of weeks for the reply and rejoinder.

THE HEARING

The hearing is the occasion for the parties to engage the tribunal with respect to the essential issues in the case and for witnesses to be cross-examined in a manner that tests the accuracy of their testimony.[39] Hearings are typically multiple-day affairs. They range from one or two days (typically for jurisdictional hearings in cases where there are no complicated legal or factual issues) to two or, in rare cases, three weeks for highly complex ones. The average hearing is probably three to five days in length.

It is difficult to generalize concerning hearings in investment treaty cases. The hearing on the merits in some cases consists entirely of arguments by counsel for the parties based on evidence introduced into the record during the written submissions. In some cases, however, argument by counsel constitutes only a small part of the hearing, with the great majority consisting of cross-examination of witnesses. Many hearings fall between these two extremes.

The one constant is that witness statements are generally considered to be the direct testimony of the witness, meaning that the witness need not repeat orally his or her written testimony for it to be fully considered by the tribunal.[40] Examination of witnesses at the hearing tends to be concentrated on cross-examination, although increasingly tribunals permit counsel for the witness to conduct a brief direct examination at the hearing to remind the tribunal of the main points of the witness's testimony and put the witness more at ease in the unfamiliar and stressful environment of an international arbitration hearing.

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39 *See* ICSID Rule 32 (stating that "[t]he oral procedure shall consist of the hearing by the Tribunal of the parties, their agents, counsel and advocates, and of witnesses and experts"); UNCITRAL Rules art. 15(2) (stating that "[i]f either party so requests at any stage of the proceedings, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument").

40 ICSID Rule 36; UNCITRAL Rules art. 25(4), (5).

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The tribunal members listen carefully to the arguments and evidence presented at the hearing. They do, however, interrupt counsel to ask questions about the arguments presented and pose questions directly to the witnesses brought before them.[41] These interventions tend to occur less frequently than in typical common-law proceedings and more frequently than in typical civil-law ones. Much, however, depends on the specific character of the arbitrators and, to some extent, counsel in the case in question.

The hearing is a critical part of the case. As a practical matter, this is when the arbitrators will focus the most on the case and begin their deliberations on its outcome. Many arbitrators read the pleadings shortly before the hearing. It is the parties' best opportunity to explain the case that they have made in the pleadings.

Post-hearing Activity

After the hearing, the arbitrators retire to deliberate and prepare the decision or award. The deliberations are secret. In many cases, the parties have nothing to do but wait during the period between the hearing and the decision or award.

Often, however, the tribunal requests additional submissions from the parties in the period between the hearing and the decision. In some cases, this results from an issue raised at the hearing that the parties had not previously addressed in detail. In others, the tribunal's deliberations will identify a discrete point on which clarification is useful for purposes of its decision, and the arbitrators will request production of evidence or a small submission on that question. In still others, tribunal members, believing it to be useful as a general proposition to have the parties' reflected views on the issues presented at the hearing, will request post-hearing submissions as a matter of course. Depending on their length, post-hearing submissions can substantially add to the cost of the proceedings for the parties.

The arbitration rules generally provide the tribunal the authority after the hearing to close the proceedings to further submissions.[42] After a closure order, the parties can make further submissions only with a showing of good cause to do so.

Depending on the complexity of the issues presented and whether there is need for a translation, it can take between three months and a year for a tribunal to issue a decision on jurisdiction. Subject to the same considerations, a decision or award on liability or damages can take between six and eighteen months for a tribunal to prepare. The mean is likely around six months for preparation of a decision on jurisdiction and a year for an award on the merits.

The Decision or Award and Its Aftermath

Decisions and awards in investment treaty cases are substantial documents. They typically describe the parties, the procedure, the facts, and the arguments advanced by the

41 *See* ICSID Rule 32(3).

42 ICSID Rule 38; UNCITRAL Rules art. 29.

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parties. They also, of course, set out the tribunal's analysis of the issues presented, the decision, and its operative part.[43] Decisions and awards range in length from 50 to over 150 pages.

Statistical studies on investment treaty arbitration do not indicate a bias in either direction in the numbers of wins and losses by States and investors. However, it has been found that, in those cases that investors win, the damages awarded are on average only about one-third of the amounts claimed by them.[44] Reimbursement to the winning party of the legal costs of the arbitration is awarded in only about one-sixth of the cases.[45]

Awards are final, binding, and not subject to appeal.[46] Awards of monetary relief may be enforced against available assets through national court systems.

After the award is rendered, different strategic questions naturally present themselves to the parties depending on whether the award favors or disfavors them. For the losing party, the main question is whether the award is infirm in a manner subject to correction or annulment. For parties winning affirmative relief, the question is how to enforce the award.[47] Both of these subjects are covered in great depth in later chapters of this book.[48]

For purposes of this overview, it is worth noting that the losing party has essentially two, very restricted options: it can ask the same tribunal to correct the decision on limited grounds, or it can ask a national court or, in the ICSID Convention system, another arbitration tribunal to annul the decision on limited grounds.[49] The applicable standards are demanding in either case, and requests for correction or annulment are rarely successful.[50]

On the subject of enforcement of investment treaty arbitration awards, there is as yet relatively little experience. One respected author concludes that this is so because States have generally observed their obligation to pay the awards against them.[51]

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43 *See generally* ICSID Rule 47; UNCITRAL Rules, art. 32.

44 Richard E. Walck, *supra* n. 34, at 6.

45 *Ibid.,* at 15.

46 ICSID Convention art. 53; UNCITRAL Rules art. 32.

47 In UNCITRAL arbitrations, it is common practice for tribunals to issue their decisions on jurisdiction and liability as interim awards that finally dispose of those issues without putting an end to the proceedings. In the ICSID system, however, there is no provision for interim awards; the only document entitled "award" is the one that puts an end to the proceeding. Because of this feature, in the ICSID system decisions on jurisdiction and liability in favor of the investor are decisions, not awards, and the post-award relief described below is not formally available, at least until the final award is rendered.

48 *See* Chapters 23 and 25 of the present book.

49 *See* ICSID Convention art. 52(1); New York Convention, art. V.

50 *But cf.* Gaëtan Verhoosel, *Annulment and Enforcement Review of Treaty Awards: To ICSID or Not to ICSID, in* 50 Years of the New York Convention, International Council for Commercial Arbitration Congress Series No. 14, at 285, 287–88 (Albert Jan van de Berg ed., 2009) (finding that only 6 percent of all non-ICSID investment treaty awards were annulled by national courts even in part, but 40 percent of all ICSID arbitration awards were at least partially annulled by *ad hoc* Committees established under the ICSID system; Dr. Verhoosel questions, however, whether these results are statistically significant given the relatively small sample size).

51 *See* Antonio R. Parra, *The Enforcement of ICSID Arbitral Awards*, *in* Enforcement of Arbitral Awards Against Sovereigns 136–37 (R. Doak Bishop ed., Juris Publishing 2009).

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CONCLUSION

The procedure in investment treaty arbitrations resembles that of international commercial arbitration in many respects. But the presence of a State as party, the applicability of public international law as the rule of decision, and the inevitable incorporation of some elements of inter-State dispute resolution mechanisms have combined to create a procedure that in a number of respects is distinct. Navigating these procedures requires care and experience. But the first step to doing so is understanding what lies ahead. I hope that this chapter has made a small contribution to that end.

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Chapter 5

The Initiation of Proceedings and Constitution of Tribunals in Investment Treaty Arbitrations

*Antonio R. Parra**

INTRODUCTION

According to the Secretariat of the United Nations Conference on Trade and Development (UNCTAD), over 2600 bilateral investment treaties (BITs) had been concluded by the end of 2008.[1] Like most treaties, BITs typically provide for the arbitral settlement of disputes between the states concerned over the interpretation or application of the treaty. The overwhelming majority of BITs also have provisions under which individuals or companies from one State investing in the other State may resort to arbitration for the resolution of disputes with their host State. Provisions of the first type, on State-State disputes, are generally self-contained, in that they briefly set out all of the main rules for the initiation and subsequent conduct of the proceedings, including the constitution of the tribunals that will decide the disputes.[2] By contrast, BIT provisions of the second type, on investor-state disputes, normally provide for the settlement of the disputes by preexisting forms of arbitration, incorporating by reference their procedural rules. The form of arbitration most commonly specified in these provisions is arbitration under the constituent treaty of the International Centre

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* Secretary General, International Council for Commercial Arbitration; former Deputy Secretary-General, International Centre for Settlement of Investment Disputes.

1 UNCTAD, Recent Developments in International Investment Agreements (2008–June 2009) 2 (2009).

2 *See, e.g.*, Bahrain-Thailand BIT, May 21, 2002, at art. 10; Guatemala-Sweden BIT, February 12, 2004, at art. 9; Switzerland-Tanzania BIT, April 8, 2004, at art. 10. These and the other BITs cited in this chapter are reprinted in ICSID's multivolume collection of investment treaties, Investment Promotion and Protection Treaties (loose-leaf service, Oxford University Press).

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for Settlement of Investment Disputes (ICSID), the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention).[3] In stipulating for arbitration under the ICSID Convention, the provisions also make applicable to any ensuing arbitrations the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (ICSID Institution Rules) and Rules of Procedure for Arbitration Proceedings (ICSID Arbitration Rules) adopted pursuant to the Convention.[4]

Arbitration under the ICSID Convention is available for the settlement of disputes coming within the jurisdiction of ICSID as delineated by Article 25 of the Convention. Article 25 notably restricts the jurisdiction of ICSID to investment disputes between Contracting States, that is, State parties to the ICSID Convention and nationals of other Contracting States. The number of Contracting States (143) is impressively large.[5] Some 50 countries, however, have yet to adhere to the ICSID Convention. The investor-state dispute settlement provisions of their BITs should therefore refer to forms of arbitration other than ICSID Convention arbitration. Additional Facility Rules adopted by the Administrative Council of ICSID in 1978 authorize the ICSID Secretariat to administer arbitration proceedings for the settlement of disputes between States and foreign investors where either the disputing State or the home State of the investor is not an ICSID Convention Contracting State.[6] The investor-state dispute settlement provisions of BITs concluded by countries that are not Contracting States with countries that are Contracting States occasionally refer to arbitration under the ICSID Additional Facility Rules.[7] It is much more common, however, for BITs entered into by countries that are not ICSID Convention Contracting States to provide for the settlement of investment disputes by arbitration under the 1976 Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).[8]

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3 The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, March 18, 1965, 575 U.N.T.S. 159 (ICSID Convention) is reprinted with the Regulations and Rules adopted pursuant to it (Administrative and Financial Regulations, Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (ICSID Institution Rules), Rules of Procedure for Conciliation Proceedings (ICSID Conciliation Rules), and Rules of Procedure for Arbitration Proceedings (ICSID Arbitration Rules)) in Doc. ICSID/15, ICSID Convention, Regulations and Rules (April 2006). Some more recent examples of the many BITs providing for the settlement of investor-state disputes by ICSID Convention arbitration include Malawi-Switzerland BIT, December 11, 2003, at art. 9; China-Germany BIT, December 1, 2003, at art. 9; France-Venezuela BIT, July 2, 2001, at art. 8.

4 *See supra* n. 3.

5 *See* Doc. ICSID/3, List of Contracting States and Other Signatories of the Convention (periodic updates).

6 The ICSID Additional Facility Rules and their annexed Conciliation, Arbitration and Fact-finding Rules are reprinted in Doc. ICSID/11 (April 2006).

7 *See, e.g.*, Germany-South Africa BIT, September 11, 1995, at art. 11(2). South Africa is the country in this pairing that is not an ICSID Convention Contracting State.

8 UNCITRAL Arbitration Rules, U.N.G.A.O.R. 31st Sess., Supp. No. 17, U.N. Doc. A/31/17 (1976). For an example of a BIT of a non-ICSID Contracting State providing for the settlement of investment disputes by UNCITRAL Rules arbitration, see U.K.-Vietnam BIT, August 1, 2002, at art. 8. The U.K. is an ICSID Convention Contracting State, but Vietnam has yet to become one.

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The UNCITRAL Arbitration Rules were endorsed by the United Nations General Assembly with the recommendation that they be used in the settlement of any "disputes arising in the context of international commercial relations." Other leading sets of arbitration rules[9] available for use in the settlement of international business disputes generally include the Rules of Arbitration of the International Chamber of Commerce (ICC) and the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC).[10] Some BITs of countries that are not ICSID Convention Contracting States refer to these forms of arbitration in their provisions on the settlement of investment disputes.[11] In many BITs, the provisions on the settlement of investment disputes refer to two or more of the above forms of arbitration, allowing the investor to choose between them for its particular case. A pattern established by U.S. BITs and since widely followed is for the BIT to provide for the settlement of investment disputes by arbitration under the ICSID Convention, the ICSID Additional Facility Rules, or the UNCITRAL Arbitration Rules.[12] Under such BITs, the UNCITRAL Rules option will be available to investors irrespective of whether the parties to the BIT are also parties to the ICSID Convention; the ICSID Additional Facility Rules alternative may be used if only one of the BIT parties is an ICSID Convention Contracting State; and recourse may be had to arbitration under the ICSID Convention if both BIT parties are (or become) Contracting States. This same approach, of providing for the settlement of investment disputes by either of the two ICSID forms of arbitration or by arbitration under the UNCITRAL Rules, is also followed in the investment chapters of many of the Free Trade Agreements (FTAs)[13] concluded in recent years and of such multilateral treaties as the North American Free Trade Agreement (NAFTA) and Energy Charter Treaty (ECT).[14] In the ECT, the relevant provision gives covered investors the further option of resorting to arbitration under the SCC Rules.[15]

The different forms of arbitration have many features in common. There are also important differences among them. This is conspicuously so in regard to the two areas examined in this chapter, the initiation of proceedings and the constitution of arbitral tribunals. In discussing these early phases of investor-state arbitrations under

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9 *See* Chapter 3 of the present volume, *International Dispute Settlement Mechanisms—Choosing Between Institutionally Supported and Ad Hoc; and Between Institutions.*

10 The ICC Arbitration Rules in force as from January 1, 1998 are reprinted in ICC Publication No. 846 (2008) and *available at* www.iccarbitration.org. The SCC Arbitration Rules in force from January 1, 2007 are *available at* www.sccinstitute.com.

11 *See, e.g.*, Haiti-U.S. BIT, November 13, 1983, at art. VII(3) (referring to ICC arbitration) and Norway-Russia BIT, October 4, 1995, at art. 8 (referring to SCC arbitration). Of the parties to these BITs, Haiti and Russia are not ICSID Convention Contracting States.

12 Examples of BITs with investor-state dispute settlement provisions referring to these three forms of arbitration include Denmark-Mexico BIT, April 13, 2000, at art. 9; Guatemala-Netherlands BIT, May 18, 2001, at art. 10; El Salvador-U.S. BIT, March 10, 1999, at art. IX.

13 *See, e.g.*, Singapore-U.S. FTA, May 6, 2003, at art. 15.15(5); Australia-Chile FTA, May 27, 2008, at art. 10.16(3).

14 *See* North American Free Trade Agreement (NAFTA), December 17, 1992, 32 ILM 289 (1993), at art. 1120(1); Energy Charter Treaty (ECT), December 17, 1994, 10 ICSID Rev.—FILJ 258 (1994), at art. 26(4).

15 *See* ECT, *supra*, at art. 26(4)(c).

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investment treaties, this chapter highlights such differences and the resulting additional complexities of arbitration under these treaties. The chapter also examines provisions of the investment treaties that supplement the applicable arbitration rules and in some cases iron out some of the variations among them. Even then, however, differences remain that may attract covered investors to one available form of arbitration over another. A possible illustration is discussed in the concluding section of this chapter, which considers a perhaps temporary increase in the use of the UNCITRAL Rules option under the investment treaties.

THE INITIATION OF PROCEEDINGS

Arbitration proceedings under the ICSID Convention and the Additional Facility, UNCITRAL, SCC, and ICC Rules are initiated by means of a written instrument called a notice of arbitration in the UNCITRAL Rules and a request for arbitration in the rules of the other forms of arbitration. In investor-state cases of the type discussed here, the party making the request or notice—the claimant—will invariably be the investor. The availability of each of the mentioned forms of arbitration is dependent on mutual consent of the disputing parties. The consent of the State party will, in this type of case, be set out, in broad general terms, in the investment treaty concerned. As explained below, the necessary separate consent of the investor will normally be given in submitting its claim to arbitration. Some BITs seemingly overlook the need for consent on the part of the investor, in simply providing for recourse to arbitration "at the request of either party,"[16] that is to say, at the request of either the host State or the investor. The investor-state clauses of some other BITs achieve a measure of the desired symmetry by correctly stipulating that "if the investor affected also consents in writing to submit the dispute" to arbitration, then "either party may institute proceedings."[17]

Also to be noted are steps that investment treaties direct covered investors to take before seeking to activate the provisions of the treaty on the arbitral settlement of investment disputes. The treaties normally stipulate that the dispute should, if possible, be settled amicably or by negotiation or consultation. They commonly require the investor, as a first step, to send a request for amicable settlement to the host State. If the dispute remains unresolved for a certain period after that request, then the investor may resort to arbitration under such provisions.[18] The treaties generally set this "waiting period" at three or six months. Under the dispute settlement section of the investment chapter of the NAFTA, an investor must, at least 90 days before submitting a claim to arbitration, send to the host State a notice with details of the intended claim.[19] The NAFTA also requires the investor to wait six months from the events giving rise

16 *See, e.g.*, Azerbaijan-France BIT, September 6, 1998, at art. 8.

17 *See, e.g.*, El Salvador-U.K. BIT, October 14, 1999, at art. 8(3).

18 *See, e.g.*, Bangladesh-Switzerland BIT, October 14, 2000, at arts. 8(1) and 8(2); ECT, *supra* n. 14, at art. 26(2).

19 NAFTA, *supra* n. 14, at art. 1119.

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to the claim before submitting it to arbitration.[20] Similar dual waiting periods are laid down in the investor-state dispute settlement provisions of more recent bilateral treaties of Mexico and the United States.[21] A primary purpose of the waiting periods prescribed by the investor-state dispute settlement provisions of the treaties is to allow sufficient time for the parties to attempt an amicable resolution of their difference.[22] The periods also give the respondent State the opportunity to make the necessary arrangements, such as engaging counsel, to defend the claim should it nevertheless be submitted to arbitration.[23] To foreclose stale claims, the NAFTA and bilateral treaties of the NAFTA parties also require that any recourse to arbitration be had within three years of the events giving rise to the dispute.[24]

Some BITs limit use of their investor-state arbitration provisions to cases where the investor has first sought to have the matter decided by local courts or administrative tribunals, and they have failed to do so within a specified period.[25] To avoid inconsistent decisions of the same dispute by local courts or administrative tribunals on the one hand, and arbitral tribunals on the other hand, many investment treaties take the opposite approach of precluding use of their arbitration provisions for the settlement of investment disputes that have previously been submitted to local courts or administrative tribunals.[26] Under the NAFTA and treaties influenced by it, the investor must, on submitting a claim to arbitration under the treaty, waive the right to initiate or pursue other proceedings for the resolution of the dispute.[27] Prior recourse to local

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20 *Ibid.*, at art. 1120(1).

21 *See, e.g.*, Denmark-Mexico BIT, April 13, 2000, at art. 9; Chile-U.S. FTA, June 6, 2003, at arts. 10.15(4) and 10.15(5).

22 In several cases, claimants have argued successfully that waiting periods need not be complied with if any attempt to negotiate an amicable settlement is bound to be futile. *See* Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador, ICSID Case No. ARB/06/11, Decision on Jurisdiction, September 9, 2008, at para. 94, and cases there cited.

23 There appears, however, to be no case in which this other function of waiting periods has been discussed.

24 *See* NAFTA, *supra* n. 14, at arts. 1116(2) and 1117(2). *See also, e.g.*, Canada-Thailand BIT, January 17, 1997, at art. XIII(3); Mexico-Portugal BIT, November 11, 1999, at art. 9(3); U.S.-Uruguay BIT, November 4, 2005, at art. 26(1).

25 One such BIT is the Argentina-Spain BIT, October 3, 1991. In a seminal case brought under that treaty, *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, the claimant successfully invoked, through the most-favored-nation (MFN) clause of the BIT, the more favorable arrangements contained in another BIT of the respondent (the Chile-Spain BIT) to avoid having to access local courts before resorting to arbitration under the first BIT. The decision of the arbitral tribunal to that effect (Decision on Objections to Jurisdiction, January 25, 2000, 16 ICSID Rev.—FILJ 212 (2001)) has helped to persuade tribunals to see MFN clauses as embracing dispute settlement provisions in a number of subsequent cases. There have, however, also been arbitral decisions to the contrary, most recently in *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, December 8, 2008.

26 *See, e.g.*, Australia-Uruguay BIT, December 12, 2000, at art. 13(2); Chile-South Africa BIT, November 12, 1998, at art. IX(4); Ecuador-Peru BIT, April 7, 1999, at art. 8(3).

27 *See* NAFTA, *supra* n. 1, at arts. 1121(1)(b) and 1121(2)(b). *See also, e.g.*, Canada-Costa Rica BIT, March 18, 1998, at art. XII(3)(b).

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courts or administrative tribunals will not bar recourse to arbitration under these treaties if the investor thus surrenders the right to continue the local proceedings.[28]

The investment treaties therefore normally set out steps for the claimant to take and other remedies for it to pursue or refrain from pursuing before resorting to arbitration. But procedures for the actual initiation of proceedings are left by the treaties almost entirely to the rules of the specified forms of arbitration. As indicated above, the rules for both forms of ICSID arbitration, as well as the SCC and ICC Rules, provide for the initiation of proceedings by means of a request for arbitration while proceedings under the UNCITRAL Rules are commenced by a notice of arbitration. The various rules have similar requirements for the contents of the request or notice.

They all specify that it should designate the parties and provide their addresses.[29] They all also require that the request or notice furnish information on or a summary of the dispute; the ICSID Additional Facility and the UNICTRAL, SCC, and ICC Rules provide, in addition, for a statement of the amount or relief sought by the claimant.[30] Another requirement common to the rules is that the request or notice furnish a copy of, or at least refer to, the agreement or consent of the parties to submit the dispute to the relevant form of arbitration.[31] As already explained, in an investment treaty case, the consent of the State party to the dispute will have been provided in advance in the treaty concerned. The request or notice will thus refer to or include a copy of the relevant treaty provision. As also already mentioned, the separate consent of the investor will normally be given in submitting its claim to arbitration, that is to say, in or with the notice or request for arbitration. This is indeed specifically expected or demanded by many of the treaties.[32] While the treaty consent of the State party will have been expressed in broad general terms, the separate consent of the investor normally need be no broader than necessary for the purpose of bringing its claim.[33]

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28 An imperfect waiver of the right to continue the local proceedings may, however, result in dismissal of arbitration proceedings. *See* Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB (AF)/98/2, Award, June 2, 2000, 5 ICSID Rep. 443 (2002).

29 *See* ICSID Institution Rules, *supra* n. 3, at rule 2(1)(a); ICSID Additional Facility Arbitration Rules, *supra* n. 6, at art. 3(1)(a); UNCITRAL Arbitration Rules, *supra* n. 8, at art. 3(3)(b); SCC Arbitration Rules, *supra* n. 10, at art. 2(i); ICC Arbitration Rules, *supra* n. 10, at art. 4(3)(a).

30 *See* ICSID Institution Rules, *supra* n. 3, at rule 2(1)(e); ICSID Additional Facility Arbitration Rules, *supra* n. 6, at art. 3(1)(d); UNCITRAL Arbitration Rules, *supra* n. 8, at arts. 3(3)(e) and 3(3)(f); SCC Arbitration Rules, *supra* n. 10, at arts. 2(ii) and 2(iii); ICC Arbitration Rules, *supra* n. 10, at arts. 4(3)(b) and 4(3)(c).

31 *See* ICSID Institution Rules, *supra* n. 3, at rules 2(1)(c) and 2(2); ICSID Additional Facility Arbitration Rules, *supra* n. 6, at art. 3(1)(b); UNCITRAL Arbitration Rules, *supra* n. 8, at art. 3(3)(c); SCC Arbitration Rules, *supra* n. 10, at art. 2(iv); ICC Arbitration Rules, *supra* n. 10, at art. 4(3)(d).

32 *See, e.g.*, Malta-Sweden BIT, August 24, 1999, at art. 7(6), characterizing "submission of the dispute by the investor" to arbitration as its consent; Kuwait-Netherlands BIT, May 29, 2001, at art. 9(3), referring to the investor in electing to submit the dispute to arbitration as "provid[ing] its consent in writing" to the chosen form of arbitration. NAFTA, *supra* n. 14, at art. 1121(3), requiring the consent of the investor to be "included in the submission of a claim to arbitration."

33 It is because the consent of the investor generally need only cover its claim that counterclaims, which must also be covered by mutual consent of the parties, may be difficult to accommodate in investment treaty arbitration. Arbitral tribunals have not been quick, however, to exclude the

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There are several special requirements applicable to requests for arbitration under the ICSID Convention and Additional Facility Rules. A request for ICSID Convention arbitration should, most obviously, address the particular restrictions on the jurisdiction of ICSID set out in Article 25 of the Convention. Thus, for example, the request should contain information sufficient to indicate that the dispute concerns an investment for the purposes of the Convention.[34] Unusually, the Additional Facility Rules require the approval, by the Secretary-General of ICSID, of the agreement or mutual consent of the parties to have recourse to arbitration under the Additional Facility Rules.[35] This approval of access to the Additional Facility must be sought, at the latest, in submitting a dispute to Additional Facility arbitration.[36] In an investment treaty case, the approval will normally be applied for at that time, in the request for arbitration; as already explained, in this type of case, it is generally only at that point that there is mutual consent of the parties to resort to arbitration. A special requirement applicable to requests for either form of ICSID arbitration is that the request must, if submitted by a juridical person, be accompanied by evidence that it has taken any necessary internal steps to authorize the request.[37] This requirement was introduced after two cases initiated in 1992 revealed the need for it.[38] Another requirement born of experience is that counsel or other persons making a request for ICSID Convention or Additional Facility arbitration on behalf of a party should present, at the same time as the request, their authorization to act on behalf of the party.[39]

Arbitration under the ICSID Convention and arbitration under the Additional Facility, SCC, and ICC Rules are institutional arbitration systems, with the institutions concerned not only providing the procedural rules but also supervising and assisting in their use by parties. Arbitration under the UNCITRAL Rules is *ad hoc*, generally lacking such involvement by an institution throughout the proceeding. The contrast between UNCITRAL Rules arbitration and the institutional systems is perhaps most evident at the stage of the initiation of proceedings. Thus, the claimant commences a proceeding under the UNCITRAL Rules by simply sending its notice of arbitration to the respondent.[40] In the institutional arbitration systems, the corresponding instrument is called a request because it is in effect an application, which the claimant addresses to the institution concerned.[41]

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possibility of counterclaims in this context. *See* Saluka Investments BV v. Czech Republic, UNCITRAL Rules Case, Decision on Jurisdiction, May 7, 2004, at para. 39.

34 *See* ICSID Institution Rules, *supra* n. 3, at rule 2(1)(e).

35 *See* ICSID Additional Facility Rules, *supra* n. 6, at art. 4.

36 *Ibid.*

37 *See* ICSID Institution Rules, *supra* n. 3, at rules 2(1)(f) and 2(2); ICSID Additional Facility Arbitration Rules, *supra* n. 6, at art. 3(1)(e).

38 The cases were *Vacuum Salt Products Limited v. Republic of Ghana*, ICSID Case No. ARB/92/1, and *Scimitar Exploration Limited v. Bangladesh and Bangladesh Oil, Gas and Mineral Corporation*, ICSID Case No. ARB/92/2.

39 *Cf.* ICSID Institution Rules, *supra* n. 3, at rule 1(1); Additional Facility Arbitration Rules, *supra* n. 6, at art. 2(1).

40 *See* UNCITRAL Arbitration Rules, *supra* n. 8, at arts. 3(1) and 3(2).

41 *See* ICSID Convention, *supra* n. 3, at art. 36(1); ICSID Institution Rules, *supra* n. 3, at rule 1(1); ICSID Additional Facility Arbitration Rules, *supra* n. 6, at art. 2(1); SCC Arbitration Rules, *supra* n. 10, at art. 2; ICC Arbitration Rules, *supra* n. 10, at art. 4(1).

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The institutions all require the request to be accompanied by payment of a nonrefundable fee.[42] The fees of the SCC and ICC are at present €1500 and US$2500, respectively.[43] The fee for lodging a request with ICSID for arbitration under the ICSID Convention or Additional Facility Rules is currently US$25,000.[44] After the prescribed fee is paid, each of the institutions will send a copy of the request to the respondent.[45] In so doing, the SCC and the ICC will invite the respondent to send them an answer to the request within a specified time limit.[46] Neither the ICSID Convention nor the Additional Facility Rules provide for the filing of such answers to requests. In practice, however, when respondents ask for the opportunity to submit a prompt answer, ICSID normally grants them this opportunity. An answer may raise an objection regarding the existence, validity, or scope of the parties' consent to arbitration. In an investment treaty case, such an objection might, for example, allege that the dispute was outside of the scope of the consent in the treaty because the dispute arose before the treaty came into force.[47]

To avoid the possibility of their procedures being put into motion unnecessarily, the institutions will under their rules refuse to permit the arbitration to go forward if it is obvious that the necessary consent is absent, even if the respondent has chosen not to file an answer to the request.[48] Thus, the ICC Court and the SCC Institute will not

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42 *See* ICSID Institution Rules, *supra* n. 3, at rule 5; ICSID Additional Facility Arbitration Rules, *supra* n. 6, at art. 3(3); SCC Arbitration Rules, *supra* n. 10, at art. 3; ICC Arbitration Rules, *supra* n. 10, at art. 4(4).

43 *See* SCC Arbitration Rules, *supra* n. 10, at app. II(I); ICC Arbitration Rules, *supra* n. 10, at app. III, art. 1(1).

44 *See* ICSID Schedule of Fees, January 1, 2008, at para. 1. Like the other institutions, ICSID also requires parties to proceedings to pay administrative charges following registration of the request for arbitration. ICSID's is an annual charge of US$20,000. The SCC and ICC charges are fixed under sliding scales on the basis of the amount in dispute. In arbitrations under the ICSID Convention and Additional Facility Rules, almost all of which are investment treaty arbitrations, the amounts in dispute are typically large and would be at the higher ends of the SCC and ICC scales. The average duration of an ICSID proceeding is two to three years. Administrative charges plus the higher lodging fee would for such proceedings thus total US$65,000 to US$85,000, compared with the maximum charges of US$88,800 under the ICC scale and € 60,000 under the SCC scale.

45 *See* ICSID Institution Rules, *supra* n. 3, at rule 5(2); SCC Arbitration Rules, *supra* n. 10, at art. 5(1); ICC Arbitration Rules, *supra* n. 10, at art. 4(5). The ICSID Additional Facility Arbitration Rules do not provide for the dispatch of the request to the respondent prior to registration of request, but this is nevertheless routinely done by the ICSID Secretariat in Additional Facility cases as well.

46 SCC Arbitration rules, *supra* n. 10, at art. 5(1); ICC Arbitration Rules, *supra* n. 10, at arts. 4(5) and 5(1).

47 For an example of a case in which such an objection was ultimately upheld by an arbitral tribunal, see Empresas Lucchetti SA and Lucchetti Peru SA v. Peru, ICSID Case No. ARB/03/04, Award of February 7, 2005.

48 If, however, the respondent answers without raising an objection of the kind mentioned in the text, the nonobjecting response may, in an ICC or SCC case, be treated as giving rise to a consent agreement sufficient to allow the case to proceed. It was with a view to avoiding such applications of the doctrine of *forum prorogatum* that the drafters of the ICSID Convention provided for the Secretary-General of ICSID to base registration of a

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allow an arbitration to proceed if they are not prima facie satisfied that a consent agreement referring to their rules may exist.[49] Similarly, the Secretary-General of ICSID will refuse to register a request for arbitration under the ICSID Convention if it is manifest from the request that the requisite consent is lacking.[50] The Secretary-General applies essentially the same standard in determining whether to approve access to the Additional Facility.[51]

The review by the Secretary-General of a request for arbitration under the ICSID Convention must also have regard to the other elements of the jurisdiction of ICSID under the Convention—for example, that the dispute concerns an investment for the purposes of the Convention and that the non-State party qualifies as "a national of another Contracting State." If any of those other elements are found to be manifestly unfulfilled, the Secretary-General will refuse to register the request and the case will proceed no further.[52] If the request is for Additional Facility arbitration, the Secretary-General will likewise deny approval and registration if the case clearly does not fit within the framework of the Additional Facility in any other respect—if, for instance, the case concerns an investment but both the State party and the home State of the other party are ICSID Convention Contracting States.[53] The additional hurdles help to explain the time it takes the ICSID Secretariat to process a request for arbitration; the interval between the receipt of a request for arbitration and its registration by the Secretary-General of ICSID currently averages about one month.

THE CONSTITUTION OF TRIBUNALS

Just as for the initiation of proceedings, most of the investment treaties depend almost entirely on the rules of the prescribed forms of arbitration to regulate the constitution

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request solely on the information presented by the requesting party. *See* ICSID Convention, *supra* n. 3, at art. 36(3).

49 *See* ICC Arbitration Rules, *supra* n. 10, at art. 6(2); SCC Arbitration Rules, *supra* n. 10, at art. 10(i). As formulated in the above text, the test is based on the one in the ICC Rules. It is understood to be essentially the same in practice as that applied by the SCC Institute in determining whether it "manifestly lacks jurisdiction," the phrase used in its rules.

50 *See* ICSID Convention, *supra* n. 3, at art. 36(3).

51 *See* text accompanying *supra* nn. 35 and 36.

52 *See* ICSID Convention, *supra* n. 3, at art. 36(3).

53 A consent clause providing for Additional Facility Rules arbitration because one of the two States is not an ICSID Contracting State is supposed also to provide for Convention arbitration in case the country concerned has become a Contracting State by the time of the initiation of any proceeding under the clause. *See* Additional Facility Rules, *supra* n. 6, at art. 4(2). The necessary consent to ICSID Convention arbitration is not, however, always included in Additional Facility Rules arbitration clauses. As concluded in 1982, the BIT between Panama and the U.S. had a consent clause referring only to Additional Facility Rules arbitration. *See* Panama-U.S. BIT, October 27, 1982, at art. VII(3)(a). Panama was then not an ICSID Convention Contracting State. However, it became one in 1996, whereupon the clause became basically inoperable. The problem was solved when the clause was amended to provide for ICSID Convention arbitration by protocol concluded by the BIT parties on June 1, 2000.

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of the tribunals that will decide claims brought by investors under the treaties. The rules all give the parties at least some scope to agree on the number of arbitrators and on the method of their appointment. ICSID's Rules provide that a request for arbitration may include a proposal in this respect.[54] There are similar provisions in the UNCITRAL, SCC, and ICC Rules.[55] However, after the initiation of proceedings, parties may often fail to agree on how to establish their arbitral tribunal. In these cases, the default provisions of the respective rules will apply. Such provisions of the ICSID Convention and Additional Facility Arbitration Rules call for the establishment of a tribunal of three arbitrators, one appointed by each party and a presiding arbitrator appointed by agreement of the parties.[56] If all of the appointments are not made within 90 days after the registration of the request for arbitration, or such other period as may be agreed by the parties, then either of them may require the Chairman of the Administrative Council of ICSID (the President of the World Bank) to make any missing appointment and complete the constitution of the tribunal.[57]

The UNCITRAL Rules also provide, in the absence of agreement of the parties to the contrary, for the constitution of a tribunal of three members, including two appointed by the respective parties, but with the third and presiding arbitrator to be selected by the two co-arbitrators, rather than by the parties.[58] The party that first appoints an arbitrator may, if the other party has not also appointed an arbitrator within 30 days after receiving notice of the first appointment, have the second arbitrator appointed by the person or institution designated by the parties to perform the role of appointing authority.[59] If within 30 days after the appointment of the second arbitrator, the two arbitrators have not agreed on the choice of the presiding arbitrator, the latter will be appointed by the appointing authority.[60] As further explained below, in some investment treaties, provisions on the settlement of investment disputes by UNCITRAL Rules arbitration designate the Secretary-General of ICSID as the appointing authority.[61] More commonly, however, such provisions of investment treaties referring to the UNCITRAL Rules omit to designate an appointing authority. The UNCITRAL Rules provide that, in the absence of a previously designated appointing authority to make a needed appointment, either party may apply to the Secretary-General of the Permanent Court of Arbitration (PCA) at The Hague to select an authority to perform this role.[62]

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54 *See* ICSID Institution Rules, *supra* n. 3, at rule 3.

55 *See* UNCITRAL Arbitration Rules, *supra* n. 8, at art. 3(g); SCC Arbitration Rules, *supra* n. 10, at art. 2(v); ICC Arbitration Rules, *supra* n. 10, at art. 4(3)(e).

56 *See* ICSID Convention, *supra* n. 3, at art. 37(2)(b); ICSID Additional Facility Arbitration Rules, *supra* n. 6, at art. 6(1).

57 *See* ICSID Convention, *supra* n. 3, at art. 38; ICSID Additional Facility Arbitration Rules, *supra* n. 6, at art. 6(4). The appointing authority function of the Chairman under these provisions is in practice performed on the recommendation of the Secretary-General of ICSID.

58 *See* UNCITRAL Arbitration Rules, *supra* n. 8, at arts. 5 and 7(1).

59 *Ibid.,* at art. 7(2)(a).

60 *Ibid.,* at art. 7(3).

61 *See infra* nn. 90 and 91 and accompanying text.

62 *See* UNCITRAL Arbitration Rules, *supra* n. 8, at arts. 6(2) and 7(2)(b).

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Where parties to proceedings under the SCC or ICC Rules have not agreed on the number of arbitrators, the institution will decide whether the tribunal is to consist of one or three arbitrators.[63] It appears that, in investment treaty arbitrations under the SCC Rules, the tribunals have always consisted of three arbitrators, as might be expected from the complex issues and large amounts typically at stake in such arbitrations.[64] In accordance with the SCC Rules, such a tribunal will comprise one arbitrator appointed by each party and a presiding arbitrator appointed by the Board of the SCC Arbitration Institute.[65] If a party fails to make its appointment within a time limit stipulated by the SCC Institute Board, the appointment will be made by the Board.[66] The ICC Rules prescribe a similar method for the constitution of three-member arbitral tribunals except that under those rules each party's nomination of an arbitrator is subject to confirmation by the ICC Court of Arbitration or its Secretary General.[67]

Under its Convention, ICSID maintains a Panel of Conciliators and a Panel of Arbitrators. The panels consist of designees of the Convention Contracting States and of the Chairman of the Administrative Council of ICSID. Each Contracting State may designate up to four, and the Chairman up to ten, persons to each panel.[68] Designees of a Contracting State may, but need not, be its nationals; the Chairman's designees must each have a different nationality.[69] All panel members serve for renewable periods of six years.[70] They are all required to be "persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment."[71] The Convention emphasizes the "particular importance" of legal competence for membership in the Panel of Arbitrators without, however, requiring that its members be lawyers.[72] Over 500 persons currently serve on the panels.[73]

In performing his regular appointing authority role in ICSID Convention arbitrations, the Chairman of the Administrative Council of ICSID must draw his appointees from the Panel of Arbitrators.[74] Arbitrators in ICSID Convention and Additional Facility cases may otherwise be appointed from outside the panel.[75] All appointees to

63 *See* SCC Arbitration Rules, *supra* n. 10, at art. 12; ICC Arbitration Rules, *supra* n. 10, at art. 8(2).

64 The author has no information on the composition of the arbitral tribunals in the few investment treaty arbitrations that have been conducted under the ICC Rules.

65 *See* SCC Arbitration Rules, *supra* n. 10, at art. 13(3).

66 *Ibid.*

67 *See* ICC Arbitration Rules, *supra* n. 10, at arts. 8(4), 9(1) and 9(2).

68 *See* ICSID Convention, *supra* n. 3, at art. 13.

69 *Ibid.*

70 *Ibid.,* at art. 15(1).

71 *Ibid.,* at art. 14(1).

72 *Ibid.*

73 *See* ICSID 2008 Ann. Rep. 7.

74 *See* ICSID Convention, *supra* n. 3, at art. 40(1).

75 *Ibid.* In addition to party-appointed arbitrators, these would include arbitrators appointed by the Chairman of the Administrative Council if the parties, using their freedom under Article 37(2)(a) of the Convention to decide on how their tribunal will be formed, agree to the appointment of arbitrators by the Chairman from outside the Panel of Arbitrators.

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tribunals in such cases must, however, have the qualities of integrity, competence, and reliability for independent judgment required of panel members.[76] The SCC Rules provide that every arbitrator must likewise be impartial and independent.[77] There is a similar provision in the ICC Rules.[78] Before or soon after their appointments are made or confirmed, ICSID, SCC, and ICC arbitrators must sign statements of independence disclosing any circumstances that might call their independence into question; the statements are submitted to the institution concerned, which in turn distributes them to the parties.[79] The UNCITRAL Rules require arbitrators to provide parties with comparable statements.[80]

With a view to enhancing their neutrality, appointees to arbitral tribunals in ICSID Convention and Additional Facility proceedings may only exceptionally be nationals of the home or host State of the investor concerned. The Chairman of the Administrative Council of ICSID may never appoint an arbitrator with the nationality of either State; a party may appoint one of three arbitrators with either nationality only if the other party so agrees; and if the second or third arbitrator is also to be a national of either State, then the appointment of each and every arbitrator will require the agreement of both parties.[81] In an arbitration under the SCC or ICC Rules, the institution will in principle appoint as the presiding arbitrator a person with a nationality other than those of the parties.[82] The "advisability" of appointing such a person must, under the UNCITRAL Rules, be taken into account by the appointing authority in selecting a presiding arbitrator.[83] There are, however, no such nationality restrictions in the SCC, ICC, or UNCITRAL Rules with respect to the appointment of the two other members of a three-person tribunal.

In connection with the constitution of the tribunals, there may also be mentioned the fees of their members that will be met from deposits by the parties. In the institutional systems of arbitration, the institution sets the fees of the arbitrators. A standard per diem fee for members of the tribunals in ICSID Convention and Additional Facility proceedings is laid down in ICSID's Schedule of Fees.[84] The SCC Institute and ICC Court fix the fees of arbitrators on an *ad valorem* basis, depending on the amount in

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76 *Ibid.*, at art. 40(2); Additional Facility Arbitration Rules, *supra* n. 6, at art. 8.

77 SCC Arbitration Rules, *supra* n. 10, at art. 14(1).

78 *See* ICC Arbitration Rules, *supra* n. 10, at art. 7(1).

79 *See* ICSID Arbitration Rules, *supra* n. 3, at rule 6(2); ICSID Additional Facility Arbitration Rules, *supra* n. 6, at art. 13(2); SCC Arbitration Rules, *supra* n. 10, at art. 14(2); ICC Arbitration Rules, *supra* n. 10, at art. 7(2).

80 *See* UNCITRAL Arbitration Rules, *supra* n. 8, at art. 9.

81 *See* ICSID Convention, *supra* n. 3, at arts. 38 and 39; ICSID Arbitration Rules, *supra* n. 3, at rule 1(3); ICSID Additional Facility Rules, *supra* n. 6, at art. 7.

82 *See* SCC Arbitration Rules, *supra* n. 10, at art. 13(5); ICC Arbitration Rules, *supra* n. 10, at art. 9(5).

83 *See* UNCITRAL Arbitration Rules, *supra* n. 8, at arts. 6(4) and 7(3).

84 This standard fee is US$3000 for each day of meetings or of other work performed in connection with the proceeding. *See* ICSID Schedule of Fees, January 1, 2008, at para. 3. Parties may agree with an arbitral tribunal on different fees for its members. Any request for higher fees must, however, be made through the Secretary-General of ICSID. *See* ICSID Administrative and Financial Regulations, *supra* n. 3, at reg. 14(1).

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dispute, under fee scales published with their rules.[85] Under the UNCITRAL Arbitration Rules, by contrast, an arbitral tribunal fixes its own fees, which must, however, "be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case."[86] In addition, the UNCITRAL Rules require the tribunal, in fixing its fees, to "take . . . into account to the extent that it considers appropriate" any designated appointing authority's "schedule of fees for arbitrators in international cases which it administers" or, if the appointing authority lacks such a schedule, any statement that the authority consents to provide "setting forth the basis for establishing fees which is customarily followed in international cases in which the authority appoints arbitrators."[87]

As mentioned in the introduction, the provisions on the settlement of investment disputes of many of the treaties refer to two or more of the forms of arbitration. Their differences in regard to the initiation of proceedings as well as the constitution of tribunals can combine to give a patchwork quality to dispute settlement under such a treaty. In regard to the constitution of tribunals, therefore, a welcome departure is that some of the treaties providing for recourse to ICSID Convention, Additional Facility, or UNCITRAL Rules arbitration take advantage of the flexibility of these forms of arbitration to fashion a common regime for the appointment of arbitrators in all of the arbitrations initiated pursuant to the treaty. The first of the treaties to take this approach was the NAFTA. Its provisions on the arbitral settlement of investment disputes establish that the tribunals will normally consist of three arbitrators, one appointed by each party and a presiding arbitrator appointed by agreement of the parties.[88] The NAFTA provisions ensure that each of the first two arbitrators may, if the appointing party so desires, be a co-national of the party irrespective of whether the proceeding is an ICSID Convention, Additional Facility, or UNCITRAL Rules proceeding.[89] The NAFTA furthermore designates the Secretary-General of ICSID as the authority that can be requested, in all three kinds of arbitration, to appoint arbitrators if a tribunal cannot be established through appointments by the parties.[90] A single time limit is established

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85 *See* ICC Arbitration Rules, *supra* n. 10, at app. III, art. 2; SCC Arbitration Rules, *supra* n. 10, at app. II, art. 1.

86 UNCITRAL Arbitration Rules, *supra* n. 8, at art. 39(1).

87 *Ibid.,* at arts. 39(2) and (3).

88 *See* NAFTA, *supra* n. 14, at art. 1123.

89 *Ibid.,* at art. 1125. This Article of the NAFTA overcomes the nationality restrictions of the ICSID Convention and Additional Facility Rules (described in the text accompanying *supra* n. 81) by providing the advance agreement of the disputing State to the appointment of each arbitrator and requiring the disputing investor to give its agreement in submitting the claim to arbitration.

90 *Ibid*., at art. 1124(1). Under this Article of the NAFTA, the Secretary-General, when called upon to appoint a presiding arbitrator, was to appoint (a) a national of a country other than the home or host State of the investor, belonging to (b) a roster of 45 presiding arbitrators established by the NAFTA parties or, "if no such presiding arbitrator is available to serve," (c) the ICSID Panel of Arbitrators. As the NAFTA roster of presiding arbitrators was never established, the presiding arbitrators appointed by the Secretary-General under this Article have all had to be drawn from the ICSID Panel of Arbitrators.

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by the NAFTA after which a disputing party may invoke the appointing authority function of the Secretary-General to appoint each of the arbitrators that then remain to be appointed.[91] Provisions on the settlement of investment disputes by ICSID Convention, Additional Facility, or UNCITRAL Rules arbitration with a similarly common approach toward the constitution of tribunals have been included in subsequent treaties of Mexico and the United States.[92]

CONCLUSION

The first investment treaty arbitration proceeding was initiated in 1987.[93] A further 308 were brought in the ensuing 21 years. The table below shows the number of such proceedings initiated annually in this period.[94] Most were commenced after the turn of the century, reflecting the dramatic growth of foreign investment flows and accompanying proliferation of investment treaties over the immediately preceding years.[95] The majority were ICSID Convention cases, but a large proportion were UNCITRAL Rules proceedings. Under many of the investment treaties involved in the UNCITRAL Rules cases, the investor had the possibility of resorting instead to ICSID Convention or Additional Facility Rules arbitration. In some of the cases, SCC or ICC arbitration was also available.

Of the areas examined in this chapter, a possible attraction of the UNCITRAL Rules option is that proceedings can be initiated without any scrutiny or control by an arbitration institution. As far as ICSID is concerned, however, the power of its Secretary-General to refuse registration of requests for arbitration is limited to cases where it is manifest or obvious from the request that there is no mutual consent or that the dispute is otherwise outside the scope of the ICSID Convention or Additional Facility Rules. As indicated earlier, the role of the institution in screening out requests for arbitration under the ICC or SCC Rules is similarly confined to cases where it is prima facie apparent there is no consent agreement. Moreover, before acting on a request to

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91 *Ibid.*, at art. 1124(2).

92 *See, e.g.*, Greece-Mexico BIT, November 30, 2000, at art. 12; Morocco-U.S. FTA, June 15, 2004, at art. 10.18.

93 This first case was *Asian Agricultural Products Limited v. Sri Lanka*, ICSID Case No. ARB/87/3, brought under the Sri Lanka-U.K. BIT of February 13, 1980.

94 As noted in the table, the source for the numbers shown is the UNCTAD Database of Treaty-Based Investor-State Dispute Settlement Cases. Under its Administrative and Financial Regulations (*supra* n. 3, at reg. 23), ICSID maintains public registers of all ICSID Convention and Additional Facility Rules proceedings. There are no similar public registers for the UNCITRAL Rules and other non-ICSID cases. This is reflected in the UNCTAD Database's acknowledgment that it is not necessarily exhaustive, there possibly being unrecorded non-ICSID cases.

95 The recent commencement of many of the proceedings is reflected in the UNCTAD Database of Treaty-Based Investor-State Dispute Settlement Cases, according to which more than 140 of all known investment treaty arbitrations were still pending as at the end of 2008. Almost 50 of the cases had been settled by the parties. Of the remaining 97 cases with known outcomes, 44 resulted in awards in favor of the investor, and 53 led to awards in favor of the State.

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designate an appointing authority or to appoint an arbitrator under the UNCITRAL Rules, the Secretary-General of the PCA, and/or the designated appointing authority must be reasonably satisfied as to their power to act. This may entail a jurisdictional review not unlike that undertaken by ICSID, the SCC, and the ICC at the outset of proceedings. Such prima facie scrutiny and control may often, in other words, only be postponed to a later stage in an UNCITRAL Rules arbitration, rather than altogether avoided.[96]

Reference was made above to the treaties that designate the Secretary-General of ICSID as the appointing authority of arbitrators in clauses providing for the settlement of investment disputes by ICSID Convention, Additional Facility Rules, or UNCITRAL Rules arbitration. A benefit that might have been expected from the designation is that it would foster uniformity in the fees of all arbitrators called upon to settle disputes under the treaty, given that the UNCITRAL Rules suggest that the fees be fixed in view of the fee schedule of the designated authority, which would also apply to the ICSID arbitrators appointed under the same treaty.[97] As the UNCITRAL Rules now stand, however, there is no automaticity in this respect.[98] A practical outcome has been that, in most of the UNCITRAL Rules proceedings initiated under such treaties, the tribunals appear to have fixed their fees at levels higher than the relatively modest ones set out in the ICSID Schedule.

In regard to the appointment of arbitrators, there is generally greater scope for the selection of co-nationals of the parties in UNCITRAL Rules and the other non-ICSID systems of arbitration than under the ICSID Convention or Additional Facility Rules. However, judging from published awards in UNCITRAL BIT arbitrations, parties often prefer to appoint nationals of third states in any event. Another important aspect is the speed with which the tribunals are constituted. As ICSID struggled to cope with the large increases in its caseload, the average period there for the constitution of the tribunal grew to about eight months from registration of the request for arbitration. In more recent years, however, that average has been improved to around four months. Such improvements may help to explain apparent recent declines in rates at which parties are making use of the *ad hoc* arbitration option under investment treaties.

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96 This point is made in Charles N. Brower, *The Initiation of Arbitration Proceedings: Jack Be Nimble, Jack Be Quick . . .!*, 13 ICSID Rev.—FILJ 15, 19 (1998).

97 *See* text accompanying *supra* n. 87.

98 The revision of the UNCITRAL Rules currently under consideration by UNCITRAL Working Group II envisages that arbitrator fees could instead be finally determined by the designated appointing authority or, if there is none, by the Secretary-General of the PCA. *See Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules*, UNCITRAL Working Group II (Arbitration) 49th Sess., Note by the Secretariat, U.N. Doc. A/CN.9/WGII/WP.151/Add. 1, August 6, 2008, at paras. 37–39.

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Investment Treaty Arbitration Proceedings 1987–2008 (Number Initiated Annually)

	ICSID Convention	ICSID Additional Facility	UNCITRAL Rules	SCC	ICC
1987	1	0	0	0	0
1993	1	0	0	0	0
1994	1	0	1	0	0
1995	1	0	0	0	1
1996	1	0	3	2	0
1997	4	2	1	0	0
1998	4	2	2	0	0
1999	4	2	5	0	0
2000	4	3	3	1	0
2001	12	0	2	2	0
2002	15	1	11	1	0
2003	28	0	9	1	2
2004	19	5	17	3	1
2005	24	2	12	4	0
2006	16	2	8	1	0
2007	27	1	6	0	1
2008	21	0	4	2	0
Total	**183**	**20**	**84**	**17**	**5**

Source: UNCTAD Database of Treaty-Based Investor-State Dispute Settlement Cases, www.unctad.org. (This table excludes eight miscellaneous other proceedings.)

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Chapter 6

Bi-Trifurcation of Investment Disputes

*Baiju S. Vasani**

INTRODUCTION

In the context of international investment arbitration, bifurcation generally refers to the separation of the jurisdiction and merits phases of an arbitral proceeding (or occasionally, the separation of the liability and quantum phases). Trifurcation, in contrast, refers to the division of the jurisdictional, merits, *and* quantum phases of an arbitration. Although the various international investment institutions provide for the concept of separating jurisdiction from merits without prescribing specific *standards* for bifurcation or trifurcation, international investment jurisprudence highlights important considerations that tribunals take into account when deciding whether to bifurcate—or trifurcate—arbitral proceedings.

THE FRAMEWORK

Although the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL Arbitration Rules) do not specifically mention bifurcation or trifurcation,[1] they afford the arbitral tribunal power to conduct proceedings in the manner "it considers appropriate provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case."[2]

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* Partner, Crowell & Moring; Adjunct Professor of Law at Georgetown Law Center.

1 *See generally* UNCITRAL Arbitration Rules, G.A. Res 31/98, U.N. GAOR, 31st Sess., Supp. No. 17, ch. V, § C, U.N. Doc. A/31/17 (1976), *reprinted in* 15 I.L.M. 701 (1976) [hereinafter UNCITRAL Arbitration Rules].

2 *Ibid.*, at art. 15.1, which provides, "Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with

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Article 21(4) of the UNCITRAL Arbitration Rules further provides that although tribunals should generally "rule on a plea concerning its jurisdiction as a preliminary question," tribunals have discretion to "proceed with the arbitration and rule on such a plea in their final award."[3] This rule appears to create a presumption *in favor of* bifurcating the jurisdictional and merits phases but makes no such presumption in regard to the separation of the quantum phase. Regardless of such presumptions, however, the ultimate decision to bifurcate or trifurcate is still left to the tribunal's discretion.

Similarly, Article 41 of the ICSID Convention provides that tribunals have the discretion to determine any jurisdictional question "as a preliminary question or to join it to the merits of the dispute."[4] Upon the raising of a formal jurisdictional objection, a tribunal may, upon hearing the arguments of the parties (whether written or oral),[5] "deal with the objection as a preliminary question or join it to the merits of the dispute." Rule 41 does not require that a tribunal deal with a jurisdictional objection as a preliminary question. Instead, the tribunal must determine in its own discretion whether it should or should not join the objection to the merits, based upon the submissions of the parties. The preference for joinder in the interest of efficiency within the particular context of ICSID proceedings has only increased in recent years, as indicated by the 2006 Amendments to the ICSID Arbitration Rules. Specifically, in the amended version of Rule 41(3), the tribunal is not only granted discretion to join jurisdictional objections to the merits, it may do so *without* declaring a suspension of any simultaneous merits proceeding (a suspension was automatic in the previous version of the Rules). ICSID Arbitration Rule 41(4) also confirms the full discretion of the tribunal without parameters or limitations on that discretion. In addition, the 2006 ICSID Arbitration Rules strongly encourage respondent parties—through the provision of an expedited objection procedure—to conserve resources by airing preliminary objections at the earliest stage possible[6] and allow for an "admissibility" or "summary judgment" procedure if the tribunal finds that the claim is "manifestly without legal merit."[7]

THE STANDARD

As just noted, in the context of international investment arbitration, arbitral tribunals have the *discretion* to bifurcate or trifurcate arbitral proceedings. Although neither the ICSID nor UNCITRAL Arbitration Rules set forth a specific standard for granting bifurcation or trifurcation, international investment arbitral jurisprudence highlights some considerations that tribunals often take into account when determining whether to bifurcate or trifurcate proceedings. These considerations include, *inter alia*

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equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case."

3 *Ibid.*, at art. 21(4).

4 ICSID Article 41(2).

5 ICSID Arbitration Rule 41(3) and (4).

6 2006 ICSID Arbitration Rules, Rule 41(1).

7 *Ibid.*, Rule 41(5).

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(1) substantive overlap between factual and legal issues at each stage of the proceeding, (2) cost and efficiency considerations, (3) the merit of the request for bifurcation, and (4) the parties' agreement on the issues of bifurcation or trifurcation.

Overlap Between Factual and Legal Issues

Joinder of the various phases of an arbitration proceeding may be appropriate when substantial overlap exists between either the jurisdictional and merits phases of an arbitration or the liability and quantum phases of an arbitration. As noted by Professor Christoph Schreuer, "some jurisdictional questions are so intimately linked to the merits of the case that it is impossible to dispose of them in preliminary form."[8] He further explains:

> The need for a joinder to the merits is apparent where the answer to the jurisdictional questions depends on testimony and other evidence that can only be obtained through a full hearing of the case. This would be the case, in particular, if the jurisdictional questions are closely related to the merits and depend on the same factual questions. In such a case, the decision on jurisdiction can only be made after a full consideration of the evidence.[9]

Arbitral jurisprudence bears out this consideration. In *Methanex v. United States of America*,[10] overlapping jurisdictional and liability questions were central to that tribunal's rejection of bifurcation:

> . . . Even if it [an objection by Respondent that no proximate cause existed] qualified as a jurisdictional challenge (which in our view, it does not), *its legal merits are so intertwined with the factual issues* arising from Methanex's case that we would have been minded, as a matter of discretion, to join that challenge to the merits under Article 21(4) of the UNCITRAL Arbitration Rules.[11]

Similarly, the tribunal in *International Thunderbird v. Mexico*[12] refused to bifurcate the proceedings because facts relating to a preliminary question concerning the investor and its control of the investment were "*closely interwoven with the merits of the case*."[13] The *Glamis Gold v. United States of America*[14] tribunal similarly noted that arbitral tribunals should consider "whether bifurcation is impractical in that the jurisdictional issue identified is so intertwined with the merits that it is very unlikely that there will be any savings in time or cost."[15]

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8 C. Schreuer, ICSID Commentary, Article 41 para. 68, at p. 545.

9 *Ibid.*, Article 41 para. 73, at p. 547.

10 Methanex v. United States of America (UNCITRAL/NAFTA), Preliminary Award on Jurisdiction and Admissibility, August 7, 2002.

11 *Ibid.*, para. 86 (emphasis added).

12 International Thunderbird Gaming Corporation v. Mexico, Award, Ad hoc—UNCITRAL Arbitration Rules, January 26, 2006.

13 *Ibid.*, Procedural Order No. 4, December 24, 2003.

14 Glamis Gold, Ltd. v. United States of America, UNCITRAL/NAFTA.

15 *Ibid.*, Procedural Order No. 2, May 31, 2005.

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Cost and Efficiency Considerations

Numerous tribunals have relied on cost and efficiency considerations when determining whether to join or divide arbitral proceedings. As explained by Professor Schreuer, "[t]he choice between a preliminary decision and a joinder to the merits is a matter of procedural economy. It does not make sense to go through lengthy and costly proceedings dealing with the merits of the case unless the tribunal's jurisdiction has been determined authoritatively."[16] As stated by other esteemed commentators on international arbitration:

> Ordinarily, it is desirable to determine all issues and decide all claims in a single award [. . .] Where there is no clear agreement by the parties on the matter, the arbitrator should decide whether a preliminary award will aid or impede the administration of arbitral justice, and particularly take into account whether the making of such an award will delay the overall conduct of the proceedings, and if so, whether such delay is justified.[17]

Cost and efficiency considerations are relevant in both the bifurcation of the jurisdiction and merits phases as well as the merits and quantum phases. Bifurcation and trifurcation may increase or decrease efficiencies and costs, depending on the circumstances of each case. Alan Redfern and Martin Hunter describe the rationale behind separating the issues of liability and quantum in certain cases as follows:

> In many modern disputes arising out of international trade, particularly in relation to construction projects, or intellectual property disputes, the quantification of claims is a major exercise. It may involve both the parties and the arbitral tribunal in considering large numbers of documents, as well as complex technical matters involving experts appointed by the parties, or by the arbitral tribunal, or both. In such cases, it may often be convenient for the arbitral tribunal to determine questions of liability first. In this way, *the parties avoid the expense and time involved in submitting evidence and argument on detailed aspects of quantification that may turn out to be irrelevant following the arbitral tribunal's decision on liability*.[18]

Such efficiency and cost considerations have played a decisive factor in the decision to bifurcate or trifurcate for many arbitral tribunals. The tribunal in *Canfor Corporation v. United States of America* refused to bifurcate the jurisdiction and merits phases due to such considerations:

> [T]he Tribunal should not be constrained, when conducting the arbitration, by any of the parties' procedural and strategic choices. The Tribunal must conduct this arbitration in a way that is compatible with the equal treatment of the parties. The Tribunal would indeed be treating the parties without equality if it were to allow the Respondent to make piecemeal objections to its jurisdiction. It is also unquestionable that the *efficiency of the arbitral procedure would be seriously*

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16 *See* Schreuer, *supra* n. 8.

17 Craig et al., International Chamber of Commerce Arbitration 359, 361 (3rd ed. 2000).

18 Martin Hunter & Alan Redfern, Law and Practice of International Commercial Arbitration 6–35, 165 (4th ed. 2004) (emphasis added).

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> *impaired by the duplication of the phases of the proceedings, one jurisdictional phase* regarding Chapter Nineteen of the NAFTA *and, if any, one phase on the merits which may include jurisdictional and other preliminary arguments* to be considered before the examination of the merits.[19]

The tribunal in *Glamis Gold, Ltd. v. United States*[20] noted that an arbitral tribunal could decline to bifurcate proceedings when doing so "is unlikely to bring about increased efficiency in the proceedings."[21] In making this determination, it explained that a tribunal should determine "whether the objection to jurisdiction if granted results in a material reduction of the proceedings at the next phase (in other words, the tribunal should consider whether the costs and time required of a preliminary proceedings, even if the objecting party is successful, will be justified in terms of the reduction in costs at the subsequent phase of proceedings)."

In the same vein, the *UPS* tribunal found "practical administration" considerations relevant when determining whether to bifurcate,[22] while the *Mondev* tribunal considered issues of convenience.[23]

The Merit of the Request for Bifurcation or Trifurcation

Tribunals appropriately consider the merit of the request for bifurcation or trifurcation. If the impetus for dividing the proceedings is a frivolous claim the separation of which is unlikely to increase costs or efficiencies, tribunals will not be inclined to grant the request. As noted by the *Glamis Gold* tribunal, "whether the objection is substantial inasmuch as the preliminary consideration of a frivolous objection to jurisdiction is very unlikely to reduce the costs of, or time required for, the proceeding" is an important consideration in a decision to bifurcate.[24]

Party Agreement

Given that respect for the consent of the parties is a cornerstone of international investment arbitration, it is unsurprising that an agreement by the parties to bifurcate or trifurcate will generally be respected. In *LG&E v. Argentina,*[25] the tribunal granted the

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19 Canfor Corporation v. United States of America, Decision on the Place of Arbitration, Filing of a Statement of Defense and Bifurcation of the Proceedings, January 23, 2004, para. 52 (emphasis added).

20 *See Glamis*, *supra* n.14.

21 *Ibid.*, Procedural Order No. 2, May 31, 2005.

22 *See* United Parcel Service of America, Inc. v. Government of Canada, Decision of the Tribunal on the Filing of a Statement of Defense, dated October 17, 2001 ("UPS Decision on the Filing of a Statement of Defense") at 6–7, paras. 17 and 7, para. 20.

23 Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2 (NAFTA), Award, October 11, 2002, para. 26.

24 *See Glamis, supra* n. 14, Procedural Order No. 2, May 31, 2005.

25 LG&E v. Argentina, ICSID Case No. ARB/02/1, Decision on Jurisdiction, April 30, 2004.

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trifurcation of proceedings "as agreed by the parties."[26] The tribunal in *Fireman's Fund v. Mexico* also trifurcated the proceedings based on party agreement.[27]

AN EXAMPLE OF THE DISCRETION OF THE TRIBUNAL ON THE QUESTION OF BIFURCATION IN INVESTMENT ARBITRATION

Perhaps the best example of the sheer scope of a tribunal's discretion on this question is the decision of the tribunal in the *Libananco Holdings Co. Limited v. Republic of Turkey* arbitration.[28] In that arbitration, taking place under the Energy Charter Treaty (ECT) and the ICSID Convention, the Respondent raised a host of jurisdictional objections and requested the tribunal to bifurcate the proceedings with immediate effect. The Claimant, on the other hand, cited to an intertwinement of jurisdiction and merits issues, cost and efficiency considerations (particularly in light of the fact that quantum had already been divided into a separate phase), and the lack of merit in Respondent's objections to argue that jurisdiction and merits should be joined.

Following pleadings on the issue by both parties, the tribunal used its discretion to the utmost by neither truly bifurcating nor fully joining jurisdiction to the merits. Instead, it bifurcated *only three* of Respondent's objections—whether Libananco was an investor within the meaning of the ECT and ICSID Convention; whether Libananco's claims satisfy express conditions on Turkey's consent to arbitration; and whether Libananco is entitled to the benefits of Article 17 of the ECT. The remainder of the Respondent's objections—including its objections *ratione materiae* and *ratione temporis*—were joined to the merits. The tribunal's reasoning for its novel bifurcation of only *certain* jurisdictional issues as a preliminary matter was laid out as follows:

> These issues have been selected on the basis that they are: genuinely preliminary; discrete; and capable of bringing proceedings to an end; and can be properly disposed of in summary proceedings without causing undue delay to the substantive disposal of the case if none of the objections was upheld."29[29]

The *Libananco* decision on the question of bifurcation brings out, perhaps more than any other arbitral decision on the same question, the discretion that tribunals possess in investment arbitration in shaping the phases of the arbitration as they see fit. In *Libananco*, the tribunal took elements of both Respondent's and Claimant's arguments and formed an arbitration schedule that took into account *both* preliminary questions that had the ability to end the arbitration for lack of jurisdiction and considerations of cost and efficiency.

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26 *Ibid.*, at para. 46.

27 Fireman's Fund Ins. Co. (U.S.) v. Mexico, ICSID Case No. ARB(AF)/02/01, Summary of the First Session of the Tribunal, July 22, 2002, paras. 14–18.

28 Libananco Holdings Co. Limited v. Republic of Turkey, ICSID Case No. ARB/06/8, Procedural Order, December 17, 2008.

29 *Ibid.*, at I(3).

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CONCLUSION

In truth, and despite the foregoing guidelines as to when an arbitration might be bifurcated or trifurcated, there is little rhyme or reason to the process. The full and absolute discretion granted to the tribunal to decide on this question makes the process largely a subjective one for the tribunal and one that is difficult to predict from the point of view of the parties. While the factors laid out here may provide guidance for parties in making their arguments either for or against bifurcation or trifurcation, there is little to stop a tribunal from making its own determination as to whether an arbitration would be better off divided into phases or joined into one. Indeed, the uncertainty that accompanies this question inures in favor of the parties trying to come to agreement—whether in an arbitration clause or following submission under an international treaty—on whether the process will be bifurcated or not. As the *LG&E v. Argentina* and *Fireman's Fund v. Mexico* tribunals have demonstrated, tribunals will follow the agreement of the parties on this issue, which will save the parties the time and cost in making these arguments in the first place.

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Chapter 7

Piercing the Veil of Confidentiality: The Recent Trend Towards Greater Public Participation and Transparency in Investor-State Arbitration

*Andrea J. Menaker**

INTRODUCTION

One of the advantages that disputing parties traditionally sought when choosing arbitration over litigation was confidentiality. The potentially far-reaching policy implications of investment arbitration and the intense public interest generated by investment disputes, however, have caused arbitral organizations, tribunals, and disputing parties alike to rethink the precise nature and extent of the disputing parties' confidentiality obligations or lack thereof.

Developments in NAFTA Chapter 11 arbitrations, including the NAFTA Free Trade Commission's (FTC) Interpretations and Guidelines, and the 2006 Amendments to the ICSID Rules, along with corresponding developments in NAFTA and ICSID jurisprudence, point toward the establishment of greater transparency and openness in investment arbitration. Underlying this evolution is the expectation that increased public awareness will allay suspicions that arbitral secrecy allows "backroom dealings" in matters of great public concern, and will augment the legitimacy of investment arbitration by enhancing public confidence in the fairness and integrity of the arbitral process.

The extent to which the trend of increasing transparency will extend to all investor-state arbitrations, including those governed by other arbitration rules, remains an open question. Seizing the opportunity presented by UNCITRAL to revise its Rules for the first time in 30 years, certain governments and organizations proposed amendments intended to provide greater transparency in investment arbitrations under

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the Rules,[1] which are increasingly utilized in investment arbitrations.[2] After its February 2008 session in New York, the UNCITRAL Working Group on Arbitration decided to proceed with its current work revising the Rules in their generic form and to seek guidance from the Commission on whether afterward to consider specific issues related exclusively to investment treaty arbitrations under the Rules.[3] According to the report prepared by the Working Group, "[r]eservations were expressed by many delegations in respect of the possible inclusion of provisions on transparency in the [Rules] because it was necessary to preserve the generic nature of the Rules and it was not certain that full transparency was in all circumstances desirable."[4] Later that year, the Commission "agreed that the topic of transparency in investor-state treaty-based arbitration was worthy of future consideration and should be dealt with as a matter of priority immediately after completion of the current revision of the UNCITRAL Arbitration Rules."[5] The Commission further noted that it had "agreed by consensus on the importance of ensuring transparency in investor-State dispute resolution."[6]

In the meantime, certain States—most prominently the United States and Canada—have incorporated "transparency" provisions into their recent investment treaties. Arbitration under those agreements thus will not be confidential, regardless of the arbitral rules governing them.

This chapter traces the development of public disclosure and participation in investment arbitration. It is divided into three sections: public access to arbitral documents, third-party written submissions, and public access to arbitration hearings. Each section first addresses developments under NAFTA Chapter 11, followed by the evolution of the practice under the ICSID Rules and the approach taken by other arbitration rules and by certain States in their recent agreements.

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* The author is a partner of White & Case, LLP, in Washington, D.C., where she practices international arbitration. Prior to joining White & Case, she was Chief of the NAFTA Arbitration Division at the U.S. State Department where she represented the United States in NAFTA Chapter 11 arbitrations and drafted investment and dispute resolution provisions in the United States' BITs and FTAs. The author thanks Epaminontas Triantafilou for his assistance in preparing this chapter.

1 *See, e.g.*, IISD, *Revising the UNCITRAL Arbitration Rules To Address Investor-State Arbitrations* (Dec. 2007), *available at* http://www.iisd.org/pdf/2008/investment_revising_uncitral_arbitration_dec.pdf.

2 *See* Luke E. Peterson, Investment Treaty News: 2006—a Year in Review 2 (2007), *available at* http://www.iisd.org/pdf/2007/itn_year_review_2006.pdf (finding that ICSID cases accounted for less than one-half of the treaty-based arbitrations initiated in 2006).

3 U.N. Comm'n on Int'l Trade Law, Working Group on Arbitration and Conciliation, *Report of the Working Group on Arbitration and Conciliation on the Work of Its Forty-Eighth Session* (New York, Feb. 4–8, 2008) para. 69, U.N. Doc. A/CN.9/646 (Feb. 29, 2008), *available at* http://daccessdds.un.org/doc/UNDOC/GEN/V08/513/98/PDF/V0851398.pdf?OpenElement.

4 *Ibid.*, para. 60.

5 U.N. Comm'n on Int'l Trade Law, Working Group on Arbitration and Conciliation, *Annotated Provisional Agenda for the Forty-Ninth Session* (Vienna, Sept. 15–19, 2008) para. 18, U.N. Doc. A/CN.9/WG.II/WP.150 (July 9, 2008), *available at* http://daccessdds.un.org/doc/UNDOC/LTD/V08/554/48/PDF/V0855448.pdf?OpenElement.

6 *Ibid.*

PUBLIC ACCESS TO DOCUMENTS

Whether parties to investment arbitrations may release to the public documents generated during the course of that arbitration is a threshold issue and one which involves competing interests. The fact that a State has been subject to a claim under an investment treaty and the outcome of the resulting arbitration certainly are matters of public concern. The public also may have an interest in discovering the positions advanced by its Government in the proceeding. That information, moreover, may prove critical for nondisputing parties wishing to make *amicus* submissions.

It is widely accepted that the disputing parties have a legitimate interest in protecting all commercially sensitive, privileged, or otherwise protected information exchanged during the arbitration, although the parameters of any privilege and the invocation of a privilege with respect to any particular document may, of course, be the subject of dispute. Even where there is no claim of protected information, however, public disclosure of documents may raise legitimate concerns for parties, as public reporting may exacerbate the dispute, affect witnesses' willingness to testify, and have other negative repercussions.

How tribunals and States have dealt with these issues, and the approaches they have taken with respect to document disclosure in investment arbitrations, is the subject of this first section.

The NAFTA Approach

The NAFTA itself contains few provisions regarding public access to information in investor-state arbitrations under Chapter 11. The filing of the Request for Arbitration and the publication of the ensuing award are the only two matters that are expressly addressed in the text of the Agreement.

The fact that a request for arbitration under NAFTA Chapter 11 has been filed is a matter of public record. NAFTA Article 1126(10) provides for the filing of Notices of (or Requests for) Arbitration with the NAFTA Secretariat, and the Secretariat, in turn, must maintain those documents in a public register.[7] The publication of NAFTA Chapter 11 awards is addressed by Annex 1137.4. In cases in which the United States or Canada is a respondent, either disputing party may publish the award. When Mexico is a respondent, however, the issue is governed by the applicable arbitration rules, which, in the case of the UNCITRAL Rules, provide that an award may be made public only with the consent of both parties.[8]

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7 North American Free Trade Agreement, U.S.-Can.-Mex., art. 1126(13), Dec. 17, 1992, *available at* http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/NorthAmericanFreeTA.asp.

8 UNCITRAL Arbitration Rules, G.A. Res. 31/98, art. 32(5), U.N. Doc. A/RES/31/98 (Dec. 15, 1976). The ICSID and ICSID Additional Facility Rules provide that the Secretariat may not publish the award absent the consent of both parties. ICSID Rules, art. 48(5), as amended and effective Apr. 10, 2006, *available at* http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp; ICSID Additional Facility Rules, art. 53(3), as amended and effective Apr. 10, 2006, *available*

In early Chapter 11 cases—governed in some cases by the ICSID Additional Facility Rules and in others by the UNCITRAL Rules—the parties frequently disagreed as to whether, absent any confidentiality agreement or order, a party was entitled to publicize aspects of the dispute and documents generated during the arbitration. In some cases it was the respondent State seeking to publish the information, while in other cases the claimant sought to do so.

While tribunals generally recognized the Parties' obligations to comply with domestic disclosure laws, such as the Freedom of Information Act in the United States (FOIA),[9] they differed on whether to permit the parties to disclose publicly arbitration materials where there was no legal duty to do so. In such cases, some tribunals ordered the parties to refrain from publishing them, while others permitted such disclosure.

In response to a complaint that the claimant had disclosed information pertaining to the arbitration in a conference call with shareholders, the *Metalclad* tribunal, for instance, noted that "[t]hough it is frequently said that one of the reasons for recourse to arbitration is to avoid publicity, unless the agreement between the parties incorporates such a limitation, each of them is free to speak publicly of the arbitration."[10] The tribunal, however, went on to state that "it still appears to the Arbitral tribunal that it would be of advantage to the orderly unfolding of the arbitral process and conducive to the maintenance of working relations between the Parties if during the proceedings they were both to limit public discussion of the case to a minimum, subject only to any externally imposed obligation of disclosure by which either of them may be legally bound."[11] The *Loewen* tribunal likewise rejected the notion that the arbitration was cloaked in confidentiality but concurred with the *Metalclad* tribunal that the parties should limit disclosure of information pertaining to the case to what was necessary.[12]

In *Mondev*, the tribunal issued an order directing that the United States could not publish on its website a tribunal order and interim decision. It reasoned that because, pursuant to the then-existing ICSID Additional Facility Rule Article 44(2), minutes of hearings could not be published absent consent of the parties, the tribunal's order and interim decision, which reflected the outcome of that hearing, similarly could not be published.[13] A few months later, the tribunal issued another order directing that, absent any statutory obligation to disclose documents (such as, for example, under FOIA), neither party could publish any documents filed in the proceedings other than those

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at http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp. In many cases where that consent has not been forthcoming, one of the parties has published the award elsewhere.

9 The U.S. Freedom of Information Act, 5 U.S.C. § 552 (2002), imposes a statutory obligation on U.S. federal government agencies to comply with requests for information contained in government records, subject to specific, enumerated exceptions.

10 Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Procedural Order No. 1 (Oct. 27, 1997) para. 9, *available at* http://naftaclaims.com/Disputes/Mexico/Metalclad/MetalcladProceduralOrder1.pdf.

11 *Ibid.*

12 Loewen Group, Inc. v. United States of America, ICSID Case No. ARB(AF)/98/3, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction (Jan. 4, 2001), *available at* http://www.state.gov/documents/organization/3921.pdf.

13 Mondev Int'l Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Interim Decision Regarding Confidentiality of Documents (Nov. 13, 2000), 6 ICSID Rep. 183.

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which were already public by virtue of their being maintained on a public register (such as the Notice of Arbitration).[14] Those restrictions were lifted once the final award was issued by the tribunal.[15]

The *S.D. Myers* tribunal similarly concluded from the fact that the hearing in the case was closed to the public that written submissions made by the parties, both in advance of the hearing and in post-hearing briefs, were also to be maintained as confidential.[16] In other cases, such as *Methanex*, the parties agreed that documents could be made publicly available, with protections for confidential or otherwise protected information.[17]

The issue of public access to documents in NAFTA Chapter 11 arbitrations ultimately was settled by the issuance, on July 31, 2001, of an Interpretation by the NAFTA Free Trade Commission (NAFTA FTC).[18] The NAFTA FTC is comprised of the Trade Ministers of each of the three NAFTA Parties and has the authority to issue interpretations of provisions of the Treaty which are binding on NAFTA Chapter 11 tribunals.[19] Its Interpretation provides, in relevant part:

> 1. Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, and, subject to the application of Article 1137(4), nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal.
>
> 2. In application of the foregoing:
>
> (a) In accordance with Article 1120(2)[[20]], the NAFTA Parties agree that nothing in the relevant arbitral rules imposes a general duty of confidentiality or precludes the Parties from providing public access to documents submitted to, or issued by, Chapter Eleven tribunals, apart from the limited specific exceptions set forth expressly in those rules.
>
> (b) Each Party agrees to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal, subject to redaction of:
>
> (i) confidential business information;

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14 *Mondev*, Order and Further Interim Decision Regarding Confidentiality (Feb. 27, 2001), 6 ICSID Rep. 184.

15 *Mondev*, Final Award, (Oct. 11, 2002) paras. 28–29 *available at* http://www.state.gov/documents/organization/14442.pdf.

16 S.D. Myers, Inc. v. Canada, *NAFTA/UNCITRAL*, Procedural Order No. 11, paras. 12–13, *available at* http://www.naftalaw.org/Disputes/Canada/SDMyers/SDMyers-AllProceduralOrders.pdf.

17 *Methanex*, Procedural Order No. 1 (June 29, 2000) § 15:2 (allowing the dissemination of certain pleadings), *available at* http://www.state.gov/documents/organization/3932.pdf; *Methanex*, Minutes of Second Procedural Meeting, Item 4 (Sept. 7, 2000) (memorializing the confidentiality agreement between the parties), *available at* http://www.state.gov/documents/organization/3982.pdf.

18 NAFTA Free Trade Commission, *Notes on Interpretation of Certain Chapter 11 Provisions*, § 1, July 31, 2001, *available at* http://www.state.gov/documents/organization/38790.pdf.

19 NAFTA arts. 2001, 1131(2).

20 NAFTA art. 1120(2) provides that "[t]he applicable arbitration rules shall govern the arbitration except to the extent modified by this Section."

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(ii) information which is privileged or otherwise protected from disclosure under the Party's domestic law; and

(iii) information which the Party must withhold pursuant to the relevant arbitral rules, as applied.

3. The Parties confirm that nothing in this interpretation shall be construed to require any Party to furnish or allow access to information that it may withhold in accordance with Articles 2102 or 2105.[[21]]

In the aftermath of the FTC's Interpretation, the public has nearly unfettered access to the relevant documents generated during the course of NAFTA Chapter 11 arbitrations. Each of the NAFTA Parties maintains a website (and each of the Party's websites has links to the other Parties' sites)[22] where tribunal orders, awards, and submissions of the parties are posted. In most cases, transcripts of hearings are also published.[23] In practice, where confidential or otherwise protected information is referenced in a submission, the disputing party generally creates both redacted and unredacted versions of that document. The unredacted versions are transmitted to the tribunal and the nondisputing NAFTA Parties, while the redacted version is posted to the Party's website. In some cases, redactions have been made to the tribunal's award before that is made publicly available.[24]

ICSID's Disclosure Regime

Once registered, Requests for Arbitration are published by the ICSID Secretariat on ICSID's website. Additional information published by ICSID on its Website includes the subject matter of the dispute; the identity of the arbitrators; and the procedural status of the case, including, for example, dates of hearings, whether an award has been issued, and whether the proceedings have been discontinued at the request

21 NAFTA Articles 2102(a) and 2105 provide that a NAFTA Party is not required to disclose information where doing so would be contrary to its essential security interests, would impede law enforcement, or would be contrary to legal obligations to protect privacy or financial information.

22 The United States' website is maintained at http://www.state.gov/s/l; Canada's website is maintained at http://www.international.gc.ca; and Mexico's website is maintained at http://www.economia.gob.mx/?P=2&NLang=en.

23 In one case, in a ruling made after the NAFTA FTC Interpretation had been issued, the *Pope & Talbot* tribunal ordered that hearing transcripts could not be published because the hearing itself had been closed to the public. The tribunal reasoned that the NAFTA FTC's Interpretation did not foreclose its ruling because hearing transcripts were not "documents submitted to, or issued by, a Chapter Eleven tribunal" and, thus, were not within the purview of documents that each Party had agreed to make public. Pope & Talbot, Inc. v. Canada, UNCITRAL/NAFTA, Interim Order of Confidentiality (Mar. 11, 2002), para. 15, *available at* http://www.naftaclaims.org/Disputes/Canada/Pope/Pope-Confidentiality-11-03-08.pdf.

24 *See, e.g.*, Fireman's Fund Ins. Co. v. United Mexican States, ICSID Case No. ARB(AF)/02/1, Award (Redacted), July 17, 2003, *available at* http://icsid.worldbank.org; Archer Daniels Midland Co. v. United Mexican States, ICSID Case. No. ARB(AF)/04/05, Award (Redacted), Nov. 21, 2007, *available at* http://www.worldbank.org/icsid.

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of the parties. Links to many decisions and awards that have been published by ICSID are also provided.[25]

Article 48(4) of the ICSID Rules (and Article 53(3) of the ICSID Additional Facility Rules) provides that ICSID shall not publish the award without the consent of the parties. This Rule applies only to ICSID, however, and parties have published the award elsewhere, even when consent from the other party was not forthcoming. In addition, in cases where the parties do not consent to ICSID publication, the ICSID Rules provide that ICSID "shall [] promptly include in its publications excerpts of the legal reasoning of the tribunal."[26] Prior to the 2006 Amendments to the ICSID Rules, those Rules provided only that ICSID "may" include in its publications excerpts "of the legal rules applied by the tribunal."[27]

The ICSID Rules contain no other provisions concerning the disclosure of documents. Thus, nothing in the Rules prohibits a party from publishing documents generated during the course of the arbitration; likewise, the Rules do not mandate such disclosure. In one of the earliest ICSID cases, *Amco Asia*, the tribunal rejected a request for a provisional measure enjoining a party from providing details of the ongoing dispute to the press. That tribunal noted that neither the Rules nor the ICSID Convention prevented the parties from disclosing such information; it did, however, warn that the parties "should refrain, in their own interests, to do anything that could aggravate or exacerbate the dispute."[28] More recently, the *World Duty Free* ICSID tribunal concurred, stating that "[t]hough it is frequently said that one of the reasons for recourse to arbitration is to avoid publicity, unless the agreement between the Parties includes such a restriction, each of them is still free to speak of the arbitration," as long as the party's statements are "factually accurate" and do not "aggravate or exacerbate the dispute."[29]

Recent ICSID practice, however, suggests that, unlike in NAFTA Chapter 11 arbitrations, publication of the parties' submissions will not become commonplace. The issue of public disclosure of submissions has arisen in the context of requests by third parties who, wishing to make submissions to the tribunal, have sought access to these documents. In two cases, *Suez* and *Biwater*, ICSID tribunals denied the third-party's request when the disputing parties objected to the disclosure of their submissions. Those tribunals both found that petitioners had sufficient information concerning the dispute and could make submissions on issues within their areas of expertise without

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25 *See* http://www.worldbank.org/icsid.

26 ICSID Rules, art. 48(4), as amended and effective Apr. 10, 2006, *available at* http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp; ICSID Additional Facility Rules, art. 53(3), as amended and effective Apr. 10, 2006, *available at* http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp.

27 ICSID Rules (2003), art. 48(4), *available at* http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp; ICSID Additional Facility Rules (2003), art. 53(3), *available at* http://icsid.worldbank.org/ICSID/ICSID/AdditionalFacilityRules.jsp.

28 Amco Asia Corp. v. Republic of Indonesia, ICSID Case No. ARB/81/1, Provisional Measures, Dec. 9, 1983, 1 ICSID Rep. 410, 412.

29 World Duty Free Co. Ltd. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award, Sep. 25, 2006, para. 16, *available at* http://www.investmentclaims.com.

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access to the parties' submissions.[30] While neither tribunal found that it lacked the authority to order such disclosure if circumstances had so warranted, in a 2005 decision, the *Suez* tribunal hinted at a reluctance to allow such disclosure when it noted that a "broad request for all documentation in the case raises difficult and delicate questions because of certain constraints in the ICSID Convention and Rules and in the practice of the Centre."[31]

The *Biwater* tribunal, for its part, had directed that pleadings and written memorials not be disclosed to the public.[32] Nonetheless, Tanzania subsequently published certain documents, including a tribunal order, on a website and indicated its intention to publish others, such as the Claimant's Memorial. The Claimant, in turn, objected and sought an order prohibiting such disclosure. The tribunal found that "the risks to the integrity of the[] proceedings, and the danger of an aggravation or exacerbation of this dispute[] have yet to manifest themselves in concrete terms,"[33] but, given the high level of media attention to the case, the tribunal was "satisfied that there exists a sufficient risk of harm or prejudice, as well as aggravation, in this case to warrant some control [over the public disclosure of documents]."[34] It thus ordered that, while the parties could discuss the case publicly so long as they avoided aggravating the dispute and could publish awards, as had been previously agreed, neither party could publish tribunal decisions or orders without obtaining the tribunal's prior consent.[35] It also prohibited the disclosure of the records or minutes of hearings, documents produced by the parties in the arbitration, and the parties' pleadings and submissions and documents appended thereto, including expert reports. The tribunal emphasized that its decision was predicated on preserving the procedural integrity of the arbitration, and not on any general implied duty of confidentiality of the proceedings.[36]

The Limited Disclosure Regime of the UNCITRAL and Other Arbitral Rules

One source of frustration for advocates of greater transparency in investor-state arbitrations is the increasing use of the UNCITRAL Arbitration Rules. Although many

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30 Suez, Sociedad General de Aguas de Barcelona, S.A. & Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Order in Response to a Petition by Five Non-Governmental Organizations for Permission to Make an *Amicus Curiae* Submission, Feb. 12, 2007, paras. 24, 25, *available at* http://ita.uvic.ca/documents/SuezVivendiamici.pdf [hereinafter *Suez I*]; Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Procedural Order No. 5, Feb. 2, 2007, para. 65, *available at* http://icsid.worldbank.org.

31 *See* Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae* (May 19, 2005) para. 30 [hereinafter *Suez II*]; *Biwater*, para. 66.

32 *Biwater*, Procedural Order No. 3 (Sept. 29, 2006), *available at* http://icsid.worldbank.org.

33 *Ibid.*, para. 144.

34 *Ibid.*, para. 146.

35 *Ibid.*, para. 153.

36 *Ibid.*, para. 121.

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NAFTA Chapter 11 arbitrations take place under those Rules, they govern only to the extent that provisions in the NAFTA do not address a specific procedural issue.[37] Most investment treaties, unlike the NAFTA and some more modern treaties, do not address issues such as publication of Notices of Arbitration, awards, and submissions made to tribunals. In such circumstances, the tribunal will be guided by the applicable arbitration Rules themselves.

UNCITRAL arbitrations are not recorded in any public registry, as they are not administered by any institution. While the commencement of many investor-state arbitrations under UNCITRAL is publicized, this is not required, and the public cannot ascertain whether a specific claim has been filed or the number of investor-state arbitrations initiated under the UNCITRAL Rules. Furthermore, Article 32(5) of those Rules provides that "[t]he award may be made public only with the consent of both parties."

A report by Jan Paulsson and Georgios Petrochilos commissioned by the UNCITRAL Secretariat proposed revising this Rule to make explicit a party's right to make public the award, absent the consent of the other party, where such disclosure is required by law or where disclosure is necessary to protect or pursue a legal right in proceedings before a state court or other judicial authority.[38] Notably, the Paulsson/Petrochilos Report does not propose making mandatory the disclosure of awards or granting any party a unilateral right to publicize the award. By contrast, certain nongovernmental organizations, such as The International Institute for Sustainable Development (IISD) and The Center for International Environmental Law (CIEL), have proposed modifying the Rules to mandate the publication of Notices of Arbitration, awards, and the composition of the tribunal.[39]

The Paulsson/Petrochilos Report also proposes a new Article *15ter* which would read as follows:

> Unless the parties have agreed otherwise, all materials in the proceedings which are not otherwise in the public domain, including materials created for the purpose of the arbitration and all other documents or evidence given by a party, witness, expert, [or any other person,] shall be treated as confidential, save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right, and in *bona fide* legal proceedings before a state court or other judicial authority in relation to an award.[40]

Again, by contrast, certain nongovernmental organizations have proposed modifying the Rules to mandate public disclosure of all documents received or issued by

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37 NAFTA art. 1120(2).

38 Jan Paulsson & Georgios Petrochilos, *Revisions of the UNCITRAL Arbitration Rules* 135 (2006), *available at* http://www.uncitral.org/pdf/English/news/arbrules_report.pdf [hereinafter Paulsson/Petrochilos Report].

39 *See* International Institute for Sustainable Development (IISD) and Center for International Environmental Law (CIEL), *Revising the UNCITRAL Arbitration Rules to Address State Arbitrations* (Feb. 2007), *available at* http://www.iisd.org/pdf/2007/investment_revising_uncitral_arbitration.pdf [hereinafter IISD/CIEL Report].

40 Paulsson/Petrochilos Report, *supra* n. 38, at 79.

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a tribunal, subject to redaction for confidential or otherwise protected information.[41] As noted earlier, UNCITRAL will be considering these issues in the near future.

At this time, no other arbitration rules are used as frequently as the ICSID and UNCITRAL Rules for investor-state arbitrations, although some, like the Stockholm Chamber of Commerce Rules, have been used in high-profile investment disputes.[42] Many arbitration rules are silent on the topic of public disclosure of certain documents.[43] Others, like the ICSID Rules, prohibit the institution from publishing an award absent consent of the parties, but are silent regarding the parties' ability to publish awards. Like ICSID, the ICDR cannot publish awards absent the parties' consent but retains the ability to publish sanitized versions of those awards.[44] Still, other arbitration rules, including some that have been recently amended, expressly prohibit disclosure of documents, including awards, absent consent of the parties.[45]

Mandating Disclosure Through Treaty Provisions

A few States, most notably the United States and Canada, have incorporated into their recent investment treaties express provisions providing for the public disclosure of documents relating to the investment arbitrations proceeding thereunder. These provisions will govern regardless of the arbitration rules utilized in the arbitration.

The 2004 U.S. Model Bilateral Investment Treaty (BIT), for example, contains a separate provision on "Transparency of Arbitral Proceedings," which requires the respondent in a case under the BIT to transmit to the nondisputing Party and to publish:

> (a) the notice of intent;
>
> (b) the notice of arbitration;
>
> (c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions made by non-disputing State Parties or third parties;

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41 IISD/CIEL Report, *supra* n. 39.

42 *See, e.g.*, RosInvestCo UK Ltd. v. The Russian Federation, SCC Case No. V079/2005; Berschader v. Russia, SCC Case No. 080/2004.

43 *See* SCC Arbitration Institute Arbitration Rules, art. 46 *available at* http://www.sccinstitute.com/filearchive/2/21686/2007_arbitration_rules_eng.pdf (providing that the SCC Institute and tribunal shall maintain the confidentiality of the arbitration, but not addressing a party's ability to make public certain documents); ICC Rules of Arbitration, art. 28(2), in force as of Jan. 1, 1998, *available at* http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf (providing that awards are made available only to the parties, but not otherwise addressing the confidentiality of documents or awards).

44 ICDR International Arbitration Rules, art. 27(8), *available at* http://www.adr.org/sp.asp?id=33994.

45 *See* LCIA Arbitration Rules, art. 30.1, effective Jan. 1, 1998, *available at* http://www.lcia-arbitration.com (providing that, unless the parties agree otherwise in writing, they undertake to keep confidential all awards and other materials in the proceedings, except to the extent disclosure may be obligated as a matter of law or to protect or pursue a legal right to enforce or challenge an award in a legitimate legal proceeding).

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(d) minutes or transcripts of hearings of the tribunal, where available; and

(e) orders, awards, and decisions of the tribunal.

This provision has been incorporated into the United States' Free Trade Agreements (FTAs) with Singapore,[46] Chile,[47] the Dominican Republic and CAFTA nations,[48] and Morocco,[49] and its BITs with Uruguay[50] and Rwanda.[51]

The Canada Model Foreign Investment Promotion and Protection Agreement (FIPA) likewise contains a provision for disclosure of documents. That instrument provides that "[a]ll documents submitted to, or issued by, the tribunal shall be publicly available, unless the disputing parties otherwise agree, subject to the deletion of confidential information."[52] This provision appears in Canada's FIPA and signed FTA with Peru.[53]

Finally, Norway has published for comment its draft Model BIT, which contains an article entitled "Transparency of Proceedings."[54] That article provides for the public disclosure of all documents submitted to, or issued by, a tribunal, with the exception of information designated as confidential.[55] Because this model remains in draft form, its provisions have not yet been incorporated into any of Norway's agreements.

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46 United States-Singapore Free Trade Agreement, U.S.-Sing., May 6, 2003, art. 15.20, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/Section_Index.html.

47 United States-Chile Free Trade Agreement, U.S.-Chile, June 6, 2003, art. 10.20, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html (in lieu of the term "protected information" that appears in the Model BIT and other agreements, this FTA contains the phrase "confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law.").

48 The Dominican Republic-Central America-United States Free Trade Agreement, Cent. Am.-U.S.-Dom. Rep., May 28, 2004 [hereinafter DR-CAFTA], art. 10.21, *available at* http://www.ustr.gov/Trade_Agreements/Regional/CAFTA/Section_Index.html.

49 United States-Morocco Free Trade Agreement, U.S.-Morocco, June 15, 2004, art. 10.20, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Morocco_FTA/Section_Index.html.

50 U.S.-Uruguay Bilateral Investment Treaty, U.S.-Uruguay, Nov. 4, 2004, art. 29, *available at* http://www.ustr.gov/trade-agreements/bilateral-investment-treaties/bit-documents/.

51 U.S.-Rwanda Bilateral Investment Treaty, U.S.-Rwanda, Feb. 19, 2008, art. 29, *available at* http://www.ustr.gov/trade-agreements/bilateral-investment-treaties/bit-documents/.

52 Canada Model Foreign Investment Promotion and Protection Agreement, art. 38(3), *available at* http://international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/2004-FIPA-model-en.pdf.

53 Agreement Between Canada and Peru for the Promotion and Protection of Investments, Can.-Peru, Nov. 14, 2006, art. 38(3)–(8), *available at* http://international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Canada-Peru10nov06-en.pdf; Canada-Peru Free Trade Agreement, Can.-Peru, May 29, 2008, art. 835(3)–(8), *available at* http://international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/peru-perou/peru-perou-table.aspx.

54 Agreement Between the Kingdom of Norway and _____ for the Promotion and Protection of Investments, Draft Version 191207, art. 19, *available at* http://ita.law.uvic.ca/documents/NorwayModel2007.doc.

55 The draft Norway Model BIT also contains a procedure for challenging the designation of information as confidential and a mechanism for addressing such disputes. *See* Draft, *supra* n. 54, art. 19(3).

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THIRD-PARTY WRITTEN SUBMISSIONS

Beginning with a series of NAFTA Chapter 11 cases, the practice of allowing nondisputing parties to file written submissions has gained substantial ground in investor-state arbitration. In 2004, the NAFTA Parties confirmed that such participation was permissible under the Treaty; ICSID did the same in 2006 when it amended its Rules.

Parties and tribunals continue to address how best to determine the appropriateness of third party petitions and, where they are deemed suitable, how to strike a balance between enabling the petitioners to be of assistance to the tribunal and ensuring that their participation does not unduly burden either the parties or the tribunal.

NAFTA Chapter11: The Beginning of Modern Nonparty Participation in Investment Arbitration

The first recent investment arbitration case to confront the question of third-party submissions was the *Methanex* case,[56] which concerned a challenge to California executive action and regulations banning the use of a gasoline additive in gasoline after the state determined that the chemical was responsible for contaminating groundwater. Citing the public issues implicated in the case, including the case's potential impact on states' willingness to adopt environmental legislation, four NGOs filed petitions to participate as *amici* in the arbitral proceedings.[57]

The UNCITRAL Arbitration Rules, which governed that arbitration, are silent on the issue of third-party participation. The only provision addressing nondisputing party participation in NAFTA Chapter 11 itself is Article 1128, which provides that the State Parties may make submissions in Chapter 11 arbitrations on issues of Treaty interpretation.[58]

Faced with these petitions, the United States argued that Article 15(1) of the UNCITRAL Rules, which grants the tribunal authority to conduct the arbitration in the manner it deems appropriate, provided the tribunal with the necessary authority to

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56 The question of *amicus* participation had arisen before the Iran-U.S. Claims tribunal. That tribunal, however, had the benefit of an interpretive note to the UNCITRAL Rules agreed upon by the State Parties to govern those proceedings, which expressly provided for third-party participation. Iran-U.S. Claims tribunal, *Tribunal Rules of Procedure*, May 3, 1983, Note 5 to art. 15(1) of the UNCITRAL Rules (stating, in relevant part, that "[t]he arbitral tribunal may, having satisfied itself that the statement of one of the two Governments—or, under special circumstances, any other person—who is not an arbitrating party in a particular case is likely to assist the arbitral tribunal in carrying out its task, permit such Government or person to assist the tribunal by presenting oral or written statements.").

57 Methanex Crop. v. United States, NAFTA/UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as "*Amici Curiae*," Jan. 15, 2001, [hereinafter *Methanex* Decision], paras. 6–8, *available at* http://www.state.gov/documents/organization/6039.pdf.

58 NAFTA Article 1128 provides that "On written notice to the disputing parties, a Party [to NAFTA] may make submissions to a tribunal on a question of interpretation of this Agreement."

accept third-party submissions.[59] Canada, in a submission made pursuant to Article 1128, likewise supported the tribunal's authority to accept such petitions.[60]

Mexico and the Claimant, on the other hand, both rejected the notion that the tribunal had such authority. Methanex argued that accepting *amicus* submissions was beyond the tribunal's jurisdiction, would have a disruptive effect on the orderly conduct of the proceedings, would increase the parties' costs, and would be unfair to it.[61] Mexico's main objections were twofold. First, it argued that Article 1128 governed the nature and full extent of permissible third-party participation in NAFTA Chapter 11 disputes.[62] Allowing third parties other than the signatories to make submissions whose scope may extend beyond issues of treaty interpretation, it argued, circumvented the Treaty's limited inclusion of third parties in the arbitral process and granted nonsignatories more extensive rights than those enjoyed by the NAFTA Parties themselves. Second, Mexico contended that the establishment of third-party practice in NAFTA arbitration would distort the balance the Treaty is supposed to strike between the legal systems of the States' signatories, some of which permit *amicus* participation (such as the United States) and others which do not (such as Mexico).[63]

The tribunal found that NAFTA's Chapter 11 did not contain any provisions relevant to the *amicus* petition before it. It considered that UNCITRAL Rules other than Article 15(1), while addressing attendance at hearings and access to arbitration documents, did not address the authority of the tribunal to accept *amicus* submissions. The tribunal ruled that allowing a third party to make an *amicus* submission fell within its broad discretion to oversee the proceedings, since it did not affect in any way the procedural or substantive rights of the disputing parties or State Parties participating under Article 1128.[64]

The tribunal also determined that the participation of *amici* through written submissions would not violate the parties' right to be treated equally and not to be

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59 *Methanex,* Statement of Respondent United States of America Regarding Petitions or *Amicus Curiae* Status, Oct. 27, 2000, at 7, *available at* http://www.state.gov/documents/organization/3970.pdf; *Methanex* Decision, paras. 17–19. In its submission, the United States cited in support the practice of the WTO Appellate Body, which accepts *amicus* submissions, as well as decisions of domestic courts that had rejected the notion that arbitration was inherently confidential.

60 *Methanex*, Submission of the Government of Canada, Nov. 10, 2000, *available at* http://www.state.gov/documents/organization/3935.pdf; *Methanex* Decision, para. 10.

61 *See generally Methanex*, Submissions of the Claimant Respecting the Petition of [IISD], Aug. 31, 2000, *available at* http://www.state.gov/documents/organization/3948.pdf; *Methanex*, Further Submissions of the Claimant to the [*Amicus* Petitions], Oct. 27, 2000, *available at* http://www.state.gov/documents/organization/3937.pdf; *Methanex*, Rejoinder of Claimant to the Petitions, Nov. 22, 2000, *available at* http://www.state.gov/documents/organization/3943.pdf; *Methanex* Decision, paras. 11–15.

62 *Methanex*, Submission of Mexico Pursuant to Article 1128, Nov. 10, 2000, paras. 2–7, *available at* http://www.state.gov/documents/organization/3936.pdf; *Methanex* Decision para. 9.

63 *Methanex*, Submission of Mexico, paras. 11–14; *Methanex* Decision, para. 9.

64 The tribunal noted, in this regard, that the State Parties have a right under the Treaty to make submissions on issues of treaty interpretation, while participating nonparties would "acquire[] no rights at all." *Methanex* Decision para. 30; *accord, e.g.*, *Methanex*, Submission of Respondent United States of America Regarding Petitions for *Amicus Curiae* Status, Oct. 27, 2000.

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burdened unfairly, noting the fact that either party could choose to incorporate *amicus* arguments into the presentation of its case, in which event the opposing party would have had to respond even if the source of the additional arguments were not the *amicus* submission, but extraneous sources.[65]

Finally, the *Methanex* tribunal alluded to the policy considerations that prompted it to accept written *amicus* submissions. Specifically, the tribunal recognized the public interest in the arbitration, which arose from the arbitration's subject matter, and observed that *amicus* participation would increase transparency, which could prove beneficial for public acceptance of arbitration under NAFTA Chapter 11.[66]

Nine months after the *Methanex* decision, another NAFTA Chapter 11 tribunal in *UPS*, an arbitration also governed by the UNCITRAL Rules, made a similar ruling. That dispute concerned a challenge to Canada Post's activities, and petitioners for *amicus* status included the Canadian Union of Postal Workers and the Council of Canadians, a civic organization focused on a broad array of issues, including fair business practices within Canada.

The *amici* in *UPS* grounded their petition on their interest in the outcome of the arbitration, which they claimed would directly affect their membership, as well as on their concern over the broader public policy consequences of the tribunal's decision. In addition, petitioners noted that they had an interest in addressing the "lack of transparency that has historically attended international arbitral processes."[67]

The NAFTA Parties, not surprisingly, took the same positions before the *UPS* tribunal that they had taken before the *Methanex* tribunal: Canada and the United States supported the tribunal's authority to accept the petitions, while Mexico rejected that contention.[68] Unlike Methanex, UPS posited that the tribunal might have jurisdiction to grant *amicus* status under appropriate circumstances, although it argued that such status should not be granted at that time.[69]

The *UPS* tribunal effectively adopted the reasoning of *Methanex*, finding that it had authority under Article 15(1) of the UNCITRAL Arbitration Rules to accept the *amicus* submissions.[70] Like the *Methanex* tribunal, the *UPS* tribunal determined it would accept written *amicus* submissions, which would be limited and otherwise regulated to protect the procedural and substantive rights of the disputing parties.[71]

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65 *Methanex* Decision, para. 36.

66 *Ibid.*, paras. 47–52.

67 United Parcel Service of America, Inc. v. Canada, NAFTA/UNCITRAL, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, Oct. 17, 2001 [hereinafter *UPS* Decision], para. 3, *available at* http://www.state.gov/documents/organization/6033.pdf.

68 *See UPS* Decision, paras. 5–10.

69 *See UPS*, Investor's Response to the Petition of the Canadian Union of Postal Workers and the Council of Canadians, May 28, 2001, *available at* http://naftaclaims.com/Disputes/Canada/UPS/UPSInvestorSubReAmicus.pdf; *UPS* Decision, paras. 5–6.

70 *UPS* Decision, para. 61.

71 The tribunal agreed with the position taken by all of the NAFTA Parties, as well as the Claimant, that it lacked authority to grant the petitioners' request to be added as parties to the arbitration. *UPS* Decision, paras. 35–43; United Parcel Serv. of Am., Inc. v. Canada, Canada's Submission on the *Amicus* Petitions, May 21, 2001, *available at* http://naftaclaims.com/Disputes/Canada/

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The NAFTA Free Trade Commission Interpretation and Guidelines and Subsequent NAFTA Practice

In October 2004, the NAFTA Free Trade Commission issued the following Interpretation:

> 1. No provision of the North American Free Trade Agreement ("NAFTA") limits a tribunal's discretion to accept written submissions from a person or entity that is not a disputing party (a "non-disputing party").
>
> 2. Nothing in this statement by the Free Trade Commission ("the FTC") prejudices the rights of NAFTA Parties under Article 1128 of the NAFTA.[72]

At the same time, the FTC issued nonbinding guidelines setting forth the criteria by which to evaluate *amicus* petitions. The guidelines provide that such petitions should:

> (a) be made in writing, dated and signed by the person filing the application, and include the address and other contact details of the applicant;
>
> (b) be no longer than 5 typed pages;
>
> (c) describe the applicant, including, where relevant, its membership and legal status (e.g., company, trade association or other non-governmental organization), its general objectives, the nature of its activities, and any parent organization (including any organization that directly or indirectly controls the applicant);
>
> (d) disclose whether or not the applicant has any affiliation, direct or indirect, with any disputing party;
>
> (e) identify any government, person or organization that has provided any financial or other assistance in preparing the submission;
>
> (f) specify the nature of the interest that the applicant has in the arbitration;
>
> (g) identify the specific issues of fact or law in the arbitration that the applicant has addressed in its written submission;
>
> (h) explain, by reference to the factors specified in paragraph 6, why the tribunal should accept the submission; and
>
> (i) be made in a language of the arbitration.

UPS/UPSCanadaSubReAmicus.pdf; Investor's Submission on the *Amicus* Petitions, May 21, 2001, *available at* http://naftaclaims.com/Disputes/Canada/UPS/UPSInvestorSubReAmicus.pdf; Mexico's NAFTA Art. 1128 Submission on the *Amicus* Petitions, June 11, 2001, *available at* http://naftaclaims.com/Disputes/Canada/UPS/UPSMexico1128ReAmicusSub.pdf; United States' NAFTA Art. 1128 Submission on the *Amicus* Petitions, June 11, 2001, *available at* http://naftaclaims.com/Disputes/Canada/UPS/UPS_USA1128ReAmicusSub.pdf; Investor's Response to the Petition of the Canadian Union of Postal Workers and the Council of Canadians, May 28, 2001. In rejecting petitioners' request, the tribunal held that Article 15(1) of the UNCITRAL Rules deals with matters of arbitral procedure, not jurisdiction, and that the "NAFTA itself does not provide any support of the addition as parties of persons such as the Petitioners in this matter." *UPS* Decision, paras. 36, 38–39.

72 NAFTA Free Trade Commission, *Statement Of The Free Trade Commission On Non-Disputing Party Participation*, Oct. 7, 2004, § A(1)–(2), *available at* http://www.state.gov/documents/organization/38791.pdf.

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The guidelines also suggest parameters for the submissions themselves, namely, that such submissions should:

(a) be dated and signed by the person filing the submission;

(b) be concise, and in no case longer than 20 typed pages, including any appendices;

(c) set out a precise statement supporting the applicant's position on the issues; and

(d) only address matters within the scope of the dispute.

The first NAFTA Chapter 11 tribunal to receive petitions after the adoption of the NAFTA FTC's Interpretation and Guidelines, in the case *Glamis Gold Ltd. v. United States of America*, applied the FTC's guidelines.[73] That case, which concerned a challenge to both federal and state action in connection with Claimant's unpatented mining claims, gave rise to petitions from numerous sources. In addition to NGO groups, the petitioners included the Quechan Indian Nation as well as the National Mining Association.

Those petitions are notable in a few respects. First, the petitions may dispel the widespread but erroneous assumption that *amicus* submissions will necessarily favor the respondent. Because NGOs were the first petitioners in investment arbitration to seek *amicus* status and were perceived as favoring the positions advanced by the State, some claimants argued that permitting *amicus* submissions would unduly burden claimants and place them at an unfair advantage.[74] In the *Glamis* case, however, the National Mining Association filed a petition for *amicus* status and its position clearly favored the claimant's.[75] Similarly, the petitions expose the fallacy in assuming that an *amicus* merely parrots the views of the party whose position it favors. The Quechan Nation, for instance, while objecting to Glamis's claims, advanced arguments that were not adopted by the United States.[76]

Third-Party Submissions in ICSID Cases

A reluctant beginning: Tunari v. Bolivia. The first published case in which an ICSID tribunal engaged in substantial discussion of a third-party's right to participate as

73 *See Glamis*, Decision on Application and Submission by Quechan Indian Nation, Sep. 16, 2005, paras. 8–11, *available at* http://www.state.gov/documents/organization/53592.pdf. After issuing this decision, the *Glamis* tribunal granted petitions for participation as *amici* of other nonparties, such as the Friends of the Earth and the National Mining Association.

74 *See, e.g.*, *Methanex* Decision, paras. 35–37; *Methanex*, Submission of the Claimant Respecting Petition of [IISD], Aug. 31, 2000, paras. 16–17.

75 *See Glamis Gold*, Application for Leave to File a Non-Disputing Party Submission by the National Mining Association, Oct. 13, 2006, *available at* http://www.state.gov/documents/organization/75178.pdf.

76 *See* Quechan Indian Nation *Amicus* Application and Submission, Aug. 19, 2005, *available at* http://www.state.gov/documents/organization/52531.pdf. More recently, the European Commission has sought *amicus* status in ICSID cases where the issue of compatibility with European Union law has arisen. *See* Global Arbitration Review, News Briefing (Dec. 15, 2008) (recounting the European Union's *amicus* petition in *AES Summit Generation v. Hungary*, ICSID Case No. ARB/07/22).

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amicus curiae was *Aguas de Tunari v. Bolivia*.[77] That dispute arose out of the Bolivian Government's privatization of the sewage and water system of Cochabamba, the country's third largest city. A few hundred health and safety and environmental organizations, represented by several organizations and individuals, filed a petition with the tribunal requesting the right to participate in the proceedings by making written and oral submissions.[78]

The third-party petitioners supported their broad request by citing to (i) the direct interest each petitioner had in the subject matter of the claim (the provision of water and sewage services to a large city); (ii) each petitioner's interest in protecting and fostering transparency during a proceeding that "may have far-reaching impacts on a broad diversity of non-party interests"; and (iii) petitioners' "unique expertise and knowledge" that could assist the tribunal.[79]

The parties opposed the participation of *amici* in the proceedings, and the tribunal rejected petitioners' requests, finding that they were "beyond the power or the authority of the tribunal to grant."[80] The tribunal premised its decision on the fact that its authority was based on the parties' consent.[81]

In its letter to the petitioners, the tribunal hinted at an additional constraint to third-party participation—confidentiality. While remarking on the careful manner in which it reviewed the *amicus* petition, the tribunal noted that it could only go so far in communicating with nonparties to the arbitration for fear it would "breach the undertakings in our declarations as arbitrators. . . . to maintain the confidentiality of the proceedings."[82]

Institutional Initiative: The New ICSID Rule 37(2). In October 2004, the ICSID Secretariat circulated for comment a Discussion Paper entitled "Possible Improvements of the Framework for ICSID Arbitration," which reported on various aspects of the ICSID dispute resolution mechanism and ways in which it could be improved. With respect to third-party practice, the Secretariat noted that "[i]n two recent investor-state arbitrations. . . .[*i.e.*, *Methanex* and *UPS*] the tribunals confirmed that they had broad authority to accept and consider submissions from third parties."[83] Although ICSID tribunals had not reached the same conclusion under the ICSID Rules, the Secretariat noted that "[t]here may be cases where the process could be strengthened by the submission of third parties. . . . It might therefore be useful to make clear that the tribunals

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77 Aguas del Tunari, S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3, *available at* http://ita.law.uvic.ca.

78 *Tunari*, NGO Petition to Participate as *Amici Curiae*, Aug. 29, 2002, *available at* http://ita.law.uvic.ca/documents/Aguaaboliviapetition.pdf.

79 *Ibid.*, para. 2.

80 *Tunari*, Letter from Tribunal President David D. Caron to *Amicus* Petitioner J. Martin Wagner, Jan. 29, 2003, at 1, *available at* http://ita.law.uvic.ca/documents/Aguas-Bolivia Response.pdf.

81 *Ibid.*

82 *Ibid.*, at 2.

83 ICSID Secretariat, *Possible Improvements For The Framework For Investor-State Arbitration* 9, Oct. 22, 2004, *available at* http://www.worldbank.org/icsid.

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have the authority to accept and consider submissions from third parties."[84] The Discussion Paper did not specify the form of the third-party submissions, *i.e.*, whether they would be written, oral, or both.

After receiving comments from member States, arbitration specialists, and business and civil society groups, the ICSID Secretariat published a second Discussion Paper in May 2005 entitled "Suggested Changes to the ICSID Rules and Regulations."[85] In addition to some further elaboration of the proposed amendments to the ICSID Rules, this paper contained the amendments themselves in draft form. Regarding third-party practice, the Secretariat noted that its proposed amendments had elicited disagreement among commentators, some of whom had expressed concerns that third-party participation would unduly burden the disputing parties.[86]

The draft amendments concerning third-party practice appeared under draft Rule 37, titled "Visits and Inquiries; Submissions of Non-Disputing Parties." Of particular interest for purposes of understanding and perhaps interpreting the draft amendments are the Notes that appear below the proposed amended Rule. According to the Secretariat, these Notes provide "the background and rationale of each proposed change."[87]

The 2005 draft Rule 37(2) provides:

> After consulting both parties as far as possible, the tribunal may allow a person or entity that is not a party to the dispute (hereinafter called the 'non-disputing party') to file a written submission with the tribunal. In determining whether to allow such a filing, the tribunal shall consider, among other things, the extent to which:
>
> (a) the non-disputing party submission would assist the tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
>
> (b) the non-disputing party submission would address a matter within the scope of the dispute;
>
> (c) the non-disputing party has a significant interest in the proceeding.
>
> The tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity of presenting their observations on the non-disputing party submission.

The Note under draft Rule 37 provides:

> The suggested changes would make clear that ICSID tribunals may accept and consider written submissions from a non-disputing person or a State, after consulting with both parties as far as possible. The tribunal would have to be satisfied that any such submissions would assist the tribunal in the determination of a factual or

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84 *Ibid.*

85 ICSID Secretariat, *Suggested Changes to the ICSID Rules and Regulations* 4, May 12, 2005, *available at* http://www.worldbank.org/icsid.

86 *Ibid.*

87 *Ibid.*, at 5.

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> legal issue within the scope of the dispute, that the non-disputing party has a significant interest in the dispute and that this would not disrupt the proceedings or unfairly burden either party.[88]

This Note clarifies that the new subsection (2) of Rule 37 contemplates only *written amicus* submissions. It does not mention oral submissions and is silent on whether the third party or parties would be allowed access to the record or other arbitration materials in connection with their submissions.

As enacted, Rule 37(2), which became effective on April 10, 2006, provides:

> 2. After consulting both parties, the tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "non-disputing party") to file a written submission with the tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the tribunal shall consider, among other things, the extent to which:
>
> (a) the non-disputing party submission would assist the tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
>
> (b) the non-disputing party submission would address a matter within the scope of the dispute;
>
> (c) the non-disputing party has a significant interest in the proceeding.
>
> The tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.

Subsection (2) of Rule 37 is a new addition to the Rule, which previously concerned only the tribunal's ability to visit places connected to the dispute. (This ability is now the subject of subsection (1) of the same Rule). Certain aspects of new Rule 37(2) merit close attention.

In particular, the Rule establishes firmly an ICSID tribunal's authority to accept third-party written submissions, even where the consent of the disputing parties is lacking. Furthermore, the Rule does not restrict the type of third party that may make a submission, since it refers to any "person or entity" that meets the Rule's requirements. This broad wording could include, for instance, private citizens, civic and business organizations, or local and national Governments.

The Rule also incorporates procedural safeguards which aim to ensure that the disputing parties are treated with equality and accorded due process. Thus, the parties are permitted to respond to the third-party submissions, while the tribunal must ensure that these submissions do not disrupt the proceedings or unduly prejudice or burden any of the parties.

The wording of the enacted Rule 37(2) differs somewhat from the one proposed in 2005. Specifically, the 2005 draft required the tribunal to consult with the disputing

88 *Ibid.*, at 11.

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parties "as far as possible." This requirement has been omitted from the Rule as adopted. Moreover, the enacted Rule's first sentence contains the requirement that the proposed written submission concern "a matter within the scope of the dispute." This requirement is repeated in the list of the nonexclusive factors that the tribunal must consider in determining whether to allow third parties to file written submissions. A plausible reason for this repetition is to make relevance a *sine qua non* of any third-party petition under the Rule. Since the list of factors to be considered is nonexclusive, some tribunals may interpret it as a "balancing test" among various considerations, of which relevance is one. By including relevance in the first sentence of the Rule, however, the drafters may have sought to ensure that this would be the primary, although not the exclusive, criterion by which each third-party petition would be evaluated.

The shift in ICSID case law: Suez *and* Biwater. On May 19, 2005, during the same month that the ICSID Secretariat circulated the draft amendments to the ICSID Rules, the ICSID tribunal in *Suez* ruled on a petition by five NGOs to participate in the proceedings before it as *amici curiae*.[89] The *Suez* case arose from yet another water concession, this one granted by Argentina to a consortium of companies, including Suez. The third-party petitioners in *Suez* asserted similar reasons warranting their participation to those asserted by the petitioners in *Tunari*. Specifically, they referred to the "basic public interest" implicated in the case, and the "fundamental rights of people living in the area affected by the dispute."[90]

The tribunal ruled that because the ICSID Rules did not contain any provisions governing the submission of written pleadings by third parties, it had the procedural power to determine whether to accept such submissions under Article 44 of the ICSID Convention, which provides, in relevant part: "[i]f any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the tribunal shall decide that question."[91] Exercising this residual procedural power, the tribunal established the following criteria by which it would evaluate an *amicus* petition: (i) the appropriateness of the subject matter of the case, (ii) the suitability of the petitioning third party to act as *amicus* in a given case, and (iii) the procedure by which the *amicus* submission is made and considered.[92] The tribunal then proceeded to apply this three-pronged test to the *amicus* petition before it.

The tribunal determined first that the subject matter of the case was appropriate for the participation of the petitioning third parties. Specifically, it found that "the present case potentially involves matters of public interest. . . .The factor that gives this case particular public interest is that the investment dispute centers around the water distribution and sewage systems of a large metropolitan area. . . . Any decision rendered in this case, whether in favor of the Claimants or the Respondent, has the potential to affect the operation of those systems and thereby the public they serve."[93] The tribunal

89 *Suez II*, *supra* n. 31.
90 *Ibid.*, at 2.
91 *Ibid.*, at 5.
92 *Ibid.*, at 7–8.
93 *Ibid.*, at 8–9.

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ruled further that other courts and tribunals faced with matters of public interest of a similar nature had been receptive toward *amicus* submissions from suitable third parties. Such submissions, it found, likely would assist the tribunal in its work, since they would "afford the tribunal perspectives, arguments, and expertise that will help it arrive at a correct decision."[94] In addition, like the *Methanex* tribunal, it observed that the participation of third parties would enhance the transparency of the proceedings, which in turn would vest any award by the tribunal with additional legitimacy.[95]

With respect to petitioners' suitability, the tribunal opined that it would accept submissions only from parties that could demonstrate to the tribunal's satisfaction that they had the expertise, experience, and independence to be of assistance. Consequently, prior to making a submission, a third party was directed to seek the tribunal's leave, which it would grant only after it evaluated the petitioner's credentials and expertise, among other things.

Finally, the tribunal stated that if it chose to grant petitioners permission to file an *amicus* submission, it would establish appropriate procedures that would allow the third parties to present their views, while safeguarding the procedural and substantive rights of the disputants and the fair and efficient administration of the proceedings.

Ultimately, the tribunal found that petitioners' request to make written submissions was premature because the tribunal was confronted with questions of jurisdiction, which the disputing parties had addressed thoroughly. The tribunal determined that additional submissions by the petitioners were not likely to be helpful or probative.[96]

On December 1, 2006, the same five NGOs filed a new petition with the tribunal, asking to make a single, joint written *amicus* submission. The Claimants objected to the application, while Argentina did not.

In its decision,[97] the tribunal noted that in the time elapsed between its 2005 decision and the current one, ICSID had enacted amendments to its Rules, including Rule 37(2). Recognizing that the new rules did not apply to the dispute before it, since the parties had agreed to arbitrate under the old Rules, the tribunal nevertheless observed that Rule 37(2) was compatible with its prior decision.

In evaluating the suitability of the petitions, the tribunal found that the petitioners had supplied sufficient information to demonstrate that they were respected organizations with particular expertise in the relevant fields of human rights, water services, and the environment.[98] It also affirmed its earlier ruling that the subject matter of the dispute was appropriate for *amicus* petitions, and, in particular, it noted the potential impact of its decision "on how governments and foreign investor operators of the water industry approach concessions and interact when faced with difficulties."[99]

The tribunal rejected Claimants' argument that the petitions were inappropriate because they would not provide new factual information but only legal argumentation.

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94 *Ibid.*, at 9.
95 *Ibid.*, at 9–10.
96 *Ibid.*, at 2.
97 *Suez I*, *supra* n. 30.
98 *Ibid.*, at 8.
99 *Ibid.*, at 9.

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Observing that third parties could offer arguments, perspectives, and expertise that the disputing parties did not or could not provide, the tribunal noted, in this regard, that the text of the new Rule 37(2) supported a flexible approach toward the role of *amici* because it contemplates *amici* assisting the tribunal "in the determination of a factual or legal issue."[100]

The tribunal thus ordered that (i) petitioners file by a certain date a single joint *amicus* submission; (ii) the submission comply with certain page limitations and formatting requirements; (iii) the submission be prepared in both English and Spanish; and (iv) the submission be unaccompanied by supporting documents, which the tribunal would request as necessary. The tribunal reiterated its earlier holding that all disputing parties would have the opportunity to comment on the *amicus* submission.[101]

Finally, while the tribunal accepted the general proposition that an *amicus* needs to have sufficient information about the case to provide a helpful submission, it determined that petitioners in the case before it had sufficient access to information about the case through various sources, including the tribunal's award on jurisdiction. Consequently, the tribunal denied petitioners' request to access documents or pleadings and declined to opine on the general question whether, and under what circumstances, third parties may access some or all documentary evidence in an arbitration case.[102]

At about the same time, five NGOs filed a petition for *amicus* status with the *Biwater* tribunal. This dispute also concerned a water concession, this time involving an investment made by a British company in Tanzania. As justification for their request, petitioners posited the paramount importance of water and sanitation services for the "basic human rights" and overall well being of the Tanzanian people, as well as the case's potential political ramifications, since it raised "a wide range of potential issues of concern to developing countries . . . that have privatized, or are contemplating a possible privatization of, water or other infrastructure services."[103]

Petitioners also emphasized the procedural feasibility of their participation, citing to the developing history of *amicus* interventions in investment arbitrations since *Methanex*, as well as to the fact that "there is no recorded instance of the abuse of [the

100 *Ibid.*, at 10.

101 *Ibid.*, at 13–14.

102 In a more recent case, an ICSID tribunal did grant the *amicus* petitioners access to certain of the parties' documents. *See* Piero Foresti *et al*. v. Republic of South Africa, ICSID Case No. ARB(AF)/07/01, Letter from the Tribunal to the Legal Resources Centre and the International Commission of Jurists dated Oct. 5, 2009, at 1 ("the [nondisputing parties] must be allowed access to those papers submitted to the Tribunal by the Parties that are necessary to enable the [nondisputing parties] to focus their submissions upon the issues arising in the case and to see what positions the Parties have taken on those issues.").

103 Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case. No. ARB/05/22, Petition for *Amicus Curiae* Status, Nov. 27, 2006, at 7–8, *available at* http://ita.law.uvic.ca/documents/investment_petition_arb0522.pdf.

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arbitral] process by any petitioner or accepted *amicus curiae*."[104] Finally, petitioners pled that the participation of *amici* in the arbitration would increase "the credibility of the arbitration process in the eyes of the public."[105]

The Claimant opposed the participation of *amici*, while Tanzania did not.[106] The parties in *Biwater* agreed that the ICSID Rules, as amended, would apply to the arbitration as of the date of their enactment.[107] Consequently, the *Biwater* tribunal evaluated the *amicus* petition before it under new Rule 37(2). In a decision rendered on February 2, 2007, the tribunal accepted the petition. It held that (i) a submission by petitioners had "the reasonable potential to assist the Arbitral tribunal by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties. . . ."; (ii) it would accept prima facie petitioners' assurance that they would address matters within the scope of the dispute, while reserving the right to reject any submission that did not do so; and (iii) each petitioner had demonstrated it had a sufficient interest in the proceeding.[108] In granting the petition, the tribunal also cited with approval the findings of the tribunals in *Methanex* and *Suez II* with respect to the public interest implicated in investment arbitration and the increased transparency that the participation of *amici* brings to otherwise "closed" arbitral proceedings.[109]

To address the procedural fairness concerns raised by the Claimant, the tribunal established a two-stage process for petitioners to file their joint submission. In the first stage, the *amici curiae* would file their submission, which would have to comply with specific length and formatting limitations (50 pages, double-spaced) and could not include any exhibits.[110] The tribunal scheduled the filing three weeks before the hearing on the merits to give the parties time to decide whether and how they wished to respond. The second stage would take place after the hearing, when the tribunal would issue additional procedural directions, depending on whether the parties wished to comment further on the *amicus* submission and whether the tribunal sought any additional submissions or evidence from the *amici*.[111]

After the hearing, the parties agreed that no further submissions from *amici* would be necessary. In its final award, the tribunal discussed at length facts and arguments raised by the *amici*[112] and concluded that their submissions had been useful and informative.[113]

104 *Ibid.*, at 13.
105 *Ibid.*, at 14.
106 Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case. No. ARB/05/22, Procedural Order No. 5, *supra* n. 30, paras. 31–37, 42–45.
107 *See ibid.*, para. 16.
108 *Ibid.*, para. 50.
109 *Ibid.*, paras. 51–55.
110 *Ibid.*, para. 60.
111 *Ibid.*
112 *Ibid.*, paras. 370–91.
113 *Ibid.*, para. 392.

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Treatment of Third-Party Submissions by Other Arbitral Rules and Investment Treaties

None of the other arbitration rules commonly used for investment arbitrations contain express provisions for third-party participation. Although the UNCITRAL Rules are silent on the issue, the first investor-state cases where *amicus* submissions were accepted—*Methanex* and *UPS*—were both governed by the UNCITRAL Rules.[114] Nevertheless, to avoid any doubt whether the UNCITRAL Rules permit such participation, the Paulsson/Petrochilos Report recommended that a new Article 15(5) be adopted, which would make explicit tribunals' authority under the Rules to accept submissions from nonparties.[115] Their proposed Rule reads as follows:

> Unless the parties have agreed otherwise, the Arbitral tribunal may, after having consulted with the parties, and especially in cases raising issues of public interest, allow any person who is not a party to the proceedings to present one or more written statements, provided that the tribunal is satisfied that such statements are likely to assist it in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight which the parties are unable to present. The Arbitral tribunal shall determine the mode and number of such statements after consulting with the parties.[116]

The proposed Rule resembles the rule adopted by ICSID, with one notable difference. While ICSID Rule 37(2) leaves the ultimate determination of whether to accept an *amicus* submission entirely within the tribunal's discretion, by including the phrase, "[u]nless the parties have agreed otherwise," the proposed UNCITRAL Rule would preclude a tribunal from accepting *amicus* submissions if both disputing parties objected to them. The NGOs IISD and CIEL have proposed revising the UNCITRAL Rules to incorporate a provision akin to ICSID Rule 37(2).[117]

The 2004 U.S. Model BIT contains an express provision granting the tribunal authority to accept submissions from nonparties,[118] and provisions of this nature appear

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114 Decisions on third-party participation in those two cases were also rendered prior to the NAFTA FTC's issuance of its Interpretation and guidelines addressing the issue.

115 Paulsson/Petrochilos Report, *supra* n. 38, at 71–72.

116 *Ibid*., at 72.

117 The proposal reads as follows: "15(4): In disputes involving a State as a party the tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the 'non-disputing party') to file a written submission with the tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the tribunal shall consider, among other things, the extent to which: (a) the non-disputing party submission would assist the tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; and (b) the non-disputing party submission would address a matter within the scope of the dispute. The tribunal shall ensure that non-disputing party submissions do not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on non-disputing party submissions." IISD/CIEL Report, *supra* n. 39, at 12.

118 Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment,

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in all of the United States' recent agreements, including the U.S.-Chile FTA,[119] U.S.-Singapore-FTA,[120] DR-CAFTA,[121] Morocco FTA,[122] and the U.S. BITs with Uruguay[123] and Rwanda.[124]

Article 39 of the Canada Model FIPA[125] likewise provides for the filing of written submissions by nondisputing parties. That article also incorporates language from the NAFTA FTC's guidelines, providing that, in determining whether to accept such submissions, tribunals assess the extent to which:

> (a) the non-disputing party submission would assist the tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
>
> (b) the non-disputing party submission would address a matter within the scope of the dispute;
>
> (c) the non-disputing party has a significant interest in the arbitration; and
>
> (d) there is a public interest in the subject-matter of the arbitration.

The provision also provides that, to protect fairness and safeguard the integrity of the arbitral process, the tribunal must ensure that:

> (a) any non-disputing party submission does not disrupt the proceedings; and
>
> (b) neither disputing party is unduly burdened or unfairly prejudiced by such submissions.

Similarly, Annex C.39 of Canada's Model FIPA outlines the procedure by which a prospective *amicus* can petition the tribunal to file a submission, and contains form and content requirements for the submission itself. This provision appears in Canada's agreement with Peru.[126]

Finally, Norway's draft Model BIT provides that the tribunal has authority to accept written submissions from nonparties "provided that the tribunal has determined that they are directly relevant to the factual and legal issues under consideration."[127]

September 15, 2004, art. 28(3), *available at* http://www.state.gov/documents/organization/38710.pdf.

119 United States-Chile Free Trade Agreement, *supra* n. 47, art. 10.19(3) (also providing that the "submissions shall be provided in both Spanish and English, and shall identify the submitter and any Party, other government, person, or organization, other than the submitter, that has provided, or will provide, any financial or other assistance in preparing the submission.").

120 United States-Singapore Free Trade Agreement, *supra* n. 46, art. 15.19 (providing that the "tribunal shall have the authority to accept and consider *amicus curiae* submissions from any persons and entities in the territories of the Parties and from interested persons and entities outside the territories of the Parties.").

121 DR-CAFTA, *supra* n. 48, art. 10.20(3).

122 United States-Morocco Free Trade Agreement, *supra* n. 49, art. 10.19(3).

123 U.S.-Uruguay BIT, *supra* n. 50, art. 28(3).

124 U.S.-Rwanda BIT, *supra* n. 51, art. 28(3).

125 Canada Model FIPA, *supra* n. 52, art. 39.

126 Agreement between Canada and Peru for the Promotion and Protection of Investments, *supra* n. 53, art. 39; Canada-Peru Free Trade Agreement, *supra* n. 53, art. 39.

127 Agreement Between the Kingdom of Norway and _____ for the Promotion and Protection of Investments, *supra* n. 54, art. 21(3).

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PUBLIC ACCESS TO ARBITRAL HEARINGS

Along with access to documents and third-party participation, constituencies have clamored for open hearings in investor-state arbitrations. The fact that hearings in investor-state proceedings are typically closed to the public has given rise to criticism that the arbitral process is secret and suspect.[128] To date, there have been open hearings in some NAFTA Chapter 11 cases, although opening those hearings to the public is not mandatory. Likewise, the revisions to the ICSID Rules also contemplate open hearings, but the parties retain discretion to keep their hearings closed. In some recent BITs and FTAs, by contrast, opening hearings to the public is compulsory. While no such hearings have yet been held under those agreements, the experience with open hearings in the NAFTA Chapter 11 context may serve as a model for future open hearings.

The NAFTA Experience: The First Open Hearings

As with the other transparency initiatives in investor-state arbitration, the first petitions for public access to hearings occurred in NAFTA Chapter 11 arbitrations governed by the UNCITRAL Arbitration Rules. Article 25(4) of those Rules provides that "[h]earings shall be held *in camera* unless the parties agree otherwise."

Unlike the case with access to documents and *amicus* submissions where the governing rules as well as the NAFTA's text were silent, the issue of presence at hearings was addressed by the governing rules and, therefore, not amenable to any interpretation by the NAFTA Parties. With this in mind, on the same day in October 2003 that the NAFTA Free Trade Commission announced the Parties' Interpretation regarding *amicus* submissions and guidelines for *amicus* participation, the United States and Canada issued public statements granting their consent to open all Chapter 11 hearings to the public:

> Having reviewed the operation of arbitration proceedings conducted under Chapter Eleven of the North American Free Trade Agreement, the [United States] [Canada] affirms that it will consent, and will request the consent of disputing investors and, as applicable, tribunals, that hearings in Chapter Eleven disputes to which it is a party be open to the public, except to ensure the protection of confidential information, including business confidential information. [The United States] [Canada] recommends that tribunals determine the appropriate logistical arrangements for open hearings in consultation with disputing parties. These arrangements may include, for example, use of closed-circuit television systems, Internet webcasting, or other forms of access.[129]

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128 *See, e.g., NOW with Bill Moyers: Trading Democracy* (PBS television broadcast February 1, 2002) (proclaiming that NAFTA Chapter 11 claims "are being decided not in open court, but in what has become a system of private justice, in secret tribunals. . . . Nothing is open to the public."), transcript *available at* http://www.pbs.org/now/transcript/transcript_tdfull.html.

129 Statement on Open Hearings in NAFTA Chapter Eleven Arbitrations, October 7, 2003, *available at* http://www.ustr.gov/assets/Trade_Agreements/Regional/NAFTA/asset_upload_

In that same statement, the United States and Canada announced that they "will continue to work with Mexico on this matter."[130]

One year later, and coinciding with the first open NAFTA Chapter 11 hearing, the NAFTA FTC issued a statement acknowledging that Mexico had joined the United States and Canada in granting its consent to open hearings.[131]

Although the NAFTA States now have consented to open hearings the consent of the claimant still is necessary for the hearings to be made open. This consent has been granted in several cases, while in several more the consent has been withheld and the hearings, accordingly, have remained closed to the public. In each of the NAFTA Chapter 11 cases where the hearings were open, the arbitration was governed by the UNCITRAL Arbitration Rules. Most, but not all of those cases, were administered by ICSID.

In every open NAFTA Chapter 11 hearing, the hearing was broadcast to a separate room for public viewing. In no case were members of the public present in the hearing room itself. Granting access in this manner avoids the disruption associated with opening the hearing room to the public. It also avoids issues that may arise concerning the arbitrators' ability to eject disruptive persons from the hearing room and potential attendant consequences from their having taken such action.

In each case, the public viewing room was situated in an area that allowed members of the public to come and go as they pleased, without obtaining building passes in advance. Observers have reported that attendance at these hearings was at first large and then quickly dissipated. Attendees have included reporters, students, and, in at least one case, opposing counsel who had a pending arbitration against the respondent State in a nearly identical case. With one exception, described below, *amici* have not been granted any special access to the hearings, beyond that which has been provided to every member of the public.

The first NAFTA Chapter 11 hearing to be open to the public was the *Methanex* hearing on the merits, in June 2004.[132] Later that year, in December, the *Canfor* jurisdictional hearing was broadcast to the public in the same manner.[133] The following

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file143_3602.pdf; Statement of Canada on Open Hearings in NAFTA Chapter Eleven Arbitrations, *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/open-hearing.aspx?lang=eng.

130 Press Release, NAFTA Free Trade Comm'n, *NAFTA Commission Announces New Transparency Measures*, Oct. 7, 2003, *available at* http://www.ustr.gov/Document_Library/Press_Releases/2003/October/NAFTA_Commission_Announces_New_Transparency_Measures.html?ht=.

131 Press Release, USTR-NAFTA, *NAFTA Free Trade Commission Joint Statement—A Decade of Achievement*, July 16, 2004, *available at* http://www.ustr.gov.Document_Library/Press_Releases/2004/July/NAFTA_Free_Trade_Commission_Joint_Statement_-_A_Decade_of_Achievement.html.

132 *See* Press Release, ICSID, *Methanex v. United States of America: NAFTA/UNCITRAL Arbitration Rules Proceeding*, June 8, 2004, *available at* http://icsid.worldbank.org/ICSID/ICSID/ViewNewsReleases.jsp.

133 *See* Press Release, ICSID, *Canfor Corporation v. United States of America: NAFTA/UNCITRAL Arbitration Rules Proceeding*, Dec. 2, 2004, *available at* http://icsid.worldbank.org/ICSID/ICSID/ViewNewsReleases.jsp.

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year, in December 2005, the *UPS* hearing was opened to the public.[134] When business confidential information was discussed during that hearing, the cameras broadcasting the hearing to the public room were shut off.[135]

The *Glamis Gold* merits hearing, held in two phases in August and September 2007, was open to the public[136] and posed unique challenges. There, the confidential information at issue was not commercially sensitive but, rather, information concerning the precise location of Native American sites that the United States has a legal obligation to keep secret.

One of the *amici* in the case, the Quechan Indian Nation, wished to attend arguments concerning these issues. Because the information that the United States was obliged to keep confidential was obtained from the Quechan Nation, there was no legal impediment to the Quechan hearing this portion of the argument and testimony. To accommodate the Quechan, ICSID arranged two public hearing rooms—one for members of the general public and one restricted to members of the Quechan Nation and their counsel. When confidential information concerning the location of Native American sites was discussed, the camera to the public hearing room was shut off, while the one to the Quechan's room remained on.

All of the aforementioned NAFTA Chapter 11 UNCITRAL cases were administered by ICSID, and their hearings were broadcast to publicly accessible rooms in the World Bank. The consolidated case brought by the Canadian cattlemen against the United States under the UNCITRAL Rules, however, was not administered by any institution. Claimants, who numbered more than 100, expressed an interest in observing the jurisdictional hearing, which was held in October 2007 at a private club in Washington, D.C. The parties therefore arranged for the hearing to be transmitted via video to a location in Canada that was most convenient for the Claimants.[137]

Even where the hearings in NAFTA Chapter 11 cases have remained closed to the public, in many cases, but not all, transcripts of those hearings have been posted to the State Party's website.[138]

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134 *See* Press Release, ICSID, *United Parcel Service of America, Inc. v. Government of Canada: NAFTA/UNCITRAL Arbitration Rules Proceeding*, Dec. 7, 2005, *available at* http://icsid.worldbank.org/ICSID/ICSID/ViewNewsReleases.jsp.

135 *Ibid.*

136 *See* Press Release, ICSID, *Glamis Gold Ltd. v. United States of America: NAFTA/UNCITRAL Arbitration Rules Proceeding*, Aug.13, 2007, *available at* http://icsid.worldbank.org/ICSID/ICSID/ViewNewsReleases.jsp.

137 *See* Canadian Cattlemen for Free Trade v. United States of America, NAFTA/UNCITRAL, Transcript of Hearing Day 1, Oct. 9, 2007, at 9, *available at* http://www.state.gov/documents/organization/93610.pdf.

138 *See, e.g.*, Grand River Enter. Six Nations Ltd. *et al*. v. United States of America, NAFTA/UNCITRAL, *available at* http://www.state.gov/s/l/c11935.htm; Int'l Thunderbird Gaming Corp. v. Mexico, NAFTA/UNCITRAL, *available at* http://www.naftaclaims.com/disputes_mexico_itgc.htm; *but see Pope & Talbot*, Order of Mar. 11, 2002, para. 14 (directing that hearing transcripts may not be made public when the hearing was held *in camera*).

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Open Hearings Under the ICSID Rules: Still Subject to the Parties' Consent

Until 2003, the ICSID Rules addressing attendance at hearings remained unchanged. Rule 32(2) of the 2003 ICSID Rules provided as follows:

> The tribunal shall decide, with the consent of the parties, which other persons besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the tribunal may attend the hearings.

In advance of the 2006 Amendments to the Rules, the ICSID Secretariat proposed draft Rule 32(2).[139] The Secretariat helpfully presented the proposed text in "track changes" format comparing the proposed rule with the existing rule:

> After consultation with the Secretary-General and with the parties as far as possible, ~~The~~ the tribunal ~~shall decide, with the consent of the parties, which~~ may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the tribunal ~~may~~, to attend or observe all or part of the hearings. The tribunal shall for such cases establish procedures for the protection of proprietary information and the making of appropriate logistical arrangements.

The Note under Rule 32 provided:

> In certain cases, it would be useful to have hearings open to persons other than those directly involved in the proceeding. The suggested changes would make clear that this might be considered by a tribunal after consultation with the Secretary-General and both parties as far as possible. Such consultation with the parties would ensure that any objection or concern they may have will be taken into account by the tribunal in considering whether to allow any third parties to attend or observe the hearings. The changes would also require the tribunal for such cases to prescribe procedures to protect proprietary information and make the appropriate logistical arrangements.

The rule in its proposed form was not adopted. Rather, Rule 32(2), as amended, provides:

> Unless either party objects, the tribunal, after consultation with the Secretary General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.

While the proposed rule would have granted the tribunal discretion to open the hearings after taking into account the parties' views on the matter, the amended rule places the ultimate determination in the hands of the parties: Any party wishing to resist open hearings can raise an objection and prevent the tribunal from exercising its discretion to open them.

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139 ICSID Secretariat, *Suggested Changes to the ICSID Rules and Regulations*, *supra* n. 85, at 4.

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Like the proposed rule, the amended subsection (2) of Rule 32 also ensures that third-party attendance or observation poses few if any logistical difficulties by requiring the tribunal to consult with the Secretary-General of ICSID prior to opening the hearing. In addition, the tribunal must oversee all necessary arrangements for the seamless conduct of the hearing. Finally, the Rule addresses confidentiality concerns by requiring the tribunal to extend protection over proprietary or privileged information that the disputing parties may use during the course of the proceedings.

At present, it does not appear that any ICSID hearings have been made open to the public. In one of the ICSID decisions to address the issue of open hearings, the *Biwater* tribunal rejected summarily third party petitioners' plea to address the tribunal during the hearing and to open the hearing to the public. The tribunal noted that ICSID Rule 32(2) required the tribunal to obtain the parties' consent before taking the action requested by petitioners, and because the Claimant had objected, the tribunal was obligated to deny petitioners' request.[140]

The Future for Open Hearings

As previously noted, the UNCITRAL Rules provide that the hearings shall be held *in camera*, unless the parties otherwise agree. The Paulsson/Petrochilos Report proposed retaining this language in the rules, while adding the following sentence immediately following:

> After consulting the parties and having regard to the circumstances and article 15, paragraph 1, the Arbitral tribunal may allow a third party to attend all or part of the hearings, subject to appropriate logistical arrangements. The Arbitral tribunal shall for such cases issue necessary directions under article 15, paragraph 1 for the protection of proprietary or privileged information.

If this proposal were adopted, it would have little effect on the frequency of open hearings in UNCITRAL arbitrations, as the parties would retain the ability to oppose having the hearings made public.

The IISD/CIEL Report calls for a revision in line with that adopted by the United States in its post-NAFTA agreements. Its proposed revision, with changes from the original shown in italics, reads as follows:

> Rule 25(4): *Except in disputes involving a State as a party*, hearings shall be held in camera unless the parties agree otherwise. . . .[]
>
> *25(4) bis: In disputes involving a State as a party, hearings shall be open to the public. The tribunal shall establish appropriate logistical arrangements, including procedures for the protection of confidential business information and information which is privileged or otherwise protected from disclosure under a party's domestic law.*[141]

140 *Biwater*, Procedural Order No. 5, *supra* n. 30, paras. 69–72.

141 IISD/CIEL Report, *supra* n. 39, at 9.

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Other arbitration rules provide for closed hearings, unless the parties and/or the tribunal otherwise agree.[142]

In its revised 2004 U.S. Model BIT, the United States indicated its intention for investor-state arbitral hearings under its agreements to be open to the public by including Article 29(2), which provides:

> The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.

This rule has been incorporated in the United States-Singapore FTA,[143] the United States-Chile FTA,[144] the Dominican Republic-CAFTA,[145] the United States-Morocco FTA,[146] the Uruguay BIT,[147] and the Rwanda BIT.[148]

Canada has also revised its model FIPA to provide for open hearings and has incorporated this provision into its agreement with Peru.[149]

Norway's draft Model BIT likewise calls for open hearings, providing, in relevant part, "The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements."[150] The commentary to the draft Model BIT affirms that hearings should be public and elaborates on some of the logistical arrangements that could accommodate this requirement: "Public hearings may be held by providing places for spectators, by providing separate auditoriums, by televising the hearings, by means of webcasting, etc. The most appropriate methods will vary from case to case and from location

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142 *See* ICC Rules of Arbitration, art. 21(3), in force as of Jan. 1, 1998, *available at* http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf (providing that the hearings shall be conducted in private and third persons be admitted only with the permission of the parties and the tribunal); SCC Arbitration Rules, art. 27(3), *available at* http://www.sccinstitute.com/filearchive/2/21686/2007_arbitration_rules_eng.pdf ("Unless otherwise agreed by the parties, hearings will be in private."); LCIA Arbitration Rules, art. 19.4, effective January 1, 1998, *available at* http://www.lcia-arbitration.com ("All meetings and hearings shall be in private unless parties otherwise agree or the Arbitral Tribunal directs otherwise.").

143 United States-Singapore Free Trade Agreement, *supra* n. 46, art. 15.20(2).

144 United States-Chile Free Trade Agreement, *supra* n. 47, art. 10.20(2).

145 DR-CAFTA, *supra* n. 48, art. 10.21(2).

146 United States-Morocco Free Trade Agreement, *supra* n. 49, art. 10.20(2).

147 U.S.-Uruguay BIT, *supra* n. 50, art. 29(2).

148 U.S.-Rwanda BIT, *supra* n. 51, art. 29(2).

149 Canada FIPA Model, *supra* n. 52, art. 38 (2004) ("Hearings held under this Section shall be open to the public. To the extent necessary to ensure the protection of confidential information, including business confidential information, the tribunal may hold portions of hearings *in camera*."); Agreement Between Canada and Peru for the Promotion and Protection of Investments, *supra* n. 53, art. 38(1); Canada-Peru Free Trade Agreement, *supra* n. 53, art. 835(1)–(2).

150 Agreement Between the Kingdom of Norway and _____ for the Promotion and Protection of Investments, *supra* n. 54, art. 21(2).

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to location, and the logistics are therefore to be clarified by the tribunal in consultation with the parties."[151151]

CONCLUSION

There have been great strides over the past decade in increasing the transparency of investor-state arbitrations. Today, it is far more common than not for awards in such arbitrations to be published. While publication of awards is sometimes required under the governing treaty, in other cases, one or both of the parties publishes the award. Moreover, where there is no requirement of publication and disputing parties do not seek to publish the award, arbitral institutions sometimes publish redacted versions of the awards. Public access to documents other than the award remains far less common. With the exception of arbitrations taking place under the NAFTA, CAFTA, or a few select other treaties, the parties' submissions and documentary evidence generally remain confidential.

Public access to awards and information concerning the filing of claims has led to calls for nonparty participation in these arbitrations, which is increasingly accepted. Several treaties expressly provide for such participation as do recent revisions to the ICSID Arbitration Rules. Even in the absence of express provisions, arbitral tribunals have found that they have the authority to accept such submissions in appropriate circumstances. Tribunals generally, with one recent exception, have not granted *amici* any greater access to information generated during the course of the arbitration than that which is otherwise provided to the public.

Finally, open hearings remain rare. At present, it appears that the only open hearings have occurred in NAFTA Chapter 11 arbitrations, where some hearings have been broadcast to a public location. Several recent treaties require open arbitral hearings, subject to appropriate logistical arrangements. In most instances, however, the parties retain the ability to determine whether or not to open the hearings to the public.

151 Investment Treaty Arbitration, *Comments on the [Norwegian] Model for Future Investment Agreements* 38 (2007), *available at* http://ita.law.uvic.ca/documents/NorwayModel2007-commentary.doc.

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Chapter 8

"Equality of Arms" in Investment Arbitration: Procedural Challenges*

*Thomas W. Wälde***

INTRODUCTION

"Equality of arms" is a foundation principle of investment arbitration procedure. A government sued on the basis of an investment treaty, signed to encourage foreign and private investment by promising effective protection, should prosecute its case vigorously but within the framework of the principles of "good faith" arbitration,[1] the applicable

* This chapter is drawn from a longer one prepared for this book by Thomas W. Wälde at the time of his tragic death, which cut short extensive discussion of editorial changes. Therefore, the editor takes responsibility for any possible departures from his intended meaning. The chapter, in turn, was based on a presentation made at an IHEI–University of Paris II colloquium in April 2008. A disclosure is necessary: Thomas Wälde reviewed, for Claimant, the state of international procedural principles to deal with the extensive interception of e-mail between client and international counsel in the pending *Libananco v. Turkey* case and advised in several other cases where electronic interception by Respondent against Claimants was practiced. The chapter identifies generically situations of arbitral misconduct specific to states and possible procedural remedies. This chapter and a forthcoming article by Dr Abba Kolo on witness intimidation in investment disputes cross-fertilized each other. Professor Wälde expressed his gratitude to numerous commentators on OGEMID for highlighting specific situations and cross-references in response to his query posted in August 2008, with particular thanks to Judge Stephen Schwebel, Dr Chester Brown, and Dr Andres Rigo.

** Professor & Jean-Monnet Chair; CEPMLP/University of Dundee & Essex Court Chambers. Investment cases are cited from: http://ita.law.uvic.ca; "published on TDM" means www.transnational-dispute-management.com

1 The duty to arbitrate in good faith can be inferred from the Preamble of the Vienna Convention on the Law of Treaties: "Every treaty in force is binding upon the parties to it and must be performed in good faith." Also the ILC Model Rules on Arbitral Procedure, 1958: "An undertaking to adjudicate "constitutes a legal obligation which must be carried out in good faith".

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arbitration rules, and with respect to "equality of arms." However, such self-restraint is difficult for some governments, particularly if the investment dispute is seen as a domestic political risk, if the government is used to controlling internal adjudication directly or indirectly, and if there is not a clear internal separation of powers between the dual roles of the government as contracting and dispute party on one hand, and as sovereign, regulator, and "owner" of a massive machinery of government on the other.

This chapter looks at some of the ways "equality of arms" can be impaired by abuse of a Respondent State's resources and powers and the means available to arbitral tribunals to redress the balance. This is a relatively new issue in international arbitration, and this chapter seeks to develop the major approaches, concepts, and principles for tribunals and counsel for managing this problem.

It also looks, in passing, at other issues which may affect equality of arms in investment arbitration: intervention by amicus curiae and measures to enhance public access to the procedure.

GOVERNMENTS COMPARED TO OTHER PARTIES WHO MAY ENGAGE IN MISCONDUCT

While particular types of litigation misconduct may more frequently be engaged in by States, one needs to bear in mind that a good deal of such misconduct can be, and at times is, committed by private parties. Forgery and concealment of documents, illegal surveillance of communications (mail, phone, e-mail, and computer hacking), intimidation of the participants in arbitration (arbitrators, party representatives, counsel, experts and witnesses), lies, and false testimony are not reserved for States only.[2] Arbitration against or between business oligarchs in countries with an underdeveloped system of "rule of law" seems often to involve the use of private detectives to spy on and sometimes visibly follow arbitrators, either to intimidate them or to find evidence for suspected corruption; eavesdropping; threatening witnesses; and forgery, including forged "evidence" of arbitrator corruption.[3]

V. Veeder, *The Lawyer's Duty to arbitrate in Good faith*, 18 Arb. Int'l (2001) 431, 438; *Methanex v. U.S.*: "In the tribunal's view, the Disputing Parties each owed in this arbitration a general legal duty to the other and to the tribunal to conduct themselves in good faith during these arbitration proceedings and to respect the equality of arms between them, the principles of equal treatment and procedural fairness being also required by Article 15(1) of the UNCITRAL Rules", Final Award, August 3, 2005, para. 54; American Law Institute/UNIDROIT Principles of Transnational Civil Procedure, Art. 11.2: "The parties share with the [tribunal] the responsibility to promote a fair, efficient and reasonably speedy resolution of the proceeding. The parties must refrain from procedural abuse. . . ."

2 Bernard Hanotiau, *Misdeeds, Wrongful Conduct and Illegality in Arbitral Proceedings, in* International Commercial Arbitration: Important Contemporary Questions, ICCA Congress Series No. 11, Kluwer, 2003, pp. 261–87.

3 See for instance the *PETREC* case (against NNPC) which reportedly involved both fabrication of forged documents purportedly showing evidence of arbitrator corruption and (at least) telephone surveillance, Gulf Petro Trading Co., Inc. v. Nigerian Nat'l Petrol. Corp, CA 5 (Tex)

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But some governments, particularly in authoritarian systems with weak "rule of law," find it difficult to refrain from using the many means at their disposal to frustrate the arbitration or steer it in their favor. Pierre Lalive[4] noted that a State or State-controlled entity may have "difficulties to accept a basic tenet of arbitral procedure, i.e. the principle of equality of the parties."[5] Politically, investment disputes are sensitive, and they may involve actions by a new government to disown or frustrate agreements made by prior governments[6] and strong political condemnation of an earlier government's dealings with foreign businesses. They may involve the application of public policies important to the government. A loss of such an international arbitration claim can be, therefore, politically very embarrassing. The government, and the particular politicians and civil servants responsible, will therefore be under immense pressure not to lose—at least not during their tenure.[7]

Some governments are particularly prone to deploying the powers of the State in internal disputes, e.g., police, security services, government-controlled press and mass campaigning, tax auditing, environmental compliance control and permitting, travel restrictions, control over postal services, telephones, now Internet and e-mail, and the justice system (prosecution, courts, bailiffs).[8] Accordingly, there is a certain political logic in the use of such services in investor disputes seen by the Respondent government as creating an internal or external political risk. A classic example of a Chief of State's active interest in investment disputes is Josef Stalin's keen interest in the progress of the Lena Goldfields case in the 1930s.[9]

The deployment of bad-faith litigation tactics by a State in investment disputes is substantially different from the use of similar tactics by private litigants. Governments as a rule have more comprehensive and stable machinery at their disposal than a

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2008, January 7, 2008, 512 F.3d 742 www.legaloil.com/NewsItem.asp?DocumentIDX=1144303925&Category=news.

4 P. Lalive, *Some Threats to International Investment Arbitration*, *in* 1 ICSID Rev. 26, 37 (1986); *see* also Boivin, *International Arbitration with States: An Overview of the Risks*, 19 J Int'l Arb. 285 (2002); H. Fox, *States and the Undertaking to Arbitration*, 37 ICLQ 1 (1988); K. Hobér, *Arbitration involving States*, *in* The Leading Arbitrators' Guide to International Arbitration 651 ff (Newmann & Hill, 2nd ed. 2008).

5 The State, said Lalive, "often finds it hard to adjust to the 'rules of the game': it sometimes expects or even requests, directly or indirectly, certain procedural privileges requiring the tribunal to reconcile some flexibility with the fundamental equality of the parties and elementary requirements of justice." Lalive noted the "dual role" of the State: As contract party (in contractual arbitration) or for purposes of investment promotion by guarantees of protection it promises submission to an adjudicatory regime it does not control; but, as government, sovereign and involved in the domestic political process, it wishes to avoid, evade, frustrate and, most of all, not lose a case initiated by a foreign investor.

6 On the political and economic dynamics of investment disputes, see Wälde, *Renegotiating acquired rights in the oil and gas industries: Industry and political cycles meet the rule of law*, 1 J World Energy Law & Business 55–98 (2008).

7 *Ibid.* On the dynamics of state-investor disputes.

8 The *Barcelona Traction* case triggered by the then-Franco-ruled government of Spain against a foreign utility investor is an example: J. Brooks, *Annals of Finance*, TDM.

9 See the historical vignettes by V. Veeder on Soviet concession disputes, in particular the *Lena Goldfields* Arbitration, *supra* note 1

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ruthless "oligarch" to deploy unacceptable means such as intimidation and spying. An oligarch, for example, will have to operate in collusion and under the protection of a State; such protection is by nature unstable. With control of the levers of government, public, formal, legal or secret, the State as a rule will not be disturbed by the existing institutions of justice (police, prosecution, courts); they will be part of its litigation conduct or at least will be persuaded or compelled to tolerate or support it. In case of private litigants, there is at least usually the possibility that such conduct can be managed with the help of the State's system of justice; but if the State itself is responsible for such conduct, no effective help is available.

It is for these reasons that the authoritative *Tadic v. Prosecutor* judgment[10] required the court to go beyond what domestic courts would normally have to do in such situations and take a proactive role in restoring the equality of arms and not just procedural equality before the tribunal. That distinction is essential; it goes beyond the *audiatur et al. tera pars* principle. The idea of a proactive duty to ensure the equality of arms has emerged out of European Convention on Human Rights (ECHR) jurisprudence. However, the scope and limits of that duty are at present not fully understood or defined.

METHODS OF UNDUE INTERFERENCE

Corruption

The "classic" method of undue influence on arbitration is by corrupting or intimidating the arbitration tribunal, or at least a majority of it.[11] But while there have been persistent rumors of corruption of international courts composed of "tenured judges," there has, so far, been no known case of corruption of an investment tribunal.[12] Perhaps investment tribunal members are more senior and experienced and thus better able to avoid inappropriate appearances. Having their reputation at stake, i.e., their essential professional capital, acts as a powerful incentive against corruption which would be likely to become known in the very collegial but competitive senior international arbitrator community. A professional arbitrator has much more to lose than a one-off

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10 http://www.un.org/icty/tadic/trialc2/judgement/index.htm.

11 Hanotiau, *supra* note 2, at 262; A. Sayed, *Corruption, in* International Trade and Commercial Arbitration (2003).

12 In the *PETREC* case (a commercial arbitration), corruption of arbitrators was alleged by the repeatedly losing Claimant but consistently rejected by various national courts; the case seems to have involved forged correspondence with an arbitrator purportedly showing corruption, see *supra* note 3. Hanotiau reports from commercial arbitration—a U.S. case where chairman and counsel shared a hotel room and cases of alleged favoritism—e.g., one-sided listening, ex parte meetings, or "a party-appointed arbitrator having drinks every evening with the party which appointed him", *supra* note 2, at 263, 264. But these cases seem to involve conduct on the borderline between not appropriate (but not corrupt) behavior on one hand and behavior that is only viewed as inappropriate through the lens of the party that lost a case and thereupon searches for reasons for a challenge. For a view of how bad-faith litigation can "taint" an international adjudication, see the separate opinion by *ad hoc* Judge Y. Fortier in the *Qatar-Bahrain* case, I.C.J, March 16, 2001.

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arbitrator or a fixed-term international judge dependent on political support for appointment and reappointment.[13]

Direct or Indirect Pressure on Arbitrators

Direct or indirect pressure on the arbitrators seems, however, much more frequent. Many practitioners report that co-arbitrators, in particular if appointed by government, seem to take instructions, report back, and feel obliged, at least in public, to take positions intended to please their appointing party.[14]

Indeed, the alleged partiality of party-appointed arbitrators feeds much of the gossipy backbiting at arbitration conferences. A frequent arbitrator with good standing in the "market" is much less likely to breach the formal rules and expectations of independence and neutrality than a national arbitrator with no prior international practice, in particular one who is a civil servant or otherwise directly dependent on the State.[15] However, the "local" or state-employed or -funded co-arbitrator, being much more dependent on the State, is consequently also much less persuasive within the tribunal.

Much of such influencing will go on informally in the "black box" of communications and relationships between co-arbitrator and the State, with little evidence unless the pressure was exercised in a particularly clumsy and visible way.

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13 It is therefore not surprising that it is not easy to find the "national" or "*ad hoc* judge" joining the ICJ's majority against their sponsoring countries. But note: the very first contentious case in the PCIJ, S.S. Wimbledon, Judge Anzilotti voted with the majority against Italy's position. In the ICJ, Judge Sir Arnold McNair voted against the UK position on jurisdiction in the Anglo-Iranian Oil Co. Case. Judge Schwebel voted against positions of the United States a dozen times, including its ultimate positions in Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement, Vienna Convention on Consular Relations (1998), La Grand (1999); while dissenting from the judgments of the Court in Military and Paramilitary Activities in and against Nicaragua, he voted against various positions in the case of the United States. There also are instances of judges *ad hoc* voting against positions of the State that appointed them: Madame S. Bastid, *Application for Revision and Interpretation of the Judgment* of 24 February 1982 in the case concerning the Continental Shelf; Sir Elihu Lauterpacht, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Yugoslavia). Van Harten, 182–83, believes "tenured judges" are guaranteed to be more virtuous than professional *ad hoc* arbitrators keen for the next appointment. But it is possible that, in quite narrow markets, the wish and at times need to get reappointed exercises, through competition, reputation, and informal transparency, a much greater discipline for adjudicative integrity. Frequent appointments may thus serve as a continuous discipline.

14 Hanotiau, *supra* note 2, at 264; P. Lalive, *supra* note 4, at 29.

15 Note here the Svea Court of Appeal in the *CME v. Czech Republic* set aside case on the evident self-isolation, continuous leakage of internal tribunal papers (including after the award to support the challenge) to the Respondent and attempts to delay issuance of the CME award in order to ensure that the *Lauder* tribunal's award was published first by the Czech-appointed co-arbitrator: 42 ILM 811 (2003). Partisan conduct by a party-appointed arbitrator seems to be frequent, in particular if the State has a hold over a national acting as co-arbitrator, i.e., presumably frequent situations that are illustrated by the *Himpurna* case (see below). But the more such partisan conduct is visible, the less it is effective. If questionable behavior within an international court becomes visible to its other members, it is also likely to become ineffectual.

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Some States have gone beyond informal persuasion, pressure, and communication with their co-arbitrators. With such States, the professional and honest State-appointed co-arbitrator can be in an impossible situation: fulfil the professional role demanded by the formal rules and the powerful expectations of the arbitration community and risk severe sanctions of a State whose expectations of absolute loyalty and subservience are not met. Jacques Werner reports an arbitration against a State enterprise where one of his co-arbitrators was assassinated after he participated in the arbitration, against a local court injunction.[16] Some of these background elements—authoritarian State, antisuit injunction to disrupt the operation of the tribunal, State enterprise as Respondent—were also present in the well known *Himpurna* case where the State's co-arbitrator tried to participate in the arbitration, against warnings delivered to him at home, only to be met at the airport by the government's security services and compelled to return and thus leave a truncated tribunal to decide.[17] The solution for tribunals has been either to simply take cognizance of such matters and go on with an apparently captive co-arbitrator[18] or, if the government-appointed co-arbitrator refuses to participate or is compelled to stop, to operate as a truncated tribunal.[19]

If the Claimant finds evidence of undue pressure (or volunteered subservience) of an arbitrator with respect to the State, it can try to challenge the arbitrator. A successful challenge, however, may allow the State to replace a clumsy appointee with a more competent and thus more persuasive one—so that the opposing party will often not challenge, preferring to leave the other party to be served haplessly by a visibly subservient arbitrator.

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16 J. Werner, *The Frailty of the Arbitral Process in Cases involving Authoritarian States*, 1 J World Investment 321 (2000); the jailing of the former Secretary-General of CIETAC has been associated by several observers with participation in an arbitration between Pepsi Cola and a Chinese competitor where he agreed with the award; a dissent may have been a safer bet; see J. Paulsson, *Enclaves of Justice*, TDM 1007; Wu Ming, *The Strange Case of Wang Shenchang*, 24 Arb Int'l 63 (2007).

17 Himpurna California Energy Ltd. (Bermuda) v. Republic of Indonesia (Final Award, October 16, 1999), 15 Mealey's Int'l Arb. Rep. A-1 (2000); also Himpurna v. Indonesia, Procedural Order No. 7. Lou Wells, Making Foreign Investment Safe, Property Rights and National Sovereignty 232 ff (2007), disputes some aspects of this account as against J. Werner, *When Arbitration Becomes War*, 19 J Intl Arb 7–103 (2000). The different factual accounts by, on one hand, Professor Wells, and, on the other hand, the tribunal awards and arbitration literature, have been the subject of OGEMID discussion in August 2008. But it is not contested that the Indonesian government tried to compel its own co-arbitrator to undermine the arbitration by withdrawing and that he, in the end, withdrew. On the ability of truncated tribunals to decide, *see* S. Schwebel, *in* International Arbitration: Three Salient Problems, 61 (Cambridge 1987).

18 That has, according to the author's confidential information, also been the practice of an international court when partiality, or more, of its president was suspected or known to the other judges. The early years of the Iran-U.S. Claims tribunal had instances of inappropriate (including physically violent) behavior by party-appointed judges. These instances illustrate the tremendous tensions under which nationals, appointed by their state, often have to operate.

19 Hanotiau, *supra* note 2.

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In addition, if an arbitrator's serious misconduct has deprived one party of a fair hearing, courts have been willing to annul an award.[20] The equality of arms as a key component of the "fair hearing" and "integrity of process" is therefore not necessarily compromised by a subservient arbitrator except if the subservience covers the majority or the whole of the tribunal.

There is a question if subservience of arbitrators, including the chair, can arise out of their desire or, in cases of professional arbitrators, their need to be well considered by prospective Claimants and Respondents and, in particular, by the leading international arbitration law firms, the major appointing firms who can have a significant influence over their livelihood. While such dependencies may exist and be a systemic challenge for investment arbitration, parties (both State and Claimant) have ways to defend themselves. They appoint their own arbitrators; co-appoint the chair, if they manage to find consensus; usually have an informal possibility of consultation close to a veto on appointment proposals by some institutions (in particular ICSID); and can challenge co-arbitrators and chairpersons, in particular under the IBA Guidelines.[21] A substantial disequilibrium of arms is therefore not easy to discern though it may exist in particular situations.

Intimidation of Local and International Counsel, Experts, and Witnesses

Anecdotal reporting indicates that some Respondent States may use the many means at their disposal, sometimes formal but mostly rather informal, to intimidate. While this is less well documented for investment disputes or commercial disputes with State enterprises,[22] there have been published reports on the response of authoritarian

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20 Hanotiau, *supra* note 2, at 275, with further references; he suggests that challenges based on overt acts of favoritism rarely succeed while ex parte communications focusing on the merits may justify the setting aside.

21 IBA Guidelines on Conflict of Interest in International Arbitration, 2004, which include in its "orange" list, Art. 3.1.3, that "[t]he arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties," and Art. 3.3.7: "The arbitrator has within the past three years received more than three appointments by the same counsel or the same law firm." The IBA Guidelines are not seen as perfect, they have serious gaps and have been criticized to reflect too much the interests of major law firms (and English barristers' chambers) but they are for investment arbitration probably the closest relevant instrument for providing soft-law standards for conflict of interest requiring disclosure and providing the basis for challenges. They need to be applied together with the older (1987) IBA Rules of Ethics for International Arbitrators. It would make sense to develop, perhaps in a working group between ICSID and the other international arbitration institutions and UNCITRAL an up-to-date set of conflict standards for investment arbitration.

22 The national co-arbitrator's assassination reported by Jacques Werner, or the compulsion of the national co-arbitrator to return home and refrain from participation in a hearing reported for the *Himpurna* case, suggest that if States go so far as to intimidate (and assassinate) their own co-arbitrators, they will be even more likely to intimidate other participants in the arbitration process which are exposed to their power and in a more vulnerable position, see *supra* note 17.

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governments to the analogous situation of complaints to the European Court of Human Rights. Party representatives and the other participants in arbitration can be harassed, obstructed, or intimidated through tax auditing and prosecution or permitting (work, residence, visa, etc). [23] Intimidation, surveillance,[24] obstruction of the work of counsel, interception of communications have been, and continue to be, reported in cases where foreign companies or no longer politically favored oligarchs are in dispute with now-favored oligarchs, the government, or its State companies.[25]

While witness and counsel intimidation may have a long tradition in authoritarian States, it has become more acute in a type of investment dispute that has developed fairly recently: claims by an offshore holding company owned or controlled beneficially, in full or in part, by nationals of the host State.[26] In such cases, the client's beneficial owners, as residents, may be exposed to the host State's state powers.[27]

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23 Government actions to obstruct recourse to the European Court of Human Rights have included assassination, rape, torture, and physical and psychological intimidation of the complainant, its counsel and its family. M GOLDHABER, A PEOPLE'S HISTORY OF THE EUROPEAN COURT OF HUMAN RIGHTS 125–27 (Rutgers 2007).

24 The *Methanex v. U.S.* tribunal, speculated on such possibility: "It would be wrong for the USA *ex hypothesi* to misuse its intelligence assets to spy on Methanex (and its witnesses) and to introduce into evidence the resulting materials into this arbitration. . . .", Final Award, *supra* note 1, para. 54. For the most recent discussion of extensive interception of client-counsel e-mail, see Libananco Holdings Co. Limited v. Turkey, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, June 23, 2008, published on http://ita.law.uvic.ca. paras. 72 ff.

25 Report by the Rapporteur for the Council of Europe, S. Leutheusser-Schnarrenberger, 2005 (*available at* http://assembly.coe.int); also on TDM.

26 E.g., the situation that underlay the *Tokios Tokeles v. Ukraine* and *the Rompetrol v. Romania cases*. Also *Libananco v. Turkey*, *supra* note 24.

27 That same exposure also exists when the claimant is a foreign national, but he/she (or staff and shareholders) are resident in the host state. *See Biloune v. Ghana*, p. 13: Claimant was arrested and held without charge and then deported (harassment took place before a claim was raised but after the dispute had broken out), award in excerpts available at www.tldb.de; claimant allegations in Helnan International Hotels A/S v. Arab Republic of Egypt, ICSID Case No. ARB/05/19, Award, July 3, 2008, para. 75; Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award, October 12, 2008, para. 161; Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Award and Separate Opinion, July 27, 2007, para. 51; Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan, ICSID Case No. ARB/05/16 Award, July 29, 2008, para. 217; CCL v. Republic of Kazakhstan, SCC Case 122/2001, Award, 2004, 1 SIAR 123 (2005), p. 22; Metalclad Corporation v. Mexico, ICSID Case No. ARB(AF)/97/1, Award, August 30, 2000, para. 46; RosInvestCo UK Ltd. v. The Russian Federation, SCC Case No. Arb. V079/2005, Award on Jurisdiction, 2007, 5.4.; Biloune v. Ghana; ICJ case of Diallo v. Congo (www.icj-cij.org). Damages for harassment and intimidation were awarded in Pope & Talbot Inc. v. The Government of Canada, Award on Damages, May 31, 2002; Desert Line Projects LLC v. Yemen, ICSID Case No. ARB/05/17, Award, February 6, 2008, para. 290: "physical duress exerted on the executives of the Claimant, was malicious." "[D]uress" was raised in Trans-Global Petroleum, Inc. v. Jordan, ICSID Case No. ARB/07/25, Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules, May 12, 2008, para. 59; Eureko B.V. v. Republic of Poland, Partial Award and Dissenting Opinion, August 19, 2005, paras. 236, 237: "[C]ertain of the acts of harassment . . . are disturbing and appear to come close to the line of treaty breach . . . If such actions were to be repeated and sustained, it may be that the responsibility of the government of Poland would be incurred by a failure to

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These cases may also have a more local personal and political dimension, evoking greater passions within the government and the controlling politicians than if the dispute is with an essentially foreign party.

Intimidation of local counsel, experts, and witnesses can also occur through more indirect levers of government power, e.g., blacklisting for government, State-owned or State-linked businesses, denial of promotion for academics, and major or minor forms of bureaucratic harassment. These forms of intimidation are difficult to identify; local counsel, experts, and witnesses will be or become unavailable either because they are aware that such intimidation will ensue or because informal signals have been sent to them, warning them to keep a distance from the dispute.[28] In most cases, the intimidatory message will come through a "nod and a wink," a telephone call, a inquiry about the expert or witness's involvement that appears on the face innocuous but carries a clear message.[29] In other cases, it will be through the opening of an apparently unrelated government action, e.g., a tax inquiry or a review of compliance with regulations

prevent them." The only breach identified in *Pope-Talbot*, (Award on Damages, paras. 68, 69) was administrative harassment of the Claimant after the claim was raised, including a threat of criminal investigation, threats of reduction of export quotas, and misrepresentation to the Minister by the senior civil servant administering the Claimant's required permitting. Alleged in Genin and others v. Estonia, ICSID Case No. ARB/99/2, Award, June 25, 2001, but no finding in favor of claimant.

28 Note Werner's account of how his government-appointed co-arbitrator advised him that he could no longer afford to participate in the arbitration.

29 In the *Hub Power v. WAPDA* case (N. Kaplan, J Intl Arb. 19 (2002) 245), it is reported that Pakistani generals attended court hearings and interrupted the (domestic court) proceedings to remind the court of the national importance of WAPDA. In both the *Enron* and *Sempra* cases, Argentina obtained an injunction preventing the former Energy Minister and witness for the Claimants from testifying at the hearing on the merits, on the argument that he had violated a confidentiality obligation with the Government. The tribunal admitted his written statements and considered the witness covered by Arts. 21 and 22 of the ICSID Convention., see Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16, Award, September 28, 2007, at para. 31; Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, May 22, 2007, at paras. 141, 142. Another reply mentioned criminal prosecutions raised against Claimant employees as a reprisal for raising an arbitration claim, one in Europe and one in the Middle East (with no further details provided). In *Occidental v. Ecuador*, Claimant alleged that the contract termination was a reprisal for the Claimant's success against the government in an earlier tax case; in *City Oriente v. Ecuador*, the tribunal considered criminal prosecution against Claimant's executives as intimidation following the raising of the ICSID claim, City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador), ICSID Case No. ARB/06/21, Decision on Provisional Measures, November 2007, paras. 64 ff.; Ecuador was ordered to refrain from criminal prosecution for conduct that gave rise to the dispute. One needs to distinguish administrative harassment before a case is raised, e.g., Azurix v. Argentina, Award, July 14, 2006, para. 263, on Claimant's factual submission and tribunal decision (arbitrary measures) at para. 442 from harassment and intimidation that is directly linked to the arbitration procedure itself. But in both cases, the treaties' obligation of fair and equitable treatment, full protection, and abstention from "arbitrary measures" apply both to the pre-arbitration and the arbitration situation.

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through which the message is sent: If you go on, you will be in trouble, and we have the means to get you into trouble.[30]

Direct or indirect intimidation by a Respondent State is difficult for a tribunal to deal with. First, full evidence will be hard to come by; few witnesses that have been intimidated will want to come forward. The arbitral tribunal will here have to follow the example of the ECHR[31] and operate a system of adverse inferences and reversal of the burden of proof. It cannot expect the Claimant, in the face of indications of a reasonable probability of intimidation by the State, to provide full proof. As with proving corruption, arbitral tribunals will need to use a system of indicators ("red flags").[32] If the host State is known for using intimidation, and if there are indications that intimidation may have been used, then it should be up to the State to prove that no intimidation was used. Simply referring to its law or internal administrative guidelines which prohibit such conduct is not enough. The issue is not if the State has good laws but if it has managed to get its services to obey them.[33]

Second, the tribunal will have to assess whether the unavailability of witnesses and experts or the intimidation of counsel and party representatives is likely to change the equality of arms to the substantial disadvantage of claimant. For example, if an expert (e.g., on local law) comes up with flimsy excuses which may indicate intimidation, that should not be enough if there are sufficient alternatives. But if all possible experts on a relevant issue become unavailable, that would indicate both the possibility of intimidation and serious harm to the ability of the Claimant to prosecute its case.

Within its possibilities, tribunals can try to protect witnesses and experts on the model of criminal and civil procedures in national law, e.g., by hearing *in camera*, videoconferencing, and accepting written testimony if intimidation appears the most plausible and not fully explained cause for the witness's withdrawal. But its possibilities are much more limited than domestic courts which can rely on its justice system (e.g., witness protection programs).

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30 Review of regulatory compliance is particularly effective in countries where the rules are of such a high standard but also contradictory so that noncompliance is universal. Unrealistic rules combined with widely practiced and accepted noncompliance provides the government with a lever to intimidate everybody, see A. Ledeneva, How Russia Really Works 20–25 (Cornell University Press 2006)

31 The European Court of Human Rights has operated a reversal of the burden of proof in the case of physical intimidation; indications ("red flags") that point toward intimidation were sufficient, and no full proof was required. *See* Tekim, *ECOHR Report of April* 17, 1997, at para. 199

32 The method of "red flags"—essentially rebuttable presumptions—is often used when the misconduct is typically confidential and hard to prove, e.g., when certain contextual facts suggest corruption, but the very fact cannot be proven, or when they suggest discrimination and harassment of a foreign investor on the behest of a powerful and politically well-connected competitor as in Marvin Roy Feldman Karpa v. United Mexican States , ICSID Case No. ARB(AF)/99/1; T. Martin, *International Arbitration and Corruption, An Evolving Standard*, TDM 2004; L. Low and M. Burton, *The OECD, OAS and COE Antibribery Conventions: 2000*, ABA Third Annual Symposium on the Implementation of the OECD Convention, Bruges.

33 On the legal implications of comprehensive noncompliance and nonenforcement of regulation, see S. Hindelang, *No Equals in Wrong? The issue of equality in a state of illegality*, 7 JWIT 883 (2006).

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If local or international counsel are intimidated or prevented from effectively aiding in the prosecution of the case, the tribunal will have powers to order the Respondent to arrange for travel permits and give credible safe-conduct guarantees or to cease and desist from intimidation and harassment. The tribunal can negotiate with the parties' otherwise flexible and effective arrangements (if necessary, secured financially). In case of noncompliance, it can impose sanctions including costs, adverse inferences, and reversal of a burden of proof.

Authoritarian governments have as a rule preferred to operate within the formal appearances of the law.[34] They will therefore be inclined to often use indirect intimidation and obstruction, e.g., private actors only invisibly controlled by government services.[35] The proper way to deal with such hidden control is to invoke the duty of government to provide effective protection.[36] If there is no sufficient proof of control,[37] the international responsibility of the State to protect aliens[38] needs to be applied in combination with the duty of good-faith arbitration so that the State has a heightened responsibility to protect, first, alien participants who have to travel to the State (e.g., international counsel), but also—under the good-faith litigation principle—nationals who are witnesses, experts, and domestic counsel. The obligation of the government to protect the security and integrity of the arbitration process can also be founded on the substantive disciplines of the applicable investment treaty, for example, the duty to afford "fair and equitable" treatment or provide "most constant protection and security" (Art. 10 (1) ECT). The obligations incumbent on the State from the treaty do not end when a claim is raised but extend throughout the arbitration. That reflects the dual role of the government—as party to the dispute but also as sovereign, responsible for good governance in its country.

Obstruction of Legal Representation

The right to legal representation is a fundamental part of "due process" and "fair administration of justice" (Article 6 (b) and (c) ECHR).[39] The equality of arms will,

34 H. James, The Deutsche Bank and the Nazi Economic War against the Jews, 2001—on the legalistic techniques used to effect "Aryanization." See also the analysis of the *Lena Goldfields*, *Barcelona Traction*, cases, *supra* notes 1, 9.

35 Note also the references in *Metalclad v. Mexico* (*supra*), and the procedural order of the *Biwater-Gauff v. Tanzania* tribunal to harassment and intimidation which on the face appears "spontaneous" but looks as though it might have occurred through invisible instigation and support by government services; Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Procedural Order No 2, May 24, 2006.

36 That has been the suggestion raised in Eureko B.V. v. Republic of Poland, Partial Award and Dissenting Opinion, August 19, 2005, paras. 236–37.

37 For attribution of non-State actors to the State in case of control, see. Art. 8 of the ILC Articles on State Responsibility; note commentary (Crawford ed., Cambridge University Press 2002) at pp. 110–13.

38 M. Shaw, International Law 694 *et seq* (Cambridge University Press, 5th ed. 2003).

39 Art. 6 (b) "adequate time and facilities for the preparation of his defense," (c) "to defend himself in person or through legal assistance of his own choosing."

as a rule, be seriously impaired if there is substantial interference by the host State with domestic and international counsel of the claimant.[40] Types of interferences are numerous.[41] They include:

- Obstruction of access of lawyers to their clients. This can be a particular problem in investment cases if the equitable owners of a corporate holding company, the foreign investor as a natural person, or its staff reside in the Respondent State.
- Interception of communications, including illegal entry into computers and Web sites ("hacking"). If one party is aware of all internal plans within the other party (identification of witnesses, experts, strengths and weaknesses, legal and factual strategy, remuneration arrangements, financial situation), it has an immense strategic advantage. It can persuade (or intimidate) experts and witnesses identified, it can manipulate the arbitration so that the other side reaches the bottom of its war chest and can exploit weaknesses discussed confidentially in the client-counsel relationship.[42]
- Intimidation, indirectly or indirectly through non-State actors secretly encouraged by government services, including blacklisting of domestic counsel. A large Respondent State using the major arbitration law firms has a lever for denying claimants the use of the best expertise (as do major private commercial companies at times).

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40 On the protection of communications between client and counsel, see R. Mosk & T. Ginsburg, *Evidentiary Privileges in International Arbitration*, 50 ICQL 345, 379 (2001); Rapporteur on the Yukos prosecution to the Council of Europe, para. 37, paras. 4 and 8; UN Basic Principles on Role of Lawyers, 1990, Art. 16—highlights intimidation and improper interference and "Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential," IBA Rule on Taking of Evidence 9(2): recognizes privilege for legal and ethical reasons; most recent case of ECJ: *Akzo v. EU Commission*, 2007, *available at* http://eur-lex.europa.eu.

41 See the jurisprudence of the ECHR under Art. 6, reported (up to 1994) in Harris et al.,; Sabine Leutheusser-Schnarrenberger, COE report 2005 relating to the prosecution against M. Khodorkovsky and Yukos, Decision on Preliminary Issues in *Libananco v. Turkey, supra* note 24.

42 The confidentiality of the client-counsel relationship ("privilege") is part of an effective legal representation under Art. 6 but is also protected by Art. 8 of the ECHR and qualifies as a fundamental element of international due process. Art. 9.2(b) of the IBA Rules of Evidence in International Commercial Arbitration, Commentary, BLI (2000) p. 35; ECHR 30 January 2007; *Ekinci & Akalin v. Turkey* case; *ECHR* case of March 25, 1992; *Campbell v. United Kingdom*; *Smirnov v. Russia* (ECHR June 7, 2007); the client-counsel privilege has been recognized recently by the European Court of Justice in the *Akzo v. European Commissions* case of September 17, 2007. *Golder v. United Kingdom* (1975). The right to a fair trail includes the right to communicate freely with a counsel; the EU Code of Conduct for Lawyers at 2.3 says, "Without the certainty of confidentiality there cannot be trust. Confidentiality is therefore a primary and fundamental right and duty of the lawyer. The lawyer's obligation of confidentiality serves the interest of the administration of justice as well as the interest of the client*."* Lanz v. Austria, 50–52, "an accused's right to communicate with his defense counsel out of hearing of a third person is part of the basic requirements of a fair trial." It required "very weighty reasons" to justify surveillance in case of suspected collusion and found a breach of Art. 6(3)(b) and (c), Judgment of January 31, 2002, on ECHR Web site, www.echr.coe.int.

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The tribunal has first to identify where and how specifically interference with the effective access to counsel (and with client-counsel privilege) has occurred and how it is most likely to affect the equality of arms. The tribunal must be aware that it is likely to have seen only the "tip of the iceberg," with most of what really happened remaining hidden. Then it has the difficult examination of how to rebalance the disturbed equilibrium. Normal sanctions—like cost, adverse inferences, exclusion of illegally obtained evidence—may not always be able to restore the equality. In serious cases, the tribunal may simply end its functions without res judicata effect for the Claimant.[43] But such "termination, even with full cost on Respondent" does not remedy the damage: the Claimant would have to restart the arbitration with another tribunal, with new uncertainty, risk, and cost. If there has been surveillance, only full reciprocal disclosure for both parties could fully restore the equality of arms, since all of the Claimant's internal intelligence would be known to the Respondent, but such a measure would be difficult to police—as is any order of discovery and disclosure. Nevertheless, it should not be discounted: if one party could show that the other party has concealed parts of the internal communication between itself and its counsel against such an order, this would pave the ground for stronger and more general procedural sanctions.

Financial Attrition by the Much Better Funded Party

A serious challenge for the equality of arms can arise if one party fully exploits access to vastly greater financial resources for litigation. That may be part of litigation strategy by financially better funded governments against "junior" Claimant companies. Full use (or abuse) of the arbitral procedure[44] can grow the cost of arbitration beyond what the "war chest" of the other party can bear. Under this strategy, a Respondent government may delay arbitral appointments; challenge arbitrators and chairpersons repeatedly once appointed; obtain antisuit injunctions from their domestic courts; raise every procedural and jurisdictional objection possible; maximize the time periods requested for every phase; insist on as many physical hearings as possible; change counsel; use appointment of experts and witnesses to compel the other party to do likewise for rebuttal; and engage to a procedural maximum in post-award challenges and obstruction of enforcement.

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43 That was, in a corruption case, the famous (and controversial) conclusion reached by Judge Lagergren as arbitrator: J.G. Wetter, *Issues of corruption before international arbitral tribunals* in ICC case No. 1110, Arb. Int. 1994, p. 277. For the acceptance of the power to "dismiss actions, assess attorneys' fees, impose monetary penalties or fashion other appropriate sanctions for conduct which abuses the judicial process," *cf* Kensington v. Congo (case of a law firm intimidating an expert for the other party), S.D.N.Y. Aug 23, 2007, 2007 US Dist. LEXIS 63115; Waste Management v. Mexico, ICSID Case No. ARB(AF)/00/3, Decision on Preliminary Objections of June 26, 2002 left open the possibility that it had the power to dismiss a claim . . . "for the purpose of protecting the integrity of the tribunal's processes or dealing with genuinely vexatious claims," at para. 49. On the power, in extreme circumstances, to "grant the request of the other party to dismiss the case," Hanotiau, *supra* note 2, at 286.

44 P. Lalive, *supra* note 4, at 30–33.

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Tribunals have difficulty restricting the exploitation of procedural tactics that are available under the applicable rules. Since tribunals are wary about creating grounds for subsequent challenge for not providing a fair hearing,[45] the incentive is, rather, to accommodate the party which uses procedural obstruction both for delay and for depleting the opponent's "war chest," in particular if it is a State. In the end, the party with a much smaller litigation fund is likely to have run out of means to challenge an award for failure of the tribunal to intervene at the point when the substantial disequilibrium between both parties became apparent.

Financial equality has not yet been considered as a factor relevant to defining the equality of arms.[46] The presumption, as in other areas of law, is that both parties are considered equal in litigation irrespective of their financial ability or litigation competence. That, however, does not exclude examining a party's strategy to abuse procedural rights in order to exploit the other party's financial weakness. The right approach is for tribunals to be conscious that such tactics, particularly in a situation of a manifest financial balance between the parties, can amount to bad-faith arbitration and also a substantial lack of equality of arms. If there are enough indications of that, the tribunal has the duty (sanctionable by annulment) to work toward restoring the equilibrium by choosing the most cost-efficient ways compatible with a fair hearing to progress the case. That is not an easy balance, but the principle of "equality of arms" should provide the tribunal with a counterweight.

Concealment of Documents, Obstruction of Discovery, and False Testimony

Governments sometimes invoke "crown" or "executive privilege" to refuse to comply with discovery requests.[47] Tribunals have as a rule accepted the concept of "executive privilege" in principle but subject to their ultimate determination whether it is justified in the particular case, rejecting government claims that it should be "self-judging". Denying reasonable discovery, however, affects the equality of arms. Tribunals therefore have to navigate carefully between reasonable accommodation of the special nature of government and tolerating abuse of the dual role of government as both arbitration party and sovereign.

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45 *E.g.*, the annulment of the AMCO Asia v. Indonesia arbitral award under Art. 52 of the ICSID rules, which may appear to some observers as a relatively minor oversight of the tribunal with no serious consequence.

46 To the author's knowledge.

47 Mosk & Ginsburg, *Evidentiary Privileges in International Arbitration*, 50 ICLQ 345, 363–67; S.D. Myers v. Canada, Partial Award, November 13, 2000, paras. 39 *et seq.*; Pope-Talbot v. Canada, Decision, September 6, 2000, 7 ICSID Rep. (2005), relying on art. 9(2)(f) of the IBA Rules of Evidence: "The Arbitral Tribunal shall . . . exclude from evidence or production any document . . . for any of the following reasons: . . . (f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a Government or a public international institution) that the Arbitral Tribunal determines to be compelling . . ."). Biwater-Gauff v. Tanzania, Procedural Order No. 2 of May 4, 2006, p. 9.

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Investment tribunals, unlike State courts, have no way of effectively compelling a State party to comply with discovery requests or to punish concealment of documents, forgery,[48] or fraudulent submission or testimony. However, they can take secondary sanctions: they can deploy the prospect of "adverse inferences" as an incentive for compliance with discovery requests but also against invocation of "executive privilege" not condoned by the tribunal[49]; they can also use cost sanctions for "bad-faith" arbitration with both a compensatory element to reflect costs unnecessarily incurred by the tribunal and claimant but arguably also with a punitive element.[50] There is precedent for the concept that an award should be annulled in case of fraudulent submission of information,[51] an approach which requires a showing that there was a reasonable possibility that the fraud, concealment, or withholding of information had some adverse impact on the outcome.

"Legitimate" Exercise of Government Powers

Government action directly or indirectly targeting the Claimant will often be based on its governmental role but, simultaneously and at times intentionally, will enhance the position of the government in the international arbitration. That dual role can create ample opportunities for abuse to improve its litigation position. It is relatively easy to separate both roles, e.g., by a "Chinese Wall" between criminal prosecution and conduct of the arbitration. But the more a country is authoritarian and the more such breaches have been reported in other situations, the more likely it is that a claimed Chinese Wall will have large holes, allowing the Respondent State to use confidential information obtained through criminal investigation or other forms of government enforcement action directed against individuals or companies, such as tax audits or environmental compliance monitoring. The issue has emerged in investment arbitration as nationals try

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48 Such as occurred by Qatar in its maritime delimitation case against Bahrain.

49 On the extent to which executive privilege is usually accepted: Mosk & Ginsburg, *supra* note 40, legitimate invocation is as a rule accepted but not if it appears to be an abuse of the privilege and evidence of bad-faith litigation. The additional consideration to be taken into account is equality of arms.

50 For a survey of authorities on cost sanctions in case of bad-faith (or manifestly incompetent) arbitration, see the author's separate opinion, in *Thunderbird v. Mexico*, at paras. 124 *et seq*., and also in particular, *Methanex v. USA, Generation Ukraine v. Ukraine*; punitive damages for willful misconduct in the *Karaha Bodas* case (2007 US Dist. LEXIS 31702) of US$500,000 for false testimony by officials of state enterprises; also *Desert Line v. Yemen*, 2008 at para. 304: "considering . . . that it insufficiently cooperated in providing documents and testimonial evidence" for imposing a cost sanction, in addition to the "moral damage" for harassment suffered by Claimant's staff. The *Desert Line* case illustrates that the tribunal's sanctions for misconduct can be both of a "procedural" character (as one should qualify the cost sanction) but also of a substantive character, as is the nature of the "moral damages." To quote, "Claimant's executives suffered the stress and anxiety of being harassed, threatened and detained . . .; the Claimant has suffered a significant injury to its credit and reputation and lost its prestige; the Claimant's executives have been intimidated by the Respondent," at paras. 286–91.

51 *European Gas Turbines* Case, Rev. Arb. 1994, p. 359.

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to arbitrate against their own State through an offshore holding company. Moreover, the issue tends to arise frequently in authoritarian States, with the investment dispute being just one facet of a larger bitter battle within the country, and, apart from an ECHR complaint, investment arbitration being the only chance for the affected party to have fair adjudication.

Again, there are two conflicting principles: first, the existence of an international investment dispute cannot "freeze" government enforcement powers; second, governments must not be allowed to enhance their litigation position by abusing governmental powers. This very complex issue mirrors similar questions that have arisen when State enterprises, to excuse noncompliance with contract, invoke force majeure because of prohibiting government regulation or refusal to permit.[52]

Tribunals faced with such challenges have to weigh the legitimate exercise of State powers against the equally imperative requirement (sanctioned under Art. 52 of the ICSID Convention by annulment) to maintain and proactively restore the equality of arms. This means, first, that a clear abuse of State powers against opponents in order to undermine the arbitration cannot be tolerated, and second, that a government's legitimate and good-faith exercise of its public responsibilities, without discrimination, arbitrariness or abuse, will rarely be of concern to the tribunal—provided that effective safeguards are in place to ensure the government action is not motivated by the investment dispute and that the findings from the prosecution are not used by it as international litigant. However, in reality, elements of legitimate criminal prosecution may be mixed with elements of political motivation and clandestine use for the arbitration. Moreover, there will be problems of evidence. Authoritarian states will try to disguise an abuse of State power under a cloak of legal correctness in formal terms. What they appear to do formally and publicly will often not be the same as what occurs through secret and informal channels. To deal with these risks to the equality of arms is the true challenge.

As mentioned before, in discussing intimidation,[53] the proper approach to use is to "lift the veil" from what happens in closed or clandestine channels.[54] The interaction within government agencies is essentially a "black box". We see external outcomes, but we rarely if ever find out what caused them.[55] In such cases, arbitral and judicial procedure have developed a reversal of the burden of proof or presumption that the party which has access to the relevant evidence must carry the burden of proof.[56]

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52 H.K. Böckstiegel, *The Legal Rules Applicable in international commercial arbitration involving states or state-controlled enterprises*, *in* ICC, 60 YEARS OF ICC ARBITRATION, 1984, at 117–76 (E. Gaillard & J. Younan eds., 2008), on other issues arising out of the combination of commercial and governmental conduct by the State.

53 See discussion of "red flags" *supra* note 32.

54 That is also the approach of the U.S. Foreign Corrupt Practices Act; A. Sayed, *Corruption in International Trade and Commercial Arbitration*, 2003; David Cairns, *Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering, and Fraud*, *in* ARBITRATION: MONEY LAUNDERING, CORRUPTION AND FRAUD 651 (Kristine Karsten & Andrew Berkeley eds., ICC Publication 2003).

55 See the author's separate opinion, International Thunderbird Gaming Corporation v. The United Mexican States, January 26, 2006, paras. 107, 114.

56 See here the Turkish-Greek Mixed tribunal, Megalidis v. Turkey, of July 26, 1928, which uses the method of international arbitration, on other issues arising out of the combination of

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This chapter suggests that legitimate exercise of governmental police powers against participants in the arbitration must be accepted, provided there is sufficient and credible indication that the exercise of police powers (prosecution, tax assessment, et al.) could not have been triggered by the state's concerns over the investment arbitration or that the results could not have been used to enhance the state's litigation position in the arbitration[57]. The more general indicators (e.g., acceptance of the rule of law as indicated, for example, by the various governance quality surveys) or specific indicators suggest the likelihood that the government may have launched its police powers because of the initiation of the claim or that results relevant for the arbitration may have been leaked formally or informally, the more does a presumption arise that the government has abused its powers to further its litigation chances and thus tilted the equality of arms in its favor. The tribunal has to infer the plausible scope of the iceberg when it sees only the tip, and the respondent has to prove that there is no iceberg under the tip.

Lifting of the Confidentiality of the Proceeding and Granting Third-Party Access

A feature of modern investment arbitration, in particular under the NAFTA but also ICSID, has been the lifting of the traditional confidentiality of the proceeding. Awards, but also the submissions of the parties and interim orders by the tribunal, are published. Access is provided to the hearing itself. Third parties, essentially activist nongovernmental organizations, are allowed to submit amicus briefs. All that is widely applauded as a move toward greater transparency, required by the public interest at

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commercial and governmental conduct by the state inference in case of a Respondent State which was unwilling to produce evidence under its control relying on the maxim *"omnia presumuntur contra spoliatorem."* The tribunal inferred that the Claimant's factual assertions were correct; these could have been rebutted by Turkey if it had made the evidence under its control available. A more recent example is the NAFTA Chapter XI *Feldman v. Mexico* case, in which the tribunal identified the external and visible effect which suggested discriminatory tax enforcement against a foreign investor but not against a powerful Mexican company carrying out the same business. The tribunal noted that there was little evidence that the enforcement was intentionally discriminatory against the foreign investor but concluded that the Claimant had introduced sufficient evidence of *de facto* discrimination to raise a presumption and shift the burden of proof. (*Feldman v. Mexico*, para.177.) The tribunal went on to look at the Claimant's notoriety and threats of litigation of which officials had to be aware at the time the tax action was initiated, to conclude that the conditions for discrimination existed, *ibid.*, para.180.

57 See the *City Oriente v. Ecuador* tribunal, requesting the government to refrain from initiating or continuing a criminal investigation related to the core of the ICSID dispute. The tribunal based this on the principle that no party should undertake measures to aggravate the dispute, pursuant to Art. 47 of the ICSID Convention and Rule 39(1) of the ICSID Arbitration Rules (preservation of rights of the requesting party), *City Oriente v. Ecuador and Petroecuador*, Procedural Order, 2007, para. 55, arguing for "provisional measures prohibiting any action that affects the disputed rights, aggravates the dispute, frustrates the effectiveness of the awards,or entails having either party take justice into their own hands"; see also the Procedural Order No 2 in *Biwater-Gauff v. Tanzania, supra* note 35.

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stake in investment disputes.[58] However, such procedural reforms, which go well beyond the arbitration procedures referred to in investment treaties, can significantly affect the equality of arms, particularly for junior company claimants.

The introduction of amicus briefs by NGOs, which as a rule oppose the Claimant, impose the cost of review and attempted rebuttal. Amicus briefs can also directly or indirectly impugn the investor or the social acceptability of the investor's conduct, without supplying evidence or being subjected to cross-examination. Even if tribunals do not refer to such depreciatory comment, this does not mean that they are ineffectual (*"semper aliquid haeret*"). The Claimant has, therefore, to try to mobilize its own supporters, normally through an industry association., Governments can also use non-State actors to carry out action against Claimants, mainly intimidation[59] and, under the guise of transparency and "freedom of information" rules, disclose information to the public in order to apply pressure on the Claimant.

The tribunal in *Biwater-Gauff v. Tanzania*[60] faced some of these issues. It sought to reduce both the impact of external campaigning against the Claimant and collusion between activist NGOs and the government likely to affect the integrity of the arbitral process by providing a set of rules close to a "Code of Conduct" to the parties. These rules deal, *inter alia*, with public disclosures and interpose the tribunal as an "approval authority". The tribunal also recommended that:

> all parties refrain from taking any steps which might undermine the procedural integrity, or the orderly working, of the arbitral process and/or which might aggravate or exacerbate the dispute.

The example set by the *Biwater* tribunal merits further development toward a set of guidelines of reasonable conduct of the parties with respect to outside political and public relations and links to NGO campaigning. Similarly, the rules starting to get developed for NGO submissions, in particular transparency of control and funding, need to evolve further as amicus briefs become more frequent.[61]

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58 H. Mann, *Transparency and Consistency in International Investment Law*, at 213, and M. Tracton, *Provisions in the New Generation of U.S. Investment Agreements to Achieve Transparency and Coherence in Investor-State Dispute Settlement, in* Appeals Mechanism in International Investment Disputes 201 (K. Sauvant ed., 2008); on the efforts to introduce such instruments into the UNCITRAL rules, *see* J. Levine, *Current Trends in International Arbitral Practice as Reflected in the Revision of the UNCITRAL Arbitration Rules*, TDM 2008.

59 If Claimant can prove informal connivance of government services with intimidatory and harassment action by facially private actors, the government can be responsible under Art. 8 of the ILC Articles—most prominently the Iran hostages case or the U.S. "Contras" case; see Crawford's Commentary on the ILC articles, *supra* note 37. *See also* S. Manciaux, *The Relationship between states and their instrumentalities in investment arbitration*, *in* State Entities in International Arbitration 195 (E. Gaillard & J. Younan eds., 2008).

60 Biwater-Gauff v. Tanzania, Procedural Order No. 3, September 29, 2006, which refers, at para. 163, to the need both to prevent a further aggravation of the dispute and to preserve an "even playing field for the parties," *available at* http://ita.law.uvic.ca.

61 *Ibid.*, Procedural Order 2; Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, May 19, 2005, paras. 17–29.

Manifestly Incompetent Legal Representation

Both States and Claimants may have difficulties in obtaining the quality of legal representation that the by-now highly specialized field of international investment arbitration requires. Ideally, the expertise deployed will include both public international law, international arbitration (and international judicial procedure in a wider sense), and comparative public/administrative law. It will go beyond rules and concepts that may be academically known and researchable, to include the much more arcane areas of the advocacy and politics of investment arbitration, e.g., arbitrator and chair selection; proclivities of appointment institutions; and personal, professional, institutional, and philosophical linkages and preferences. A party, Respondent, or Claimant not served by professionals experienced in this newly emerging field is quite likely to be at a considerable handicap. There are awards which indicate that one of the parties (or both) was unable to mount a reasonably competent claim or defense.[62] This applies both to junior companies with no prior foreign investment experience (arguably the most frequent Claimants) and small developing countries with no prior Respondent experience.

Junior companies, in particular, will often have stumbled in their first foray abroad due to lack of international business experience. They may stumble equally when choosing advocates. Without sufficient funds for litigation, they may be limited to those firms or independent practitioners keen on but not prepared for international arbitration and therefore ready to accept contingent-fee arrangements. Governments can be handicapped when relying exclusively on their internal legal services, in particular when, unlike the services of frequent Respondents such as, e.g., the United States, Iran, Canada, Mexico, Argentina, they lack experience.

This raises the question of whether the tribunal has a duty to restore the equality of arms in a case of the manifest incompetence of legal representation that seriously undermines one party's ability to put its case. There are two opposing principles. The principle of the presumed equality of the parties in the adversarial process suggests that each party must have the opportunity to obtain effective legal representation; whether that occurs in reality is irrelevant for the court. On the other side, there is a view that the tribunal is responsible for a true equality of arms; complete absence of legal representation[63] or manifestly inadequate legal representation requires the court to intervene in one way or the other.[64] There may be precedents in domestic adjudicatory

62 *E.g.*, Generation Ukraine, Inc. v. Ukraine, ICSID Case No. ARB/00/9, Award, September 16, 2003; *see also* CDC Group plc v. Republic of Seychelles, ICSID Case No. ARB/02/14, Award, December 17, 2003.

63 Bogdanov et al. v. Republic of Moldova (*Bogdanov* case), SCC, Award, September 22, 2005 (G. Cordero Moss, sole arbitrator); In this case, the sole arbitrator had to deal with a not appearing Respondent, note comment by G. Cordero Moss, *Tribunal's Initiative or Party Autonomy?*, on TDM 2007.

64 Inquisitorial and adversarial elements are present in most adjudicatory regimes, both common and civil law: J Jolowicz, *Adversarial and Inquisitorial models of civil procedure*, 52 ICLQ 281 (2003), *reprinted in* J. Jolowicz, On Civil Procedure 175 (2000).

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procedure[65] for courts to intervene when the legal representation is so manifestly incompetent that in effect one party is not properly legally represented. International tribunals sometimes seem to be inclined to take a manifest and grave lack of equality in legal representation into account, but that is dangerous territory as they expose themselves to challenges on the charge of partiality.[66]

In one investment case where the Respondent did not appear,[67] the tribunal did not simply accept the Claimant's submission of facts and law (which would lead to something akin to a default judgment) but felt obliged to examine it more closely than if both parties had been present. It is worth noting that in ICJ proceedings where the Respondent State fails to appear, the ICJ cannot simply enter a default judgment but has to satisfy itself "that the claim is well founded in fact and law."[68]

There are no similarly clear precedents for dealing with the challenge to equality of arms from manifestly incompetent legal representation. However, the possibility for the tribunal of engaging in a "legal dialogue" with both parties may provide an opportunity to raise, in a way that cannot be seen as partisan, the need for legal expertise at a level that the complexity of the case requires.

Tribunal Powers to Restore the Equality of Arms Affected by Abuse of Government Powers

Tribunals have a duty, if necessarily proactively, to restore "equality of arms"—a foundation principle of investment arbitration procedure—in particular if affected by the abuse by the Respondent of its dual role as both equal-level party to an arbitration and, simultaneously, as sovereign State. That duty of the tribunal, which goes beyond the mere ordering of the proceeding before it, can lead, if breached, to annulment under Article 52 of the ICSID procedure as a "serious departure from a fundamental rule of procedure" or the equivalent conditions for challenges of arbitral awards before domestic courts.[69]

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65 *E.g. a Scottish case:* Sheriff Principal Iain Macphail in the appeal Richardson v. Lynda Rivers, A1993/02 of August 23, 2004: "Thus the duty to secure equality of arms for a litigant rests primarily upon his or her advocate. The court's duty to intervene. . . . as in this case will arise only in exceptional circumstances where it is clear to the court that there is a substantial inequality of arms which the advocate has taken no effective steps to remedy. . . .The need for such intervention may therefore be rare."

66 For a discussion of comparative (court) litigation approaches, see Jolowicz, *supra* note 64. The German principle of the required "dialogue between the court and the parties" (which is not far from the modern system of English litigation following the Woolf reforms) legitimates, or even requires, that the court raises legal questions the parties may have overlooked. That can at times favor the party with a less effective legal representation. One should assume that in case of a manifest and grave imbalance between the parties, tribunals will frequently intervene more proactively.

67 *Bogdanov et al. v. Moldova*, *supra* note 63.

68 ICJ Statute, article 53(2). The Court's power to question and ask explanations—Art. 49—can also provide a way to restore the balance at least to some extent.

69 On ICSID annulment, *see* C. Schreuer with L. MAlintoppi, A. reinisch and A. Sinclair, The ICSID Convention: A Commentary (Cambridge University Press, 2nd ed. 2009.); A. Crivellaro,

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In effect, arbitral tribunals (as international courts) often apply a *de facto* deference: They abstain from coercive measures through assistance of domestic courts (which would not be practical); they may often be more lenient with respect to discovery; they will "go soft" on remedies involving specific performance and rather prefer financial compensation. They may often be more lenient with deadlines, evidence of manipulation, relations of witnesses, experts (and co-arbitrators) with the government. There is a considerable dilemma between formal tribunal role and power and principles on one hand, and the pragmatic solution of such tensions through the procedural action of the tribunal on the other. There is good sense in appreciating that governments may not be as efficient as most commercial Claimants in terms of internal organization, deadline compliance, and project management. But, as Pierre Lalive said many years ago, "One of the Arbitrator's delicate tasks is to reconcile here a need for some flexibility . . . with the fundamental equality of the parties and the elementary requirements of justice."[70]

Investment tribunals, unlike in commercial arbitration, cannot expect domestic courts and national justice systems to help. Their main power lies not only in the right to design and apply procedural rules, which generally allow tribunals considerable leeway to manage the procedure before them, but also in the fact that the Respondent State does not wish to lose the case or individual stages (procedural orders; jurisdictional decision; award on damages and cost) because it has alienated the tribunal. There is no doubt that the evidence of serious misconduct can "pollute the whole case."[71] Not only will tribunals be influenced in their perception of facts by serious misconduct by one party; but also the application of the law (including the assessment of damages and cost) allows explicit sanctions for a party that arbitrated in bad faith. Moreover, it is recognized in authorities on advocacy[72] that serious misconduct by a party can, consciously or subconsciously, affect the way the merits of its case are considered. That leverage allows tribunals, often under the shadow of possible procedural orders, to negotiate precautionary measures to prevent or remedy the consequences of intimidating government conduct, e.g., hearing of witnesses *in camera*, by video, or even just on the basis of a written testimony; safe conduct passes for counsel, witnesses, experts, and party representatives; and appointment of tribunal experts to review sensitive or secret documents.

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in Ch. Leben (2009); Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Decision on Annulment, February 5, 2002, para. 57:, "minimal standards of procedure to be respected as a matter of international law"; Maritime International Nominees Establishment (MINE) v. Republic of Guinea, ICSID Case No. ARB/84/4, Decision on Annulment, December 22, 1989:, "A clear example of such a fundamental rule is to be found in Article 18 of the UNCITRAL Model Law on International Commercial Arbitration which provides: The parties shall be treated with equality. . . .", at para. 5.06; the only ICSID annulment for breach of the fundamental rule of procedure was AMCO Asia v. Indonesia, Decision of December 3, 1992, Annulment of Supplemental Judgement; in this case, the tribunal had committed an arguably quite minor procedural flaw by not repeating its request to the government to respond on a minor issue that had no significance for the outcome.

70 P. Lalive, *supra* note 4, at l 37.

71 *Ad hoc* Judge Y. Fortier in the *Qatar-Bahrain* case, *supra* note 12.

72 Antonin Scalia/Bryan Garner, Making Your Case: The Art of Persuading Judges: On Advocacy 26–30 (2008).

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"Inherent powers" is the key concept that provides substance to fulfill the tribunal's duty to restore, proactively, the equality of arms. Based on this concept, the tribunal has sufficient means at its disposal to safeguard the fairness and integrity of its judicial process.[73] International courts and tribunals have exercised their function, going beyond their technical rules of procedure, on the foundation of "inherent" or "implicit" powers, i.e., powers that are necessary to "conserve the respective rights of the parties and to ensure (the) tribunal's jurisdiction and authority are made fully effective."[74] The boundaries of "inherent powers" are not as yet clearly defined. They should be seen as determined by the judicial character of a tribunal and thus can be inferred from comparative law of civil, criminal, and administrative procedure.[75] What is within the accepted boundaries of judicial remedies based on the "inherent powers" concept is subject to evolution. The extreme deference shown by the International Court of Justice in inter-state disputes will not be appropriate in investor-state disputes; here, it is rather the model of the major systems of administrative procedure which can provide guidance. It is with this general concept in mind that the following sections examine particular procedural remedies available to courts to sanction a party's misconduct and restore the equilibrium of arms between the Claimant and Respondent State.

Exclusion of the Misbehaving Party from the Process

Exclusion from the game is, throughout human society, the ultimate sanction for extremely grave misconduct. In adjudication, it can only be applied with considerable caution as total or even partial exclusion of a party can clash with the principle of "*audiatur et al. tera pars*," though common principles of abuse of right can overcome this principle. But it should only be thought of as *ultima ratio* after warnings, recommendations, and procedural and interim orders have failed to correct serious and continued misconduct with a grave impact on the integrity of the process. It is appropriate as a possible sanction (and deterrent) in case lesser measures have failed to work.

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73 Ch. Brown, *The Inherent Powers of International Courts and Tribunals* (2005), 76 British Yearbook of International Law 195; confirmed by *Libananco v. Turkey*, at para. 78: "nor does the tribunal doubt for a moment that like any other international tribunal, it must be regarded as endowed with the inherent powers required to preserve the integrity of its own process,".

74 Iran-U.S. Claims Tribunal, E-Systems et al. (1983); Inter-American Court of Human Rights: *Genie Lacayo* case: ICJ: *Nuclear Tests* case: "inherent jurisdiction . . . to maintain its judicial character." ICJ Rep 1974, 259–60, para. 23; for more comprehensive references; *see* Gaeta, *Inherent Powers of International Courts & Tribunals*, *in* Man's Inhumanity to Man 359 (Vohrah ed., 2003); Ch. Brown, *supra* note 73, at 55–82. Inherent powers are increasingly recognized in the "technical rules" of procedure, *e.g.*, the UNCITRAL Arbitration Working Group's proposed revision to the model law (Art. 17(2)(b)): "the tribunal would have the authority to order a party to "take action that would prevent or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process itself."

75 On the limits of "implicit" powers in the habit of "deference" by the International Court of Justice: Ch. Brown, *supra* note 73, at 78–81.

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There are authorities for full or partial exclusion of counsel, or even a party, for serious misconduct before a tribunal or court.[76]

There is no authority available for a default judgement even in case of one party's serious misconduct. If a party were to be excluded for grave misconduct, precedent suggests that the procedure applied in case of a not-appearing party should be followed.[77] That would mean that the tribunal has to examine the factual submissions of the party which participates at least for plausibility and to fully examine its legal theories, with research *sua sponte* and on the principle *iura novit curia*.

Contempt

Contempt of court is a common-law principle that gives to the court wide powers to safeguard its authority.[78] To the extent it overlaps with the principle of "inherent powers," arbitral tribunals will have power to deal with contempt, though not the same range of powers as a national court, i.e., an organ of government. Custody, for example, must be excluded while exclusion is possible. Also, while domestic courts can refer misconduct (e.g., by counsel, witnesses, experts, party representatives) to prosecutors, investment arbitral tribunals cannot rely on other instruments of the justice system, at least not the justice system of the host State.[79] Accordingly, while the

76 *European Gas Turbines* (Rev. Arb. 1994, p. 359)—an ICC Award was annulled by the Paris Court of Appeal on the ground that Respondent had submitted a fraudulent report of expenses to the arbitral tribunal. The court applied the principle of *fraus omnia corrumpit; Arrow* case (2000, C.P. Rep. 59);"Where a litigant's conduct puts the fairness of the trial in jeopardy . . . the court is entitled—indeed, I would hold, bound—to refuse to allow that litigant to take further part in the proceedings and (where appropriate) to determine the proceedings against him." Logicrose (Chancery Division [1998] E.G.C.S. 114) a party should be prevented from continuing to litigate where his conduct made a fair trial of the action impossible, "The deliberate and successful suppression of a material document is a serious abuse of the process of the court and may well merit the exclusion of the offender from all other participation in the trial. The reason is that it makes the fair trial of the action impossible to achieve and any judgment in favor of the offender unsafe." Even if the document is produced, the offender still may be excluded from the proceedings "if it were no longer possible to remedy the consequences of the document's suppression despite its production." *Waste Management II* at para. 49, left open the possibility that it had the power to dismiss a claim on this basis "for the purpose of protecting the integrity of the tribunal's processes or dealing with genuinely vexatious claims." That principle applies as well to Respondents as to Claimants, but it is of little use to Claimant except in cases where Claimant considers it better to be able to restart the case (at considerable loss of money and time) again with a "fresh slate."

77 *Bogdanov v. Moldova* and the article by G. Cordero Moss, TDM 2007, *supra* note 63.

78 Lord Diplock in *Sunday Times* case: contempt of court is punishable "because it undermined the confidence of the parties and of the public in the due administration of justice. The due administration of justice required that all citizens should have unhindered access to the courts; that they should be able to rely on an unbiased decision based only on facts proved in accordance with the rules of evidence."

79 For a discussion of disregard of the ICJ's interim orders, see. U.S. v. Iran (Tehran hostages) ICJ Reports 1980, p. 3; La Grand ICJ case (Germany v. U.S.), ICJ Reports 2001, 466; ICJ in Armed Activities (DR Congo v. Uganda) Judgement, December 19, 2005, para. 345(7).

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"contempt power" of international investment tribunals cannot be rejected simply because judges are public officials and arbitrators in treaty-based cases are "private" persons,[80] it is limited by both the nature of the adjudicatory process and the limited means available to tribunals for enforcing their orders.

Cease and Desist Orders

Tribunals have extensive powers to issue interim and/or procedural orders.[81] They can accordingly order the Respondent to ensure that its services stop the misconduct at issue.[82] If the State complies, that will solve the issue of future conduct. But if past conduct has caused irremediable harm (e.g., full interception of client-counsel electronic communications), this measure may be useful but not sufficient to restore the equality of arms. A cease and desist order thus fits well into the menu of the remedies available to a tribunal to respond to a serious disequilibrium between the parties, but it needs to be complemented by other measures, in particular compensatory rather than just prospective and prohibitive ones. There is also the risk that the State (or uncontrolled or uncontrollable "rogue" elements within the State or informally associated with the State) will continue the incriminated conduct under cover while the State issues formal directions merely to satisfy the tribunal. The challenge for the tribunal is therefore to develop a system of sanctions and incentives which makes it more likely that its orders will be effectively complied with.

Nonadmissibility of Evidence Procured with Improper Means

There is extensive, though not absolute, authority that evidence procured with improper (illegal or unethical) means is not admissible.[83] For example, in *Methanex v. U.S.*, a

80 The distinction between "public" judges and "private" arbitrators is often made, *e.g.*, in the criticism by Van Harten, *supra* note 13, at 153 *et seq*. But while arbitrators in a commercial dispute could be described as "private persons," that does not apply to arbitrators appointed by the parties on the basis of an international law treaty. They are, in essence, public *ad hoc* judges, at one end of the spectrum between dispute-specific appointments, the part-time members of the WTO Appellate Body and the full-time fixed-term judges of the ICJ).

81 Ch. Brown, 2007, pp. 119–51.

82 ICJ, La Grand: para. 124, *Case concerning the Rainbow Warrior*, RIIA Vol XX 1990 p. 217, 270, para. 114 cited with approval in Enron and Ponderosa v. Argentina, ICSID Case ARB/01/3, Decision on Jurisdiction, January 14, 2004 at para. 79; Biwater-Gauff v. Tanzania, Procedural Order of September 2006: "refrain from taking any steps which might undermine the procedural integrity." (p. 43), "ensure a level playing field,","minimize the scope for any external pressure on any party, witness, expert or other participant in the process," "avoid trial by media" (referring to Art. 17 of the newly revised UNCITRAL Model law); *see also City* Oriente v. Ecuador, Decision on Revocation of Provisional Measures, May 2008, para. 111, where Claimant raised the risk of proceedings being affected by potential social and media pressure due to the strong political essence of the arbitration.

83 M. Reisman and E. Freedman: *The Plaintiff's Dilemma: Illegally obtained evidence and admissibility in international adjudication*, 78 Am J Int'l L 737 (1982); in response, *see* H. Thirlway,

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comparatively harmless case of "dumpstering"—search in a garbage container on private, but accessible premises—led to nonadmissibility of the evidence discovered in this way.[84] The power to exclude evidence is also recognized in Article 9 of the IBA Rules on Taking of Evidence though as a possibility ("may"), not as an absolute command; the IBA Rules refer to considerations of privilege but also to fairness and equality of the parties.

While it may be appealing for a tribunal to solve the embarrassing issue of a government obtaining evidence illegally (e.g., theft, intercept, intimidation, torture) by excluding it from the "record" of the case, that may not solve the disequilibrium between the parties. Evidence obtained by the government improperly may help it to find other evidence in proper ways; evidence that has been submitted to a tribunal is impossible to erase from recollection. Moreover, there is intelligence obtained improperly that is not submitted to the tribunal (and hence cannot be excluded) but which will help to develop an effective counter-strategy. For example, interception (by e-mail, phone, or bugging) of discussion of possible experts, witnesses, and documents can help the respondent government to discourage the participation of experts and witnesses under its influence or arrange for inconvenient documents to vanish. As with cease and desist orders, an order declaring evidence inadmissible may be a proper and necessary measure but not one that restores the disrupted equilibrium. Its main effect lies, first, in a measure of dissuasion: the parties to whom such an order is addressed may comply because they take the order seriously, or, at least, because they worry over the risk if they are caught out in noncompliance. Second, noncompliance, if identified, can lead to further, more serious, sanctions.

Adverse Inferences

The most frequently invoked principle is the power of arbitral tribunals to draw adverse inferences in case of a party's misconduct, e.g., noncompliance with discovery or other orders, concealment of evidence, fraud and forgery, lies, etc.[85] The concept of "adverse inferences" has never been fully made clear. In essence, it means that the tribunal can, within its powers of assessing evidence, take into account a party's misconduct,

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Dilemma or Chimera?—Admissibility of illegally obtained evidence in international adjudication, 78 AJIL 622 (1984); R. Wolfrum, *International Courts and Tribunals, Evidence*, *in* Zimmermann et al. (eds.) 2006, op. cit. The *Libananco v. Turkey* tribunal (cited *supra*) at para. 80 noted that "the tribunal may consider other remedies available apart from the exclusion of improperly obtained evidence"; that suggests it considered the inadmissibility of illegally obtained evidence as an evident, but not exclusive, remedy.

84 *See also* ECJ: Teixeira de Castro v. Portugal, JCP 1999, I, 105, no. 38 (infiltration of cover agents).

85 Hanotiau, *supra* note 2, at 285: "International arbitrators invariably take the wrongful or illegal conduct into consideration by awarding in favor of the other party or drawing adverse inferences," *see also* p. 286; L. Enrique Graham, *Interim Measures*, ICCA conference paper, Dublin 2008; Ch. Brown, A Common Law of International Adjudication 108–10 (2007); J. Sharpe, *Drawing Adverse Inferences from the non-production of Evidence*, 22 Arb Intl (2006) 549.

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i.e., determine that the party whose misconduct is at issue has not proved the facts it has to prove or that the other party, in spite of not offering evidence that otherwise would be necessary, has proved its facts. Adverse inferences can therefore include a reversal of the burden of proof and can facilitate proof by prima facie evidence. Tribunals can, for example, accept a party's submission of what an expert or witness might have said had she not been intimidated.[86] Adverse inferences, however, cannot change the legal assessment of the tribunal—except that tribunals, consisting of human beings, will be influenced by the evidence of grave and relevant misconduct by a party. There are also cases where law and fact are closely intertwined, so that the application of law to the fact (rather than the more theoretical interpretation of the rules applicable) may also be influenced by adverse inferences.

The concept of "adverse inferences" is a very fluid concept; it is part of the implicit leverage the tribunal has over a recalcitrant party. The fluidity of the concept itself may enhance the tribunal's leverage. There are real questions as to how far adverse inferences can go, which are beyond the scope of this chapter. However, it appears that this concept is not only the most popular, but also one of the most effective tools a tribunal has to counter a party's misconduct. Its effectiveness lies partially in the ambiguity of what it actually means (or, perhaps expressed more positively, the flexibility of its application to different factual situations). It allows a tribunal to subtly threaten adverse results for the misbehaving party without having to take a clear stance on more controversial measures such as exclusion or contempt.

Cost Sanctions and Punitive Damages

That misconduct of a party—bad faith or highly incompetent arbitration can be sanctioned by courts and tribunals is generally accepted.[87] It is arguable (but not established)

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86 Case v. Iran, 3 U.S. Cl. Trib. (1983) 66–69; *Riahi v. Iran*, dissent by Judge Brower, 37 Iran-U.S. Cl. Trib. (203) at p. 176: tribunal should have drawn inferences adverse to the Respondent and assumed that the requested documents, if submitted, would have substantiated the Claimant's assertions." For further details and examples, see forthcoming Kolo, *supra*, (article with the author), in particular to Judge Brower's dissent in *Riahi v. Iran* arguing that the tribunal should not rely on "obviously coerced testimony" and allow its "processes to be corrupted.".

87 *Generation Ukraine v. Ukraine*, at 24.6: lack of discipline in arbitration; needless complication of examination of claims; *Victor Pey Casado v. Chile*: Respondent to pay $2 million of Claimant's legal fee because it failed to cooperate with the arbitration, 2008, paras. 726–30; *Letco v. Liberia*, 1986, 2 ICSID Rep. 343, 378: Liberia to pay Claimant's legal representation cost because of bad faith—it attempted to use Liberian courts in order to nullify results of arbitration. For an analysis of the practice of cost decisions, *see* R. Dolzer, C. Schreuer, Principles of International Investment Law 276, 277 (Oxford Univerity Press 2008), and my Separate Opinion in: *Thunderbird v. Mexico*, 133 ff., concluding that prevailing practice is that each party bears its own legal representation cost except in case of bad faith, highly incompetent arbitration or exceptional circumstances. In the *Karaha Bodas v. Pertamina* case (April 30, 2007, 2007 US Dist. LEXIS 31702): US$500,000 to be paid as "there should be a substantial penalty"; at issue was misrepresentation by one of the executives of Respondent; Kensingon v. Congo (S.D.N.Y. 2007) intimidation of expert by law firm for Respondent: "[C]ourts may sanction parties, attorneys, or law firms . . . includ[ing] the ability to dismiss actions, assess

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that tribunals have also an inherent “contempt of tribunal” power to levy fines for misconduct based on the analogy with common law courts,[88] going beyond damages.

Misconduct may also be taken into account in the context of assessment of damages by the tribunal. Tribunals have some degree of discretion in assessing damages; opinion is divided whether, for example, compensation for expropriation can have a punitive element or not, but there are some authorities supporting consideration of punitive elements.[89] Compensation for expenditures incurred unnecessarily by the other party because of its opponent’s misconduct, or expenditures frustrated by the misconduct, should generally count as compensable, either in the cost decision or in a damages award. Even if a Claimant does not prevail with its claim, the Respondent’s misconduct can be sanctioned in the form of a cost decision which awards not only tribunal costs, but, against the normal rule, also legal representation and party costs.

Finally, one should bear in mind that arbitral misconduct by the State may also breach its duties of “fair and equitable treatment” and of providing “constant protection and security,” e.g., by intimidation and harassment and thus give rise to a separate claim for compensation.[90]

CONCLUSION

This chapter has dealt with a relatively new issue in international arbitration: the special procedural challenges faced by the tribunal in an investment arbitration when the State, as Respondent, exploits its dual role both as sovereign and equal-level party to the arbitration and thus seriously affects the required equality of arms. Some of the issues raised can also occur in normal commercial arbitration, e.g., in particular, but not exclusively, with parties in authoritarian states where the rule of law has weak roots, and the linkages between States and powerful businesses (“oligarchs”) are strong and close. They have also occurred in the past in commercial arbitration against States. The risks to the integrity of the arbitral process have also increased to the extent that new types of investment disputes pit local businesses against governments with which they have fallen out politically; this intensifies the antagonism and increases the exposure of the claimant (and its supportive players) to machinations of the State against them.

Given the relative newness of the issue, this chapter cannot provide an exhaustive treatment, but it develops the major approaches, concepts, and principles for guiding tribunals and counsel in managing such risks. The overarching principle is the “equality of arms,” which has found expression as a proactive duty of courts and tribunals to

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attorneys’ fees, impose monetary penalties, or fashion other appropriate sanctions ‘for conduct which abuses the judicial process.’” In *Lac Minerals* (1990) FSR 441, it was recognized that monetary compensation can be awarded for breach of attorney-client privilege.

88 Ch. Brown, 2007, *supra* note 85, at 56.

89 Wälde/Sabahi, *Compensation of Damages in Investment Disputes*, *in* Handbook of International Investment Law (Muchlinski et al., eds., Oxford University Press 2008).

90 See the previously cited cases, *Pope-Talbot v. Canada; Desert Line v. Yemen*; and the *obiter dictum* in *Eureko v. Poland*.

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restore the equality of arms in the *Tadic* case. It is recognised as a key element of any process of adjudication worth its name. While tribunals may and often should go about managing these issues pragmatically, in essence they are under a duty, sanctioned by annulment, to maintain and restore the equality of arms within their powers. Their powers go beyond the technical arbitration rules; the principle of "inherent powers" provides a broader foundation. As tribunals grapple with such challenges, they should rely on their explicit and implicit procedural powers, learning from how other international courts and tribunals, as well as the courts in the major legal systems, deal with them. There is one significant difference, though: domestic courts can rely on the support of their country's judicial system; in investment disputes, international tribunals as a rule cannot refer misconduct by a Respondent State to the courts and prosecutors of this State. This difference means that international investment tribunals have a heightened responsibility to deal with risks to the integrity of the arbitral process themselves.

It should be borne in mind that, under the applicable treaty, governments remain obligated toward foreign investors throughout the arbitration process. The arbitration relates directly to the "investment" and the "investor" which are covered by the treaty. Serious misconduct by the State towards the Claimant during the arbitration should therefore be covered by the pertinent obligations of the treaty, primarily the duty of "fair and equitable treatment" and the obligation to provide "constant security and protection," the "due diligence" obligation imported into treaties from customary international law. Breaches of these obligations after a claim has been raised and during the arbitration can lead to distinct remedies, e.g., orders by the tribunals for specific performance (i.e., cease and desist), to financial compensation and, possibly, to other remedies such as a public apology. This interaction between the substantive obligations under an investment treaty and the procedural duty of the State (arguably also both parties) has not as yet been properly identified or explored in detail but is foreshadowed in several awards.[91]

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91 *Pope-Talbot v. Canada*; *Desert Line v. Yemen; Eureko v. Poland*; as cited earlier, *Saluka v. Czech Republic*, Partial Award, 2006 at para. 308: "According to the 'fair and equitable treatment' standard, the host state must never disregard the principle of procedural propriety and due process and must grant the investor freedom from coercion or harassment by its own regulatory authorities."

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PART III

Practical Guide to the Key Jurisdictional Issues

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Chapter 9

The Law Applicable in Investment Treaty Arbitration

*Yas Banifatemi**

The inquiry into the law 'applicable' to a dispute seems, on its face, a fairly simple question: identifying the law that will govern the resolution of the dispute. Given the fundamental principle of party autonomy in international arbitration, the arbitrators' inquiry is primarily guided by the determination of whether the parties themselves have chosen the law governing their dispute. It is only in the absence of such choice that the arbitrators must determine the law that will apply to the dispute. The framework of the analysis is therefore discernible. The choice of law process must first be distinguished from the arbitrators' subsequent investigation concerning the determination of the *content* of the law that will apply and the manner in which such content must be evidenced.[1] Equally, it is distinct from the review, at the back end of the arbitral process, of the manner in which the arbitrators have *applied* or *failed to apply* such law to the merits of the dispute.[2] Finally, a further distinction must be made between

* Yas Banifatemi is a Partner at Shearman & Sterling LLP. She is a member of the firm's International Arbitration group and heads its Public International Law practice. She also teaches investment law and international investment arbitration at Panthéon-Sorbonne University in Paris.

1 On this question, *see*, *e.g.*, the Final Report prepared by Mark Friedman and Luca Radicati di Brozolo for the Committee for International Commercial Arbitration of the International Law Association on "The Ascertainment of the Content of the Applicable Law in International Commercial Arbitration" and adopted at the 73rd Conference of the International Law Association in Rio de Janeiro on August 21, 2008, *available at* www.ila-hq.org/en/committees/index.cfm/cid/19; the Report contains a number of developments on investment arbitration. *See also* James Crawford, *Treaty and Contract in Investment Arbitration*, The 22nd Freshfields Lecture on International Arbitration, November 29, 2007, available on the Web site of the Lauterpacht Centre for International Law, at p. 2.

2 On this question, *see infra*, Part 6, Chapter 23, K. Yannaca-Small, *Annulment of ICSID Awards: Limited Scope but Is There Potential? See also* Emmanuel Gaillard, *The Extent of Review of the*

the substance of the dispute and the *procedure* governing the arbitration: choice of law is essentially concerned with the substance of the dispute, the conduct of the arbitration not being subject to any particular national legal system but allowing for a great degree of freedom for the parties (including their choice of the arbitration rules which will govern the arbitral process) and, in the absence of agreement between them, the arbitrators.[3]

That is not to say that choice of law is of no consequence. To the contrary, in investment treaty arbitration just as in international commercial arbitration, it is a fundamental process in that the outcome of the dispute may sometimes greatly depend on the rules determined to be applicable.

Being an arbitral process, investment treaty arbitration in no way differs from international commercial arbitration in that the principle of party autonomy is the primary rule governing the arbitration, including as regards the law applicable to the substance of the dispute. When the applicable law has been chosen by the parties, the arbitrators have a duty to apply such law and nothing but such law. It is only in the absence of a choice by the parties that the arbitrators are entitled to exercise a degree of discretion in the determination of the applicable law. Each of these situations will be examined

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Applicable Law in Investment Treaty Arbitration, *in* ANNULMENT OF ICSID AWARDS, IAI SERIES ON INTERNATIONAL ARBITRATION NO. 1, at 223 *et seq.* (Emmanuel Gaillard & Yas Banifatemi eds., Juris Publishing 2004).

3 For a general presentation of the law governing the procedure under the common rules of international arbitration, *see* EMMANUEL GAILLARD ET AL., FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 633 *et seq.* (Emmanuel Gaillard & John Savage eds., Kluwer 1999). *See also*, for the most recent trend, draft Article 15(1) of the new UNCITRAL Arbitration Rules adopted by the Working Group at its forty-sixth session and incorporated in the Draft revised Arbitration Rules discussed at the UNCITRAL forty-ninth session in Vienna on September 15–19, 2008, available on the UNCITRAL Web site: "Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given an opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute."

For a different view on the determination of the '*lex arbitri*' as "the law applicable to the conduct of the arbitration" in investment treaty arbitration, *see*, *e.g.*, Campbell McLachlan, "Investment Treaty Arbitration: the Legal Framework," Paper submitted at the ICCA Congress in Dublin (2008), pp. 30 *et seq*.

As regards the distinction between the law applicable to the merits and the law applicable to the question of jurisdiction: *see*, *e.g.*, Azurix Corp. v. The Argentine Republic, Decision on Jurisdiction of December 8, 2003 (Arbitral Tribunal composed of Andrés Rigo Sureda, President; Elihu Lauterpacht, and Daniel Martins), 10 ICSID REPORTS 416 (2006), para. 48: "As pointed out by both parties, the relevant provision for determining the law applicable to this dispute is Article 42(1) of the Convention. However, the rules applying to the dispute under Article 42(1) address the resolution of disputes on the merits, and so will not necessarily be those which apply to the Tribunal's determination of its jurisdiction under Article 41 at this stage of the proceedings." *See also* CMS Gas Transmission Company v. The Republic of Argentina, Decision on Jurisdiction of July 17, 2003 (Arbitral Tribunal composed of Francisco Orrego Vicuña, President; Marc Lalonde, and Francisco Rezek), 42 ILM 788 (2003), paras. 88–89.

in turn, before considering whether the specific nature of investment protection treaties has implications in terms of choice of law process.

IDENTIFICATION OF THE LAW CHOSEN BY THE PARTIES

The parties' agreement to arbitrate may include the legal system or the rules of law that will govern the substance of their dispute. The main arbitration rules which may come into play in investment treaty arbitration recognize the parties' autonomy in this respect, the only differences being the reference to a particular system of law ('law') or to specific 'rules of law'. Article 42(1) of the ICSID Convention provides that "[t]he Tribunal shall decide a dispute in accordance with such *rules of law* as may be agreed by the parties." Article 33(1) of the UNCITRAL Arbitration Rules differs slightly in that the parties can designate the legal system that will govern their dispute: "[t]he arbitral tribunal shall apply the *law* designated by the parties as applicable to the substance of the dispute." Article 22(1) of the Arbitration Rules of the Stockholm Chamber of Commerce, for its part, provides that "[t]he Arbitral Tribunal shall decide the merits of the dispute on the basis of the *law* or *rules of law* agreed upon by the parties." In line with these rules, the choice of law effectuated in investment treaties often covers a variety of models on the basis of the law of the host State and international law. Before examining these models, it is important to put in context the notion of choice of law by the 'parties' to an investment treaty arbitration.

Choice of Law in Context

One of the specific features of investment treaty arbitration is that the parties to the international instrument under consideration (a bilateral or a multilateral treaty containing investment protection rules), namely the contracting States, are to be distinguished from the parties to the dispute brought to arbitration on the basis of the instrument, namely one of those contracting States and an investor of the other contracting State. This distinction was at play in *AAPL v. Sri Lanka*, the first arbitration initiated on the basis of an investment treaty. In that case, the Arbitral tribunal seemed to have difficulty with the notion that a prior choice of law could be effectuated by the contracting States for the benefit of their respective investors. It therefore felt necessary to lay emphasis on the conduct of the parties to the arbitration amounting to an agreement on the applicable law during the course of the arbitration:

> [. . .] the Parties in dispute have had no opportunity to exercise their right to choose in advance the applicable law determining the rules governing the various aspects of their eventual disputes.
>
> In more concrete terms, the *prior choice-of-law* referred to in the first part of Article 42 of the ICSID Convention *could hardly be envisaged in the context of an arbitration case directly instituted in implementation of an international obligation undertaken between two States in favour of their respective nationals* investing within the territory of the other Contracting State.

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> Under these special circumstances, the choice-of-law process would normally materialize after the emergence of the dispute, by observing and construing the conduct of the Parties throughout the arbitration proceedings.
>
> Effectively, in the present case, both Parties acted in a manner that demonstrates their mutual agreement to consider the provisions of the Sri Lanka/U.K. Bilateral Investment Treaty as being the primary source of the applicable legal rules. [. . .][4]

On that basis, the *AAPL* tribunal concluded that the parties to the arbitration had agreed to the applicability of the Sri Lanka/United Kingdom bilateral investment treaty as "*lex specialis*" and of the international or domestic legal relevant rules referred to "as a supplementary source" by virtue of the provisions of the treaty itself.

The *AAPL* award has been criticized especially for the methodology used in determining the applicable law where the appropriate rule, in the absence of a choice of law in the bilateral investment treaty, would normally have been determined in accordance with the second sentence of Article 42(1) of the ICSID Convention.[5] It shows in particular the conceptual difficulty for the Tribunal to envisage a prior choice of law "between two States in favor of their respective nationals." There is, however, no such difficulty since the arbitration agreement contained in an investment treaty is deemed to be stipulated by the contracting States for the benefit of their investors.[6] Any agreed mechanism in the arbitration agreement, including the law applicable to the dispute, is therefore deemed to be chosen directly by the parties to the arbitration. This assumption

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4 Asian Agricultural Products Ltd. v. Sri Lanka, Award of June 27, 1990 (Arbitral Tribunal composed of Ahmed El-Kosheri, President; Berthold Goldman, and Samuel Asante), 4 ICSID Reports 256 (1997), paras. 19–20 (emphasis added).

5 *See*, in particular, Samuel Asante's Dissenting Opinion, *ibid*., p. 296. *See also*, for a criticism of the Tribunal's conclusion as to the existence of an implicit choice of law where the bilateral investment treaty contained none, Emmanuel Gaillard, *Observations on the AAPL Award*, 119 Journal du Droit International 217, 227–29 (1992), reproduced *in* Emmanuel Gaillard, La Jurisprudence du CIRDI 336–38 (Pedone 2004) ("Un tel accord ne peut résulter de la simple concordance des écritures respectives des parties sur le fondement de leurs prétentions. Les arbitres doivent cependant faire preuve d'une certaine prudence dans la constatation d'un accord qui résulterait uniquement de la concordance des écritures. En particulier, le fait que les parties aient l'une et l'autre longuement discuté de l'interprétation d'un texte ne suffirait pas à traduire leur accord sur son applicabilité à la cause. Ce n'est que s'il résulte de leurs explications qu'elles ont entendu y voir une source de droit applicable qu'il est permis d'analyser la concordance de leurs écritures comme la manifestation de l'adoption de règles de droit au sens de l'article 42(1).", *ibid*., p. 337); Christoph Schreuer et al., The ICSID Convention: A Commentary 573–75 (Cambridge University Press 2nd ed. 2009).

6 The possibility was envisaged during the negotiation of the Washington Convention with respect to the situation where the law applicable to a dispute is specified in a State legislation or in a bilateral treaty: *see* Summary Record of Proceedings, Addis Ababa Consultative Meetings of Legal Experts, December 16–20, 1963, Document No. 25, *in* II Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Documents Concerning the Origin and the Formation of the Convention 267 (ICSID Publication 1968) ("The Chairman remarked that [. . .] it was likewise open to the parties to prescribe the law applicable to the dispute. Either stipulation could be included in an agreement with an investor, in a bilateral agreement with another State, or even in a unilateral offer to all investors, such as might be made through investment legislation.").

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is nothing more than the implementation of the dissociated nature of consent to arbitration in investment treaty arbitration: although consent to arbitration is dissociated in time, the parties to the arbitration are still presumed to have given their *common consent* to arbitration at the time the investor accepts the host State's general consent by filing the request for arbitration.[7]

This mechanism has been readily recognized in case law and is today well established.[8] In *Antoine Goetz v. Burundi*, for example, the Tribunal had to determine whether the applicable law clause in the Burundi-Belgium investment treaty had to be considered as an express choice of law under Article 42 of the ICSID Convention. The Arbitral Tribunal specifically noted that:

> Undoubtedly, the applicable law has not been determined here, strictly speaking, by the parties to this arbitration (Burundi and the investors), but rather by the parties to the Bilateral Treaty (Burundi and Belgium). As was the case with the consent of the parties [to the arbitration], the Tribunal deems nevertheless that Burundi accepted the applicable law as determined in the above provision of the Bilateral Treaty by becoming a party to this Treaty, and that claimants did the same by filing their request for arbitration based on the Treaty.[9]

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7 *See* Emmanuel Gaillard, *L'arbitrage sur le fondement des traités de protection des investissements*, *in* Revue de l'arbitrage 853, 859 (2003): "[. . .] il s'agit d'une forme d'arbitrage dans lequel le consentement des parties à la convention d'arbitrage est dissocié. L'Etat émet une offre générale de contracter en spécifiant, dans l'instrument de protection des investissements concernés, que les litiges relatifs aux investissements couverts par cet instrument pourront être réglés par voie d'arbitrage. L'investisseur n'accepte cette offre qu'au moment de former la demande d'arbitrage. Les auteurs de la Convention de Washington avaient prévu, dès l'origine, la possibilité d'une telle dissociation. La convention d'arbitrage reposent, une fois conclue, sur *la volonté commune des parties*, cette première caractéristique ne nous paraît pas de nature à rendre compte, à elle seule, du particularisme de cette forme d'arbitrage." (Emphasis added).

8 *See*, *e.g.*, Rudolf Dolzer & Christoph Schreuer, Principles of International Investment Law 266 (Oxford University Press 2008).

9 Antoine Goetz et al. v. Republic of Burundi, February 10, 1999 (Arbitral Tribunal composed of Prosper Weil, President; Mohammed Bedjaoui, and Jean-Denis Bredin), para. 94, French original *in* 15 ICSID Rev. 457 (2000); English translation *in* XXVI Yearbook Commercial Arbitration 24, 36 (2001). The Tribunal also observed, noting the increasing "internationalization" of investor-state relations, that: "The Bilateral Treaty on investment protection is not only the basis for the jurisdiction of the Centre and of the Tribunal; it also determines the applicable law. The present case is one of the first ICSID cases where this happens. Considering the growing use of choice of law clauses in investment treaties, as well as their considerable variety, such situation is equally likely to occur with increasing frequency. It may be interesting to remark on this subject that choice of law clauses in investment protection treaties frequently refer to the provisions of the treaty itself, and, more broadly, to international law principles and rules. This leads to a remarkable comeback of international law, after a decline in practice and jurisprudence, in the legal relations between host States and foreign investors. This internationalization of investment relations, be they contractual or not, surely does not lead to a radical 'denationalization' of the legal relations born of foreign investment, to the point that the national law of the host State is totally irrelevant or inapplicable in favour of the exclusive role played by international law. It merely means that simultaneously—one could say in parallel—these relations depend on both the sovereignty of the host State on its national law and its international obligations." (*ibid.*, paras. 68–69, at p. 31).

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Variations on the Law of the Host State and International Law

Article 42(1) of the ICSID Convention gives the parties considerable freedom in that they can choose the 'rules of law' as opposed to an entire system of law that will govern their relationship, namely, any national legal system such as the law of the host State, selected rules of that system, rules common to certain legal systems, general principles of law, *lex mercatoria*,[10] or international law.[11] In general, the reference to the law of the host State is more likely to occur in relationships arising out of a contract, where the investor's rights and obligations may be governed by specific instruments or by the legal system of the host State more generally,[12] sometimes combined with a reference to international law. In this context, international law may apply either directly, possibly in conjunction with the law of the host State,[13] or indirectly as incorporated into the selected domestic law.

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10 On *lex mercatoria*, *see* in particular Emmanuel Gaillard, *Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules*, 10 ICSID Rev. 208 (1995), in particular at pp. 215 *et seq*.

11 On the parties' freedom to choose the applicable rules of law pursuant to the first sentence of Article 42(1) of the Washington Convention, *see generally* Aron Broches, *Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965: Explanatory Notes and Survey of its Application*, *in* XVIII Yearbook Commercial Arbitration 627, 667 (paras. 113–14) (1993); Ibrahim Shihata & Antonio Parra, *Applicable Substantive Law in Disputes Between States and Private Foreign Parties: The Case of Arbitration under the ICSID Convention*, 9 ICSID Rev. 183, 188 *et seq.* (1994); Chittharanjan Felix Amerasinghe, *Dispute Settlement Machinery in Relations Between States and Multinational Enterprises—With Particular Reference to the International Centre for Settlement of Investment Disputes*, 11 Int'l Law. 45, 54–55 (1977); Christoph Schreuer et al., The ICSID Convention: A Commentary, *supra* note 5, at pp. 557 *et seq*.

12 In the context of a dispute arising out of a contract and not an investment treaty, *see*, *e.g.*, Autopista Concesionada de Venezuela, C.A. (Aucoven) v. Bolivarian Republic of Venezuela, Award of September 23, 2003 (Arbitral Tribunal composed of Gabrielle Kaufmann-Kohler, President; Karl-Heinz Böckstiegel, and Bernardo Cremades), 10 ICSID Reports 314 (2006), para. 94: the *Aucoven* Tribunal determined that Clause 5 of the Agreement represented the "rules of law" under the first sentence of Article 42(1) of the ICSID Convention and a "valid choice of law agreement providing for the application of Decree Law 138 and Executive Decree Nr. 502." It also noted that the reference to these specific instruments did not "necessarily amount to a general choice of Venezuelan law": had the parties to the Agreement so wished, they could have referred to Venezuelan law in general or to international law.

Compare, for example, with Atlantic Triton v. Guinea, where the agreement specifically provided for Guinean law to be applicable subject to the contractual protection from subsequent changes in the law ("The term 'law' in the present Agreement refers to Guinean law. However, Guinean law will be applicable only insofar as it is not incompatible with the terms of the present Agreement, and where it is not more restrictive than the law in force at the date of entry into force of the present Agreement."), Atlantic Triton v. Guinea, Award of April 21, 1986 (Arbitral Tribunal composed of Pieter Sanders, President; Jean-François Prat, and Albert Jan van den Berg), 3 ICSID Reports 17, 23(1995).

13 *See*, *e.g.*, AGIP S.p.A. v. The Government of the People's Republic of the Congo, Award of November 30, 1979 (Arbitral Tribunal composed of Jørgen Trolle, President; René-Jean Dupuy, and Fuad Rouhani), 1 ICSID Reports 306, 318 (1993) (the law applicable was the law of Congo, "supplemented if need be by any principles of international law"); Kaiser Bauxite v. Jamaica,

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Most investment treaties do not contain an express choice of law. Where such choice exists, the situations can broadly be categorized as follows.[14] Almost always, the dispute is to be decided "in accordance with the provisions of the Agreement" itself.[15] Frequently, the bilateral investment treaty is applicable in conjunction with "the principles of international law"[16] or "the applicable rules of international law."[17] This is also the case for multilateral treaties containing investment protection rules such as the NAFTA[18] and the Energy Charter Treaty.[19] The choice of applicable law may include, in addition, the law of the host State in its entirety.[20] Some bilateral investment treaties

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Decision on Jurisdiction of July 6, 1975 (Arbitral Tribunal composed of Jørgen Trolle, President; Michael Kerr, and Fuad Rouhani), 1 ICSID Reports 301 (1993) (the law applicable was the law of Jamaica and "such rules of international law as may be applicable excluding however any enactments passed or brought into force in Jamaica subsequent to the date of this agreement which may modify or affect the rights of the parties under the Principal Agreement or this Agreement [. . .]").

14 Regarding BITs in general, *see* Rudolf Dolzer & Margrete Stevens, Bilateral Investment Treaties 128–29 (Martinus Nijhoff Publishers 1995). Concerning the reliance on a treaty containing a clause on the applicable law, *see* Christoph Schreuer et al., The ICSID Convention: A Commentary, *supra* note 5, at pp. 575–78.

15 *See*, *e.g.*, BITs entered into by Argentina, Australia, Belgium and Luxembourg (most BITs with exceptions such as the BIT with Mongolia), Canada, Chile, China (most BITs with exceptions such as the BIT with Australia), Costa Rica, Ecuador, Spain; *see also* BITs entered into by Bulgaria (with Albania, Ghana, the Slovak Republic), Cuba (with Mexico), the Czech Republic (with Italy, Ireland, Switzerland, Paraguay), Egypt (with Sri Lanka, Uganda), France (with Algeria, the Dominican Republic, Honduras, Hungary, Mexico, Uruguay), Germany (with Kuwait, India, Peru, Zimbabwe), Greece (with Latvia), Italy (with Venezuela), Malaysia (with Vietnam), Mexico (with Portugal), the Netherlands (with Mexico, Venezuela, Zimbabwe), Panama (with Uruguay), Paraguay (with Romania), Peru (with Paraguay, Romania), Poland (with Estonia, France, Latvia, Lithuania), Portugal (with Venezuela, Turkey), Switzerland (with Mexico, Paraguay, Peru), United Kingdom (with Lebanon).

16 *See*, *e.g.*, BITs entered into by Argentina, Belgium and Luxembourg, Chile, China, Costa Rica, Ecuador, Spain (with the exception of the BIT with Mexico), *supra* note 15; see also BITs entered into by Bulgaria, the Czech Republic, Egypt, Poland, France, Germany, Italy, Panama, Peru, *supra* note 15.

17 *See*, *e.g.*, the BITs entered into between, on the one hand, Canada and, on the other hand, Armenia, Barbados, Croatia, Ecuador, Egypt, Latvia, Lebanon, Panama, Philippines, South Africa, Romania, Thailand, Trinidad and Tobago, Ukraine, Uruguay and Venezuela, *supra* note 15; see also BITs entered into between Mexico and the Netherlands, Mexico and Spain, Mexico and Switzerland, the Netherlands and Zimbabwe, or between France and Poland.

18 Article 1131(1) of the North American Free Trade Agreement (NAFTA), entered into force on January 1, 1994, provides that: "[A] Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."

19 Article 26(6) of the Energy Charter Treaty, entered into force on April 16, 1998, provides: "A Tribunal established under paragraph 4 shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law."

20 *See*, *e.g.*, BITs entered into by Argentina, Belgium and Luxembourg, Chile (with exceptions such as the BITs with Greece and Norway), China, Costa Rica, Ecuador (with the exception of the BIT with Canada), Peru, Spain, *supra* note 15; *see also* BITs entered into by Bulgaria, Egypt, France (with the exception of the BITs with the Dominican Republic, Hungary, Mexico), Germany, Italy, Paraguay, Poland, Switzerland (with the exception of the BIT with Mexico),

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refer to the treaty, the law of the host State and particular agreements between the parties, but not necessarily to the rules of international law.[21]

It is important to observe that the choice of the applicable law must be made clearly and unequivocally and cannot be implied without a clear intention of the parties to that effect.[22] The question may arise as to whether a treaty provision setting forth that a number of sources of law must be "taken into account" amounts to a choice of the applicable law. The question was raised in *CME v. Czech Republic*, an arbitration conducted in accordance with the UNCITRAL Arbitration Rules and arising under the Netherlands/Czech bilateral investment treaty. Article 8(6) of the treaty provided as follows:

> The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively:
>
> – the law in force of the Contracting Party concerned;
>
> – the provisions of this Agreement, and other relevant Agreements between the Contracting Parties;
>
> – the general principles of international law.[23]

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supra note 15. The BITs between Canada and Argentina and between Canada and Costa Rica refer also to the law of the host State; in the latter case, the law of the host State applies only insofar as it is not inconsistent with the BIT or the principles of international law.

21 *See*, *e.g.*, the BITs entered into between Australia on the one hand and, on the other hand, the Czech Republic, Egypt, Hungary, Laos, Lithuania, Pakistan, Peru, Philippines, Poland, Romania, and Vietnam. As an exception, however, the BIT entered into between Australia and Argentina is internationalized and refers also to the "relevant principles of international law," in the same way as the BIT between Argentina and the Netherlands (which includes a reference to "such rules of international law as may be applicable"); *see also* the BIT entered into between Belgium & Luxembourg and Mongolia. *See also* Article 9(5) of the Colonia Protocol of the Common Market of the South (MERCOSUR) signed on January 17, 1994: "[t]he arbitral tribunal shall decide the disputes in accordance with the provisions of this Protocol, the law of the Contracting Party that is a party to the dispute, including its rules on conflict of laws, the terms of any specific agreements concluded in relation to the investment, as well as the relevant principles of international law." (Unofficial translation).

22 *See*, *e.g.*, Compañía del Desarrollo de Santa Elena (CDSE) v. The Republic of Costa Rica, Final Award of February 17, 2000 (Arbitral Tribunal composed of Yves Fortier, President; Elihu Lauterpacht, and Prosper Weil), 15 ICSID Rev. 205 (2000), para. 63: "Article 42(1) of the ICSID Convention does not require that the parties' agreement as to the applicable law be in writing or even that it be stated expressly. However, for the Tribunal to find that such an agreement was implied it must first find that the substance of the agreement, irrespective of its form, is clear. Having reviewed and considered Respondent's oral and written argument on this question and analysed the documents to which we have been referred, including, in particular, the Helms Amendment and related documents, the Tribunal is unable to conclude that the parties ever reached a clear and unequivocal agreement that their dispute would be decided by the Tribunal solely in accordance with international law." *See also* Berthold Goldman, *Le droit applicable selon la Convention de la BIRD du 18 mars 1965 pour le règlement des différends relatifs aux investissements entre États et ressortissants d'autres États*, *in* Investissements étrangers et arbitrage entre États et personnes privées133, 144 (Pedone 1969).

23 CME Czech Republic B.V. v. The Czech Republic, Final Award of March 14, 2003 (Arbitral Tribunal composed of Wolfgang Kühn, President; Stephen Schwebel, and Ian Brownlie), 9 ICSID Reports 264, 348 (2006), para. 91.

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The tribunal considered this clause to be a proper choice of law provision, albeit in a flexible manner:

> [. . .] the choice-of-law clause in the Dutch Treaty is broad and grants to the Tribunal a discretion, without giving precedence to the systems of law referred to. Art. 8(6) of the Treaty says: 'The Arbitral Tribunal shall *decide on the basis of the law*, taking into account in particular though not exclusively:. . .' (Emphasis supplied).
>
> There is no ranking in the application of the national law of the host state, the Treaty provisions or the general principles of international law. Further there is no exclusivity in the application of these laws. [. . .] None of the precedents contained a choice of law clause similar to the clause in the Treaty, which instructs the Arbitral Tribunal to *take into account* (not: to apply) the above mentioned sources of law, in particular *though not exclusively*. [. . .][24]

In all situations where a choice of the applicable law exists unequivocally, the issue boils down to the arbitral tribunal's duty to respect the choice of law validly made by the parties pursuant to the first sentence of Article 42(1) of the ICSID Convention.[25] In other words, any issue of interpretation by the tribunal would arise in relation to the parties' intention, as opposed to an interpretation of the ICSID Convention itself.[26]

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24 *Ibid*., para. 402. *See also* the judgment rendered by the Svea Court of Appeal following the Czech Republic's application for annulment of the Partial Award of September 13, 2001: "The wording that the arbitral tribunal shall 'take into account in particular although not exclusively' must be interpreted such that the arbitrators may also use sources of law other than those listed. The four sources of law are not numbered, nor are they otherwise marked in such a manner that governing law in the relevant contracting state should primarily be applied and general principles of international law applied thereafter. The un-numbered list almost gives the impression that the contracting states have left to the arbitrators the determination, on a case by case basis, as to which source or sources of law shall be applied. If the case concerns an alleged violation of the Investment Treaty, it might be relevant first of all to apply international law, in light of the Investment Treaty's purpose of affording protection to foreign investors by prescribing norms in accordance with international law." The Svea Court observed that there was "no conclusion other than that the arbitral tribunal has complied with the provisions of the choice of law clause as such must be interpreted, *i.e.* applied relevant sources of law, primarily international law, and thus has not based its decision that the Republic violated the Treaty on a general assessment of reasonableness devoid of any basis in law." Svea Court of Appeal, The Czech Republic v. CME Czech Republic B.V., Judgment of May 15, 2003, 42 ILM 919, 965 (2003).

25 On the arbitrators' duty to respect the choice of the parties in general, *see* Emmanuel Gaillard, *The Role of the Arbitrator in Determining the Applicable Law*, *in* The Leading Arbitrators' Guide to International Arbitration 185 (Lawrence Newman ed., Juris Publishing 2003); in investment arbitration, *see also* the author's observations under SPP v. Egypt in relation to the Tribunal's failure to apply the law applicable under the first sentence of Article 42(1) of the ICSID Convention, *in* Emmanuel Gaillard, La Jurisprudence du CIRDI, *supra* note 5, at pp. 379–83.

26 An arbitral tribunal may find inspiration in the ICSID case law regarding the interpretation of the second sentence of Article 42(1) when the wording of the choice of law clause of the BIT is similar to or exactly the same as the second sentence of Article 42(1): see, for example, Article 9(3) of the BIT between the Netherlands and Zimbabwe of December 11, 1996, which provides that "[t]he arbitral tribunal to which such legal dispute is submitted shall, unless the parties to the dispute agree otherwise, decide in accordance with the laws of the Contracting

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These cases, however, are not the most frequent ones: a very large number of bilateral investment treaties do not provide for any choice of law.[27]

DETERMINATION OF THE APPLICABLE LAW BY THE ARBITRATORS IN THE ABSENCE OF THE PARTIES' AGREEMENT

Practice shows that in the majority of cases, there was no choice of law provision in the arbitrations initiated on the basis of a bilateral investment treaty.[28] In such cases, the determination of the applicable law depends on the arbitration rules in accordance with which the arbitration is conducted.

The most recent statistics established by UNCTAD indicate that, out of a total of 317 known treaty-based arbitrations from 1987 to 2008, 63.4 percent were submitted to ICSID (including the ICSID Additional Facility), the remaining cases being conducted in accordance with the UNCITRAL Rules (26.2 percent), the rules of the Stockholm Chamber of Commerce and those of the ICC.[29] The statistics also show that non-ICSID fora tend to be selected increasingly by the parties (in particular after 2002), a trend that may increase in the coming years and that makes such other options under investment treaties as UNCITRAL or the Stockholm Chamber of Commerce all the more significant.

Under these various arbitration rules, although the differences tend to diminish as regards the arbitrators' freedom to determine the applicable law in the absence of the parties' agreement, one major difference exists between the ICSID system and the other fora available to the investors: the respective role of the law of the host State and the rules of international law. Under the second sentence of Article 42(1) of the ICSID Convention, in the absence of an agreement between the parties, "the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the

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Party—party to the dispute—(including its rules on the conflict of laws) and such rules of international law as may be applicable." In this case, however, the tribunal should interpret and give effect to the provision under the BIT and not to Article 42(1) of the Convention as such.

27 The vast majority of BITs entered into by countries such as the United States, the United Kingdom, France, or Germany do not contain a clause on the applicable law regarding investment disputes between one of the contracting States and the investors of the other contracting State: as at December 15, 2008 and to the best of the author's knowledge based on the BITs available, none of the 40 BITs entered into by the United States and which are in force contain a clause on the applicable law; a clause on the applicable law can be found in only 12 out of 91 BITs concluded by France and in force, in only 6 out of 91 BITs concluded by the United Kingdom and in force, and in only 8 out of the 114 available BITs concluded by Germany and in force.

28 *See* Antonio Parra, *Applicable Law in Investor-State Arbitration*, *in* I Contemporary Issues in International Arbitration and Mediation: the Fordham Papers 3, 7–8 (Michael Rovine ed., Martinus Nijhoff Publishers 2008): the author indicates that out of 20 ICSID awards rendered on the merits on the basis of bilateral investment treaties as of June 19, 2007, 15 concerned treaties containing no choice of law provision; the remaining 5 bilateral treaties provided that the treaty itself, general international law principles, and the law of the host State applied.

29 United Nations Conference on Trade and Development (UNCTAD), IIA Monitor No. 1 (2009), International Investment Agreements, "Latest developments in investor-State dispute Settlement," available on the UNCTAD Web site, at pp. 2–3.

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conflict of laws) and such rules of international law as may be applicable." The rule is worded more broadly under Article 22(1) of the Arbitration Rules of the Stockholm Chamber of Commerce, which provides that in the absence of a choice by the parties the "Arbitral Tribunal shall apply the law or rules of law which it considers to be most appropriate," without specifically designating the law of the host State or the rules of international law. Under Article 33(1) of the UNCITRAL Arbitration Rules, in the absence of a choice of law by the parties, "the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable." Under this provision, the arbitrators have to go through the less flexible conflict of laws method[30] to determine which system of law is applicable as opposed to designating directly specific rules of law that may apply to specific questions.[31]

In practice, a determining question in the operation of these rules is what balance is found by the arbitrators, in the absence of a choice of the applicable law by the parties, between the law of the host State and international law. Unlike the UNCITRAL Arbitration Rules and the Arbitration Rules of the Stockholm Chamber of Commerce, in the ICSID system the arbitrators' recourse to both the law of the host State and international law is mandatory. Until the decision rendered by the *ad hoc* Committee in *Wena v. Egypt*,[32] both arbitral practice and legal writings essentially focused on the

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30 For an analysis of this rule as leaving "a wide margin to the arbitral tribunal in the selection of the applicable conflict of laws rules, in contrast to the restriction to host State law and international law in Article 42(1) of the ICSID Convention", *see* Campbell McLachlan, "Investment Treaty Arbitration: The Legal Framework," *supra* note 3, at p. 22.

31 This provision is currently undergoing a revision process: see Draft Article 33(1) in the Draft revised Arbitration Rules discussed at the UNCITRAL forty-ninth session in Vienna on September 15–19, 2008, available on the UNCITRAL Web site ("[t]he arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law [*variant 1*: with which the case has the closest connection] [*variant 2*: which it determines to be appropriate]."). The Working Group's commentary of this provision reads: "The Working Group agreed that the arbitral tribunal should apply the rules of law designated by the parties and that therefore the words 'rules of law' should replace the word 'law' in the first sentence of article 33 [. . .]. In relation to the second sentence of paragraph (1), diverging views were expressed as to whether the arbitral tribunal should be given the same discretion to designate 'rules of law' where the parties had failed to make a decision regarding the applicable law. It was suggested that the Rules should be consistent with article 28, paragraph (2) of the Model Law which refers to the arbitral tribunal applying the 'law' and not the 'rules of law' determined to be applicable. [. . .] The Working Group expressed broad support for wordings along the lines of variants 1 or 2 contained in the second sentence of paragraph (1), which were said to offer the opportunity to modernize the Rules by allowing the arbitral tribunal to decide directly on the applicability of international instruments. Variant 2 reflects a proposal made to provide the arbitral tribunal with a broader discretion in the determination of the applicable instrument." (United Nations Commission on International Trade Law, Working Group II (Arbitration), Forty-ninth session (Vienna, September 15–19, 2008), "Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules", Note by the Secretariat, August 6, 2008, Doc.A/CN.9/WG.II/WP.151/Add.1, pp. 14-15).

32 Wena Hotels Ltd. v. Arab Republic of Egypt, Decision on Application for Annulment of February 5, 2002 (*Ad hoc* Committee composed of Konstantin Kerameus, President; Andreas Bucher, and Francisco Orrego Vicuña), 41 ILM 933 (2002).

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primary role of the law of the host State, leaving a residual role to international law in situations where the law of the host State contained *lacunae* or was inconsistent with international law, or in situations where the law of the host State entered into collision with fundamental norms of international law.[33] The role of international law as a body of substantive rules directly accessible to the arbitrators without initial scrutiny into the law of the host State, which had been advocated by some,[34] was not fully espoused until the decision by the *ad hoc* Committee in the *Wena v. Egypt* annulment proceeding.

In that case, the application for annulment was based on the Tribunal's alleged failure to apply the applicable law because Egyptian law was the law applicable to the lease contracts underlying the dispute between the parties. The investor submitted that there was an important distinction to be drawn between the lease contracts (for which the applicable law was Egyptian law) and the BIT which was the basis for its action in consideration of Egypt's failure to protect its investment under that treaty. The Committee concurred in determining that the subject matter of the lease agreements submitted to Egyptian law was different from the subject matter brought before ICSID arbitration on the basis of the BIT, which is why there was no choice of law under Article 42(1), first sentence.[35] Therefore, in the absence of a choice of law pursuant to the first sentence of Article 42(1), the *ad hoc* Committee considered the issue of the meaning of the second sentence of Article 42(1) and the interplay between domestic and international law,[36] before determining the meaning of "and" as well as the role of international law under that provision:

> What is clear is that the sense and meaning of the negotiations leading to the second sentence of Article 42(1) allowed for *both legal orders to have a role*. The law of the host State can indeed be applied *in conjunction with international law* if this is justified. *So too international law can be applied by itself* if the appropriate rule is found in this other ambit.[37]

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33 On these two lines of reasoning and an analysis of the negotiating history of the ICSID Convention with respect to Article 42(1), *see* Emmanuel Gaillard & Yas Banifatemi, *The Meaning of 'and' in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process*, 18 ICSID Rev. 375 (2003).

34 *See*, regarding the question of the applicability of international law to issues involving the conduct of the host State, Elihu Lauterpacht, *The World Bank Convention on the Settlement of International Investment Disputes*, *in* Recueil d'Études de Droit International en hommage à Paul Guggenheim, IUHEI 642, 659–61(1968) (suggesting, with respect to "disputes arising out of contracts," that an ICSID tribunal should be able to consider whether a State party's conduct is consistent with its obligations under public international law). *See also* Emmanuel Gaillard, *Centre international pour le règlement des différends relatifs aux investissements (C.I.R.D.I.)—Chronique des sentences arbitrales*, *in* 114 J. du droit int'l 135, 157 (1987); Emmanuel Gaillard, *Centre international pour le règlement des différends relatifs aux investissements (C.I.R.D.I.)—Chronique des sentences arbitrales*, *in* 118 J. du droit int'l 165,182–83 (1991).

35 *Wena v. Egypt*, Decision of February 5, 2002, *supra* note 32, at pp. 940–41.

36 *Ibid.*, at p. 941.

37 *Ibid.* (emphasis added). This holding is in sharp contrast with the *ad hoc* Committee's decision in *Klöckner*, according to which "Article 42(1) therefore clearly does not allow the arbitrator to base his decision *solely* on the 'rules' or 'principles of international law.'" (*Klöckner v. Cameroon*, Decision of May 3, 1985, 2 ICSID Reports 95, 122 (1994), para. 69, emphasis

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The rationale underlying the *Wena* holding is that, on a given issue, the rules of international law can be applied as the proper law in the same way as the law of the host State. A tribunal may find two equally applicable rules in each legal system and decide that, under the circumstances of the case, it will apply the rule of international law, without any need to find either a *lacuna* or an inadequacy of the law of the host State. On this basis, the *Wena* Committee validated the tribunal's recourse to international law, in particular the award of compound interest to the investor as the appropriate rule justified by the international law standard of "prompt, adequate and effective" compensation under the BIT which could not be achieved through the simple interest rule of Egyptian law.[38]

The *Wena* method implies a choice of law inquiry.[39] The designation of the rule of international law in that case was the result of the identification of the particular issue at hand (award of damages) and the consideration of the various rules that were susceptible to apply (rules under each of Egyptian law and international law). The Tribunal thus determined, after a choice of law inquiry, that the international law rule

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in original), and also with the *ad hoc* Committee's decision in *Amco*, according to which "Article 42(1) of the Convention authorizes an ICSID tribunal to apply rules of international law *only* to fill up lacunae in the applicable domestic law and to ensure precedence to international law norms where the rules of the applicable domestic law are in collision with such norms." (*Amco Asia Corporation and others v. Republic of Indonesia*, Decision on the Application for Annulment, May 16, 1986, 1 ICSID Reports 509, 515 (1993), para. 20, emphasis added).

For a more recent recognition of this ruling, *see also* CMS Gas Transmission Company v. The Republic of Argentina, Award of May 12, 2005, 44 ILM 1205 (2005), para. 116 ("[. . .] a more pragmatic and less doctrinaire approach has emerged, allowing for the application of both domestic law and international law if the specific facts of the dispute so justifies. It is no longer the case of one prevailing over the other and excluding it altogether. Rather, both sources have a role to play. [. . .]").

38 *Wena v. Egypt*, Decision of February 5, 2002, *supra* note 32, at pp. 942–43 (paras. 50–53). For a similar reasoning, in the context of Article 42(1), first sentence, directing the Tribunal to rule on the basis of the applicable BIT as the law chosen by the parties (and proceeding to a *renvoi* to Egyptian law only regarding provisions more favorable for the investor), Middle East Cement Shipping and Handling Co., S.A. v. Arab Republic of Egypt, Award of April 12, 2002, 7 ICSID Reports 178 (2005), paras. 173–75. *Contra*, *see Aucoven v. Venezuela*, *supra* note 12, paras. 393–96 (determining, in an arbitration initiated on the basis of a concession agreement, that international law does not "require" an award of compound interest and that the applicable Venezuelan law combined with the pertinent contractual provisions did not allow compound interest).

39 *Compare*, for a critical approach in terms of methodology, Campbell McLachlan, "Investment Treaty Arbitration, The Legal Framework," *supra* note 3, at p. 20: "It is doubtless correct, as the [*Wena*] *ad hoc* Committee observed, that the second sentence of Article 42(1) 'does not draw a sharp line for the distinction of the respective scope of international and of domestic law and, correspondingly, that this has the effect to confer on to the Tribunal a certain *margin and power for interpretation*.' But, it is submitted that the rule nevertheless still requires the tribunal to undertake a choice of law enquiry. The starting-point for the analysis, as in Private International Law, is the identification and characterisation of the particular *issue* to which the legal rule is to be applied, and the selection of the legal system which properly applies to the determination of that issue."

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of compound interest was the proper rule in consideration of the State's wrongful act and of the principle of full compensation with respect to the loss of the claimant's investment.[40]

The role of international law in investment treaty arbitration is essential; recognizing this role in no way undermines that of the law of the host where it would be the proper law. Indeed, by the very nature of investment treaty arbitration, certain issues can be resolved only through the application of international law;[41] on the other hand, certain questions can be determined only pursuant to domestic law. The two systems of law may thus apply depending on each distinct issue to be determined on the merits. In terms of methodology, this is allowed by each of the second sentence of Article 42(1), Article 33 of the UNCITRAL Arbitration Rules or Article 22(1) of the Arbitration Rules of the Stockholm Chamber of Commerce, which enable arbitral tribunals, in the exercise of their discretion and pursuant to a choice of law inquiry, to decide what rule of law (international or domestic) is the most appropriate to the determination of each specific question.

IMPLICATIONS OF THE SPECIFIC NATURE OF INVESTMENT TREATIES IN THE CHOICE OF LAW PROCESS: STANDARDS OF PROTECTION VERSUS LAW APPLICABLE TO THE SUBSTANCE

As previously noted, multilateral treaties such as the NAFTA and the Energy Charter Treaty and a number of bilateral investment treaties provide that the treaty itself, along with the rules of international law, apply to the resolution of disputes brought under those instruments. It is unquestionable that arbitral tribunals are also bound by the terms of the investment treaty as the instrument that provides the parties' rights and obligations and the treaty standards against which they will have to determine whether the international responsibility of the host State must be engaged. In this context, the question arises as to the role of the treaty in the choice of law mechanism. In other words, must a distinction be drawn between, on the one hand, a treaty's substantive protections—for example the obligation to treat an investment in a fair and equitable

40 *See* Wena Hotels Ltd. v. Egypt, Award of December 8, 2000 (Arbitral Tribunal composed of Monroe Leigh, President; Ibrahim Fadlallah, and Don Wallace), 41 ILM 896, 909 (2002), paras. 128–29 and the reference to "restor[ing] the Claimant to a reasonable approximation of the position in which it would have been if the wrongful act had not taken place." *See also* the Decision by the *ad hoc* Committee of February 5, 2002, *supra* note 32, at p. 943, para. 53: "The option the Tribunal took was in the view of this Committee within the Tribunal's power. International law and ICSID practice, unlike the Egyptian Civil Code, offer a variety of alternatives that are compatible with those objectives [of prompt, adequate and effective compensation]. These alternatives include the compounding of interest in some cases. Whether among the many alternatives available under such practice the Tribunal chose the most appropriate in the circumstances of the case is not for this Committee to say as such matter belongs to the merits of the dispute. Moreover, this is a discretionary decision of the Tribunal."

41 On this question, *see infra*, the developments under the title "Implications of the Specific Nature of Investment Treaties in the Choice of Law Process: Standards of Protection versus Law Applicable to the Substance".

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manner, or the obligation to refrain from any measures of discrimination or arbitrary treatment, or the prohibition of expropriatory measures without due compensation—and, on the other hand, the treaty as containing the law applicable to the determination of whether such standards have been violated?

The role of the investment treaty in the choice of law mechanism was envisaged in *AAPL v. Sri Lanka*, where the Tribunal saw in the Sri Lanka/United Kingdom bilateral investment treaty the "substantive material rules of direct applicability" as well as seeing in it, by *renvoi*, other sources of law:

> Furthermore, it should be noted that the Bilateral Investment Treaty is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature. Such extension of the applicable legal system resorts clearly from Article 3(1), Article 3(2), and Article 4 of the Sri Lanka/U.K. Bilateral Investment Treaty.[42]

The *AAPL* tribunal concluded that both parties had agreed to the applicability of the Sri Lanka/United Kingdom bilateral investment treaty as "*lex specialis*" and of the international or domestic legal relevant rules referred to "as a supplementary source" by virtue of the provisions of the treaty itself. A very similar reasoning was adopted by the Tribunal in *Azurix v. Argentina*,[43] and by the Tribunal in *LG&E v. Argentina*,[44]

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42 *Asian Agricultural Products Ltd. v. Sri Lanka*, *supra* note 4, para. 21.

43 *Azurix v. Argentina*, *supra* note 3, paras. 65–67: "The Tribunal notes first the agreement of the parties with the statement that *the BIT is the point of reference for judging the merits of Azurix's claim*. The Tribunal further notes that, according to the Argentine Constitution, the Constitution and treaties entered into with other States are the supreme law of the nation, and treaties have primacy over domestic laws. [. . .] Azurix's claim has been advanced under the BIT and, as stated by the Annulment Committee in *Vivendi II*, the Tribunal's inquiry is governed by the ICSID Convention, by the BIT and by the applicable international law. While the Tribunal's inquiry will be guided by this statement, this does not mean that the law of Argentina should be disregarded. On the contrary, the law of Argentina should be helpful in the carrying out of the Tribunal's inquiry into the alleged breaches of the Concession Agreement to which Argentina's law applies, but is only an element of the inquiry because of the treaty nature of the claims under consideration." (Emphasis added).

44 LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic, Decision on Liability of October 3, 2006 (Arbitral Tribunal composed of Tatiana B. de Maekelt, President; Francisco Rezek, and Albert Jan van den Berg), 21 ICSID Rev. 269 (2006), para. 85: "It is to be noted that the Argentine Republic is a signatory party to the Bilateral Investment Treaty, which may be regarded as a tacit submission to its provisions in the event of a dispute related to foreign investments. In turn, LG&E grounds its claim on the provisions of the Treaty, thus presumably choosing the Treaty and the general international law as the applicable law for this dispute. Nevertheless, these elements do not suffice to say that there is an implicit agreement by the Parties as to the applicable law, a decision requiring more decisive actions. Consequently, the dispute shall be settled in accordance with the second part of Article 42(1)." The Tribunal goes on to analyze the respective roles of domestic law and international law under Article 42(1), second sentence, before concluding, by specific reference to *AAPL* (at para. 97) that, in the absence of a "binding contractual agreement" between the parties, it must apply

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although in the context of the absence of a choice of law provision under the United States-Argentina bilateral investment treaty. The Arbitral Tribunal in *Wena v. Egypt* had equally relied on the Egypt-United Kingdom bilateral investment treaty while relying on the second sentence of Article 42(1) of the ICSID Convention to complete the provisions of the treaty through the application of Egyptian law and international law.[45] The Tribunal in *ADC v. Hungary* also applied the bilateral investment treaty, on the basis of what it found to be the express terms of the treaty itself as completed by the rules of international law.[46]

In all these cases, the relevant bilateral investment treaty was treated as the primary source of applicable law by each of the Arbitral Tribunals. The question, however, is not as straightforward as it would seem at first glance: when confronted with a choice of law provision containing a reference to the treaty itself, must the arbitral tribunal treat the provisions of such treaty as the 'applicable law' or, rather, as the provisions containing the respective rights and obligations of the parties to the dispute on the basis of which the claim is lodged? The same would be true of a contract in a purely

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"*first the Bilateral Treaty*; second and in the absence of explicit provisions therein, general international law, and, third, the Argentine domestic law, particularly the Gas Law that governs the natural gas sector." (paras. 98–99, emphasis added).

45 *Wena Hotels Ltd. v. Egypt*, Award of December 8, 2000, *supra* note 40, paras. 78–79: "As both parties agree, 'this case all turns on an alleged violation by the Arab Republic of Egypt of the agreement for the promotion and protection of investments that was entered into in 1976 between the United Kingdom and the Arab Republic of Egypt.' *Thus, the Tribunal, like the parties (in both their submissions and oral advocacy), considers the IPPA to be the primary source of applicable law for this arbitration*. However, the IPPA is a fairly terse agreement of only seven pages containing thirteen articles. [. . .] The Tribunal finds that, beyond the provisions of the IPPA, there is no special agreement between the parties on the rules of law applicable to the dispute. Rather, the pleadings of both parties indicate that, aside from the provisions of the IPPA, the Tribunal should apply both Egyptian law (*i.e.*, 'the law of the Contracting State party to the dispute') and 'such rules of international law as may be applicable.'). The Tribunal notes that the provisions of the IPPA would in any event be the first rules of law to be applied by the Tribunal, both on the basis of the agreement of the parties and as mandated by Egyptian law as well as international law." (Emphasis added).

46 Although the *ADC* Tribunal refers to the treaty as the applicable law under the first sentence of Article 42(1) of the ICSID Convention, it would appear that the express reference to the bilateral investment treaty under Article 6(5) of the treaty concerns disputes between the Contracting Parties and not disputes between an investor and a Contracting Party. *See* ADC Affiliate Ltd. and ADC & ADMC Management Ltd. v. Hungary, Final Award on Jurisdiction, Merits and Damages of October 2, 2006 (Arbitral Tribunal composed of Neil Kaplan, President; Charles Brower, and Albert Jan van den Berg), 18 World Trade & Arb. M. 285 (2006), para. 290: "In the Tribunal's view, by consenting to arbitration under Article 7 of the BIT with respect to 'Any dispute between a Contracting Party and the investor of another Contracting Party concerning expropriation of an investment . . .' the Parties also consented to the *applicability of the provisions of the Treaty* [. . .]. Those provisions are Treaty provisions pertaining to international law. That consent falls under the first sentence of Article 42(1) of the ICSID Convention [. . .]. The consent must also be deemed to comprise a choice for general international law, including customary international law, if and to the extent that it comes into play for interpreting and applying the provisions of the Treaty. [. . .]" (Emphasis added).

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contractual context: the proper law of the contract is not the contract but the legal system in which the contract finds its validity. In other words, the question is whether treaty provisions must be treated as primary rules of conduct forming the basis of the claim or, in terms of choice of law, as secondary rules designed to ensure the proper 'application' of the primary rules, following the well-known distinction adopted by the International Law Commission in its codification of the law of State responsibility.[47]

In individual cases, it could be argued that a treaty provision contains both a standard of conduct (for example, the prohibition of an expropriation or measures having an equivalent effect without due compensation) and rules regarding the operation of such standard in case of dispute (for example, the method of calculation of compensation due in case of expropriation, such as fair market value at the time of expropriation).[48] In such situations, the tribunal will be bound to 'apply' the treaty provision to the extent that it is part of the general framework of the parties' rights and obligations. In terms of methodology, however, this does not make the treaty the 'law applicable' to the dispute brought under the treaty, or change the nature of the treaty provisions which contain substantive obligations that can be the subject of the parties' dispute and provide the basis for a claim.

Beyond methodological differentiations, practical consequences may attach to the distinction between standards of protection and the law applicable to the substance of the dispute. Strictly speaking, in situations where there is a choice of law provision making reference to the treaty itself, the treaty's provisions would normally constitute the standards against which the parties' conduct is assessed by the tribunal, whereas the rules of international law would in any event constitute the 'law applicable' to the determination of the creation, scope, modification, extinction, interpretation and operation of such provisions, for example the rules on State responsibility which determine

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47 On secondary rules in this context, *see* JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY. INTRODUCTION, TEXT AND COMMENTARIES 17 (Cambridge University Press 2002): "The law relating to the content and the duration of substantive State obligations is as determined by the primary rules. The law of State responsibility as articulated in the Draft Articles provides the framework—those rules, denominated 'secondary,' which indicate the consequences of a breach of an applicable primary obligation." *See also* at p. 75: "[. . .] it is not the function of the articles to specify the content of the obligations laid down by particular primary rules, or their interpretation. Nor do the articles deal with the question whether and for how long particular primary obligations are in force for a State. It is a matter for the law of treaties to determine whether a State is a party to a valid treaty, whether the treaty is in force for that State and with respect to which provisions, and how the treaty is to be interpreted. The same is true, *mutatis mutandis*, for other 'sources' of international obligations, such as customary international law. The articles take the existence and content of the primary rules of international law as they are at the relevant time; they provide the framework for determining whether the consequent obligations of each State have been breached, and with what legal consequences for other States."

48 The treaty may contain other rules concerning, for example, the time at which the obligations under the treaty come into effect or whether such obligations may have retroactive effect, or the types of investment that are protected. In such situations, it may be argued, the rules in question concern the qualifying conditions under which the treaty will apply *ratione personae*, *ratione materiae* and *ratione temporis*, and presumably concern issues of jurisdiction rather than merits.

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whether an international obligation has been breached and attach specific consequences to such breach or determine whether there are causes of exoneration, or the rules of treaty interpretation where the nature and extent of the parties' obligations under the treaty are in dispute.[49] Equally, where the treaty does not contain a choice of law rule, it is submitted that the proper 'rules of law' that can be determined as applicable by the arbitrators as regards the creation, scope, modification, extinction, interpretation, and operation of the treaty's substantive provisions will always be rules of international law.[50]

This conclusion is not very different from that reached unambiguously by the *Vivendi* Annulment decision in relation to the distinction between claims arising out of a contract and claims arising out of a treaty:

> [. . .] A state may breach a treaty without breaching a contract, and *vice versa*, and this is certainly true of these provisions of the BIT. The point is made clear in Article 3 of the ILC Articles, which is entitled 'Characterization of an act of a State as internationally wrongful':
>
> > The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.
>
> In accordance with this general principle (which is undoubtedly declaratory of general international law), whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law—in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract, in other words, the law of Tucumán. For example, in the case of a claim based on a treaty, international law rules of attribution apply, with the result

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49 *Compare* with the Judgment of the International Court of Justice in the *Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of February 5, 1997, I.C.J. Reports 7 (1997), para. 47: "Nor does the Court need to dwell upon the question of the relationship between the law of treaties and the law of State responsibility, to which the Parties devoted lengthy arguments, as those two branches of international law obviously have a scope that is distinct. A determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties. On the other hand, an evaluation of the extent to which the suspension or denunciation of a convention, seen as incompatible with the law of treaties, involves the responsibility of the State which proceeded to it, is to be made under the law of State responsibility."

50 *Compare* Antonio Parra, *Applicable Law in Investor-State Arbitration*, *supra* note 28, at p. 8: "Unlike the BITs in *Siemens* and the four other cases, most BITs, including those involved in the remaining 15 cases under consideration, lack specific provisions on applicable law. *However, as indicated earlier, in all of the cases the claims were made in respect of alleged violations by the respective host States of their obligations under the BITs.* The investor-State arbitration provisions of the BITs obviously authorize this type of claim; they typically do so by stating that they cover disputes over the obligations of the State under the BIT or disputes relating to alleged breaches of rights created or conferred by the BIT in respect of investments. *Inevitably it would seem, the claims will fall to be decided in accordance with the provisions of the BIT and of international law as the BIT's governing law.*" (Emphasis added).

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> that the state of Argentina is internationally responsible for the acts of its provisional authorities. By contrast, the state of Argentina is not liable for the performance of contracts entered into by Tucumán, which possesses separate legal personality under its own law and is responsible for the performance of its own contracts.[51]

The conclusion reached more recently in *MTD v. Chile* was similar. In that case, the parties disagreed on the law applicable with regard to foreign investment contracts, the Claimants arguing in favor of international law while Chile claimed that Chilean law applied. The Tribunal held that "[t]his being a dispute under the BIT, the parties have agreed that the merits of the dispute be decided in accordance with international law" and that, as regards foreign investment contracts, "the parties have agreed to this arbitration under the BIT. This instrument being a treaty, the agreement to arbitrate under the BIT requires the Tribunal to apply international law."[52] The *ad hoc* Committee constituted after Chile's application for annulment of the *MTD* award confirmed this conclusion:

> [. . .] MTD's claim is one for 'an alleged breach of any right conferred or created by this Agreement with respect to an investment by such investor' (BIT, Article 6(1)(ii)), and thus international law as the proper law of the BIT is applicable to that claim and to any defence thereto. The Respondent insists—and the Claimants do not disagree—that the Tribunal had to apply international law as a whole to the claim, and not the provisions of the BIT in isolation.
>
> As noted above, the *lex causae* in this case based on a breach of the BIT is international law. However it will often be necessary for BIT tribunals to apply the law of the host State, and this necessity is reinforced for ICSID tribunals by Article 42(1) of the ICSID Convention. Whether the applicable law here derived from the first or second sentence of Article 42(1) does not matter: the Tribunal should have applied Chilean law to those questions which were necessary for its determination and of which Chilean law was the governing law. At the same time, the *implications* of some issue of Chilean law for a claim under the BIT were for international law to determine. In short, both laws were relevant.[53]

This case shows, and the above analysis may explain, the progressive fading, in investment treaty arbitration, of the assumed strict frontier between an express choice of the applicable law by the parties and the absence of such choice, such that the

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51 Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, Decision on Annulment of July 3, 2002 (*Ad hoc* Committee composed of Yves Fortier, President; James Crawford, and José Carlos Fernández Rozas), 6 ICSID Reports 340 (2004), paras. 95–96.

52 MTD Equity Sdn Bhd and MTD Chile SA v. Chile, Award of May 25, 2004 (Arbitral Tribunal composed of Andrés Rigo Sureda, President; Marc Lalonde, and Rodrigo Oreamuno Blanco), 12 ICSID Reports 3 (2007), paras. 86–87.

53 MTD Equity Sdn Bhd and MTD Chile SA v. Chile, Decision on Annulment of 16 February 2007 (*Ad hoc* Committee composed of Gilbert Guillaume, President; James Crawford, and Sara Ordoñez Noriega), 13 ICSID Reports 500 (2008), paras. 61 and 72.

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arbitrators' reference to the investment treaty as the 'applicable' instrument will inevitably lead to the determination of international law as the 'applicable law'. In other words, irrespective of whether or not an investment treaty refers to international law as the law applicable to the merits of the dispute, international law will always be the law governing the interpretation and the application of the treaty providing the basis for the arbitration, to the extent that what is at stake, in investment treaty arbitration, is the international responsibility of a State.

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Chapter 10

Who is Entitled to Claim? Nationality Challenges

Katia Yannaca-Small

INTRODUCTION

Among the main elements of the scope of application of international investment agreements are the definitions of investor and investment. An investment agreement applies only to investors and investments made by those investors who qualify for coverage under the relevant provisions, and only these can submit a claim against the host State. The definition is a key element for both identification and jurisdictional purposes. On the one hand, it identifies the group of investors whose foreign investment the home country is seeking to protect through the agreement as its "nationals" as well as the "clients" and the investments the host country wishes to attract; in addition, it identifies ways in which the investment might be structured in order to attract better protection under investment treaties.[1] On the other hand, the definition is essential to establish jurisdiction of the arbitral tribunals since the scope of application *ratione persona* depends on who the investor is, and the scope of application *ratione materiae* depends on what constitutes an investment.

The chapter deals with the nationality of the investor, as a natural and legal person; the criteria used by investment agreements to confine this nationality and the arbitral awards that support this qualification. For natural persons, the issues are usually not problematic, although some may arise in particular in establishing whether

1 The broader the definition, the greater is the number of persons or entities who may benefit from the host State's admission policies and the wider is class of investors who could claim coverage under the agreement.

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a natural person is a dual national. For legal persons, the debate remains by far more complex. [2]

NATURAL PERSONS

The right to grant and withdraw nationality of natural persons is part of a State's reserved domain. The question before tribunals has been whether and to what extent a State can refuse or consent to recognize the nationality of a claimant. International law practice on questions of nationality has developed primarily in the context of diplomatic protection before it became part of the numerous investment agreements' universe. Even in the context of diplomatic protection, there was no agreement among international courts and tribunals as to how to establish nationality –although the threshold applied was quite high in order for the State to espouse its nationals' claim, since it recognized the nationality of a person only when there was a genuine link with the State of the asserted nationality.

Customary International Law

The best known case is the so-called *Nottebohm* case.[3] The International Court of Justice (ICJ) held that even though a State may decide on its own accord and in terms of its own legislation whether to grant nationality to a specific person, there must be a real connection between the State and the national for that to be a basis for international protection. The Court made the following statement:

> Nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State.

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2 *See generally*, R. Dolzer & C. Schreuer, Principles on International Investment Law (Oxford University Press 2008); K. Yannaca-Small & L. Liberti, *The Definition of Investor and Investment in International Investment Law*, *in* International Investment Law: Understanding Concepts and Tracking Innovations, Chapter 1 (OECD 2008); A. Sinclair, *ICSID's Nationality Requirements*, *in* Investment Treaty Arbitration and International Law (TJ Grierson Weiler ed., JurisNet LLC 2008).

3 The Nottebohm case (Liechtenstein v. Guatemala), 2nd phase, Judgment of April 6, 1955, 1955 ICJ Reports 4, at 23. The case concerned Mr. Nottebohm, a German national who resided in Guatemala (since 1905). In 1939, he travelled to Liechtenstein to visit his brother and obtained Liechtenstein nationality "in exceptional circumstances of speed and accommodation" in order to gain the status of a neutral State instead of the one of a belligerent State. He returned to Guatemala in 1940 and remained there until his deportation to the United States in 1943. He then tried to rely on his Liechtenstein nationality to seek diplomatic protection against Guatemala. In these circumstances, the Court said he could not assert his Liechtenstein nationality against Guatemala where he had settled for 34 years.

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> Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national.

However, today it would be impractical to prove effective nationality following the *Nottebohm* considerations, i.e., the person's attachment to the State through tradition, interests, activities, or family ties.[4] The International Law Commission's (ILC) Report on Diplomatic Protection expressed skepticism over the *Nottebohm* findings with respect to an individual claim:

> If the genuine link requirement proposed by Nottebohm was strictly applied it would exclude millions of persons from the benefit of diplomatic protection as in today's world of economic globalisation and migration there are millions of persons who have drifted away from the State of nationality and made their lives in States whose nationality they never acquire or have acquired nationality by birth or descent from States with which they have a tenuous connection.[5]

However, these findings may still be useful in cases of dual or multiple nationalities when the nationality of the claimant in order to be accepted has to be "predominant." Under customary international law, a State may exercise diplomatic protection on behalf of one of its nationals with respect to a claim against another State, even if its national also possessed the nationality of the other State, provided that the dominant and effective nationality of the person was of the State exercising diplomatic protection. In this respect, customary law has evolved from an earlier rule under which diplomatic protection could not be exercised in those circumstances. This is reflected in the ILC Draft Convention, which states:

> A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the time of the injury and the date of the official presentation of the claim.[6]

The Iran-United States Claims Tribunal[7] relied on the customary international law rule of dominant and effective nationality in determining whether a claimant with dual United States-Iranian nationality was to be regarded as predominantly American or

4 Amerasinghe comments that: "There is a distinction between diplomatic protection and jurisdiction for the purposes of the [ICSID] Convention. . .. [E]ven if the *Nottebohm Case* were to be used as an applicable precedent, it is arguable that an effective link is relevant to negating the existence of nationality only in the particular circumstances of that case, or at any rate, in very limited circumstances," *in The Jurisdiction of the International Centre for Settlement of Investment Disputes*, 19 Indian J. Int'l L. 166, 203 (1979).

5 Report of the International Law Commission on the work of its fifty-fourth session (2002) (UN doc A/57/10) Chapter V at 176.

6 Draft Convention on Diplomatic Protection (2004 draft), UN Doc. No. A/CN.4/L.647 (May 24, 2004).

7 The Algiers Accords resolved the hostage crisis between Iran and the United States. Pursuant to these Accords, the Iran-U.S. Claims tribunal was established in 1981 in order to adjudicate claims by nationals of each country following the Iranian revolution.

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Iranian for purposes of bringing a claim before the tribunal. In *Nasser Esphahanian v. Bank Tejarat*,[8] the tribunal adopted this rule, finding that the claimant could claim before the tribunal because his "dominant and effective nationality at all relevant times [was] that of the United States and the funds at issue in the present case related primarily to his American nationality, not his Iranian nationality." Also in case No A/18, the tribunal considering another case of dual nationality, relied on *Nottebohm* and held that the international law rule was the one of "real and effective nationality", involving "stronger factual ties between the person concerned and one of the States whose nationality is involved."[9]

State Practice/Investment Agreements

Some BITs include a single definition of a national, which applies to both parties. Other BITs offer two definitions, one relating to one Contracting Party and the other to the second Contracting Party. For example, the United States-Uruguay BIT,[10] which is based on the 2004 U.S. Model BIT, defines "national" to mean:

a) For the United States, a natural person who is a national of the United States as defined in Title III of the Immigration and Nationality Act.
b) For Uruguay, a natural person possessing the citizenship of Uruguay, in accordance with its laws.

However, some investment agreements introduce alternative criteria such as a requirement of residency or domicile. For instance, the Germany-Israel BIT[11] provides in its Article 1(3)(b) that the term "nationals" means, with respect to Israel, "Israeli nationals being permanent residents of the State of Israel," and according to the Canada-Argentina BIT,[12] the term "investor" means "(i) any natural person possessing the citizenship of or permanently residing in a Contracting Party in accordance with its laws."

The Energy Charter Treaty (ECT)[13] defines nationals by reference to each State's domestic laws determining citizenship or nationality but also extends coverage to permanent residents: "Investor" means: "(a) with respect to a Contracting Party: (i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law."

NAFTA, in its Article 201, equally provides in part that "'national' means a natural person who is a citizen or permanent resident of a Party."

8 Award No 31-157-2 (March 29, 1983), *reprinted in* 2 Iran-US C.T.R. 157.
9 *Ibid.*, at 265.
10 U.S.-Uruguay BIT, entered into force on November 1, 2006.
11 Germany-Israel BIT, signed on June 24, 1976, not yet entered into force.
12 Canada-Argentina BIT, entered into force on April 29, 1993.
13 Energy Charter Treaty, entered into force in April 1998.

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Most investment agreements do not refer to dual nationality.[14] One BIT which has addressed this issue is the 1991 treaty between Israel and Romania which, in its Protocol, states that:

> With respect to physical persons—an individual who possesses both Israeli and Romanian citizenship who invests in Israel—shall be considered as Romanian investors, under Israeli law in force, for the purposes of this Agreement.

The 2004 Model U.S. BIT, stipulates that ". . . a natural person who is a dual citizen shall be deemed to be exclusively a citizen of the State of *his or her dominant and effective citizenship*" [emphasis added].

The ICSID Convention

Article 25(1) of the ICSID Convention provides that "the jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment between a Contracting State . . . and a national of another Contracting State. . . ." With respect to natural persons, Article 25(2) of the Convention defines "National of another Contracting State" to mean:

> (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute *on the date on which the parties consented* to submit such dispute to conciliation or arbitration *as well as on the date on which the request was registered* pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36. . . .

The ICSID Convention requires claimants to establish that they had the nationality of a Contracting State on two different dates: the date at which the parties consented to ICSID's jurisdiction *and* the date of the registration of the request for arbitration.

An investor's nationality has to be objectively determined. An agreement between the host State and an investor may specifically state his nationality, but this may not be conclusive if the nationality does not exist in an objective way.[15] In addition, a certificate of nationality, although it provides strong evidence, is not conclusive proof.

An extension of treaty rights to permanent residents cannot extend ICSID's jurisdiction beyond nationals of Contracting States to the ICSID Convention.

With respect to dual nationality, the ICSID Convention excludes dual nationals, if one of the nationalities is that of the host State, i.e., it ". . . does not include any person

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14 Dolzer & Stevens say that in the absence of treaty regulation, general principles of international law would apply, according to which the "effective" nationality of the individual would govern. R. Dolzer and M. Stevens, Bilateral Investment Treaties (Martinus Nijhoff Publishers 1995).

15 Dolzer & Schreuer, Principles of International Investment Law 237 (Oxford University Press 2008).

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who on either date also had the nationality of the Contracting State party to the dispute."[16,17]

In practice, at least thirty ICSID and Additional Facility cases, have involved investors who were national persons[18] although those which involved dual nationals have drawn most attention.

In *Soufraki v. United Arab Emirates*,[19] the claim was related to a port concession in Dubai. When a dispute arose, Mr. Soufraki, who asserted dual Italian and Canadian nationality, invoked the Italy-United Arab Emirates BIT to bring a claim based on his Italian nationality. The tribunal investigated his claim of Italian nationality and found that he had lost it when he spontaneously acquired Canadian citizenship. The tribunal looked at Mr. Soufraki's certificates of nationality only as *prima facie* evidence of his nationality[20] and held that he was not entitled[21] to bring a claim under the Italy-U.A.E. BIT as an Italian national[22]:

> . . . when, in international arbitral or judicial proceedings, the nationality of a person is challenged, the international tribunal is competent to pass upon that challenge. It will accord great weight to the nationality law of the State in question and to the interpretation and application of that law by its authorities. But it will in the end decide for itself whether, on the facts and law before it, the person whose nationality is at issue was not a national of the State in question and when, and what follows from that finding. Where as in the instant case, the jurisdiction of the international

16 Schreuer refers to the Report of the Executive Directors, which explains the provision of dual nationality as follows: "It should be noted that under clause (a) of Article 25(2) a natural person who was a national of the State party to the dispute would not be eligible to be a party in proceedings under the auspices of the Centre, even if at the same time he had the nationality of another State. This ineligibility is absolute and cannot be cured even if the State party to the dispute had given its consent." 1 ICSID Reports 29, *in* C. Schreuer with L. Malintoppi, A. Reinisch and A. Sinclair, The ICSID Convention: A Commentary 667, at 271 (Cambridge University Press, 2nd ed. 2009).

17 *Ibid.*, referring to Amerasinghe, *The Jurisdiction of the International Centre*, p. 205.

18 Schreuer, *supra* note 16, para. 640, p. 264.

19 Hussein Nuaman Soufraki v. United Arab Emirates, ICSID Case No. ARB/02/7, Decision on Jurisdiction, July 7, 2004.

20 *Ibid.*, para. 63.

21 In a very interesting statement, the tribunal recognized the difference between the ease with which an investor may incorporate an investment in a favorable jurisdiction in order to have the most advantageous BIT coverage and the many difficulties that were faced by Mr. Soufraki as a natural person in proving that he had Italian nationality, when he had previously lost it: ". . . had Mr. Soufraki contracted with the United Arab Emirates through a corporate vehicle incorporated in Italy, rather than contracting in his personal capacity, no problem of jurisdiction would now arise. But the tribunal can only take the facts as they are and as it has found them to be," *Ibid.*, para. 83.

22 Another interesting argument was raised by the defendant but was not elaborated by the tribunal: if Mr. Soufraki had qualified as an Italian national, would he still need to meet a further test of "effective" or "dominant" nationality under international law? Such a test might have required that, as a dual passport holder, he demonstrate that he had closer or more "effective" ties with the "home" State under whose BIT he sought to bring a claim (i.e., Italy).

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> tribunal turns on an issue of nationality the international tribunal is empowered, indeed bound, to decide that issue.[23]

Soufraki requested the annulment of the award claiming *inter alia* that the tribunal manifestly exceeded its powers on this point. The *ad hoc* Committee confirmed the tribunal's finding as follows:

> [. . .] the principle is in fact well established that international tribunals are empowered to determine whether a party has the alleged nationality in order to ascertain their own jurisdiction, and are not bound by national certificates of nationality or passports or other documentation in making that determination and ascertainment.[24]
>
> . . . .
>
> Certificates of nationality constitute *prima facie*—not conclusive—evidence, and are subject to rebuttal. *In fine* the Tribunal did not manifestly exceed its powers in deciding that it had to determine for itself Mr. Soufraki's nationality.[25]

In *Pey Casado and Président Allende Foundation v. Chile*,[26] the tribunal was faced with the situation where the claimant, Pey Casado, had renounced his Chilean nationality in favor of the Spanish one, but Chile argued that he was still a Chilean national.[27] The tribunal agreed with the *Soufraki* tribunal's finding regarding its obligation to determine on its own terms the nationality of the investor and proceeded to its own investigation. After examining the Chilean Constitution, the Chilean jurisprudence on this matter as well as the Inter-American Convention on Human Rights, the tribunal concluded that Pey Casado had indeed successfully renounced his Chilean nationality. In addition, based on Professor Schreuer's analysis of the ICSID Convention on this point,[28] the tribunal rebuffed any efforts made by the host State to impose its nationality

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23 *Ibid.*, para. 55.

24 Soufraki v. United Arab Emirates, Decision of the Ad Hoc Committee on the Application for Annulment, June 5, 2007, para. 64.

25 *Ibid.*, para. 76.

26 Pey Casado and Président Allende Foundation v. Chile, Award, ICSID Case No. ARB/98/2, April 22, 2008.

27 The claim arose out of Pinochet's coup d'état. Following the coup, Pinochet's government shut down the El Clarin newspaper and dissolved the company that owned it. One of the claimants, Victor Pey Casado, owned shares in that company. After fleeing to his native Spain, Mr. Pey Casado joined with other former friends of Allende to establish the philanthropic Salvador Allende Foundation to promote freedom of the press and democratic values. When he returned to Chile in the late 1980s, he was unable to secure any remedies in Chilean courts and turned to the Chile-Spain bilateral investment treaty. He was joined by the Salvador Allende Foundation, to which he had donated 90 percent of his shares. The tribunal ordered Chile to pay over US$10 million for breaching the BIT.

28 According to Schreuer, "The host State may not impose its nationality on a foreign investor for the purpose of withdrawing its consent. During the Convention's drafting the problem of compulsory granting of nationality was discussed and the opinion was expressed that this would not be a permissible way for a State to evade its obligation to submit a dispute to the Centre (History, vol. II, pages 658, 705, 876). But it was decided that this question could be left to the decision of the Conciliation Commission or Arbitral Tribunal." THE ICSID CONVENTION: A COMMENTARY, 2009, *supra* note 16, para. 678, p. 274.

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upon an investor for the purpose of withdrawing its consent and therefore evade its obligation to submit a dispute to ICSID.

In *Champion Trading v. Egypt*,[29] U.S. nationals who were also found to be Egyptian nationals were denied the right to bring a claim against Egypt (based on the U.S.-Egypt BIT). The individual claimants argued that the tribunal should employ the international law test of "real or effective nationality," which they contended would show that they "have not effectively acquired Egyptian nationality." The tribunal found that the claimants had used their Egyptian nationality for the registration of their business and therefore were clearly excluded from ICSID arbitration.[30]

In the case *Siag and Vecchi v. Egypt*,[31] Mr. Siag and his mother, Ms. Vecchi, former Egyptian nationals, submitted a claim under the Italy-Egypt BIT, as Italian nationals. Because the ICSID Convention does not allow persons to take their own State to arbitration, the tribunal extensively examined the Egyptian law in order to determine whether they had ceased to be Egyptian nationals. Although all three arbitrators held that Ms Vecchi had lost her Egyptian nationality on the date she reacquired her Italian nationality, one tribunal member,[32] in a partial dissenting opinion, disagreed that this was the case with Mr. Siag. Two of the three arbitrators held that Mr. Siag had lost his Egyptian nationality by virtue of his failure to take formal steps to retain it. The third arbitrator stated in his dissent:

> The drafting history of Article 25(2)(a) is unequivocal about the concern expressed by many countries that did not want to be taken to international arbitration by investors who were their nationals, even if holding the nationality of another Contracting Party as well . . . .This conclusion is equivalent to the recognition that the prohibition in question is a kind of rule of *jus cogens* which does not admit derogation by consent, at any rate for the parties to the Convention . . .

In *Micula et al. v. Romania*,[33] the tribunal was faced with the situation where, while the claimants Ioan and Viorel Micula had renounced their Romanian nationality in favor of Swedish nationality, Romania argued that the individuals should not be permitted to "oppose" Romania in an international arbitration because their "effective"

29 Champion Trading Company, Ameritrade International Inc, James T. Wahba, John B. Wahba, Timothy T. Wahba v. Arab Republic of Egypt, ICSID Case No. ARB/02/9, Decision on Jurisdiction, February 21, 2003.

30 After dismissing jurisdiction for the individual claims, the tribunal upheld jurisdiction for the claims brought by the two corporate entities, observing that there was no bar to ICSID claims by companies whose shares were held by dual nationals of the two parties engaged in the arbitration.

31 Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt, ICSID Case No. ARB/05/15, Decision on Jurisdiction, April 11, 2007. Mr. Siag and his mother, Ms. Vecchi, claimed that Egypt confiscated a property which had been purchased by their Egyptian company and slated for development into a resort property.

32 *Ibid.*, *see* Orrego Vicuña's Dissenting Opinion.

33 Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, September 24, 2008.

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nationality, as a matter of international law, was Romanian. The tribunal rejected the argument that the Micula brothers were effectively Romanian by declining to use the "effective nationality" test.[34] It held that the test of "effective" nationality—which it characterized as a disputed one under public international law—should not be utilized in the context of an ICSID case. What's more, the tribunal stressed that, under public international law, there was a particular "reluctance" to apply such a test where the individuals in question held only one nationality (as compared to situations where individuals might hold several nationalities, and adjudicators might inquire which of these was effective or genuine and which was more tenuous).[35] It added that:

> It is also doubtful whether the genuine link test would apply pursuant to the BIT. The Contracting Parties to the BIT are free to agree whether any additional standards must be applied to the determination of nationality. Sweden and Romania agreed in the BIT that the Swedish nationality of an individual would be determined under Swedish law and included no additional requirements for the determination of Swedish nationality. The Tribunal concurs with the *Siag* tribunal that the clear definition and the specific regime established by the terms of the BIT should prevailand that to hold otherwise would result in an illegitimate revision of the BIT." [36]

LEGAL PERSONS

Corporate nationality raises more complex issues than nationality of natural persons. Companies today operate in ways that make it very difficult to determine nationality because of the several layers of shareholders, both natural and legal persons themselves, operating from and in different countries. The customary international law does not provide full guidance since its relevance was essentially limited to the context of diplomatic protection. Investment treaties specifically define the objective criteria which make a legal person a national, or investor, of a Party for purposes of the agreements and specify any additional requirements that the contracting States wish to see applied to determine the standing of claimants. In some cases, if the Party does not wish to extend its treaty protection, it may include a "denial of benefit clause," allowing exclusion of investors in certain categories.

The ICSID Convention, which limits the jurisdiction of the Centre to disputes between one Contracting State and a national of another Contracting State, provides specific rules on the nationality of claims in its Article 25.

34 This test of "effective" or "genuine" nationality, if applied in the ICSID context, would oblige the tribunal to look below the surface of the situation and inquire into whether the two Swedish passport holders suing Romania were, in fact, "effectively" nationals of Romania—by virtue of their deep ties to that country—and thus lacking standing to sue Romania under international law.

35 *Ibid.*, paras. 99–100.

36 *Ibid.*, para. 101.

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Customary International Law

The ICJ addressed the issue of corporate nationality in dealing with the role of shareholders and has recognized the limited role that customary law plays in this context, in particular in a landscape with an increasing number of investment agreements.

The first case was brought and discussed in a period where the number of investment agreements was very limited. In *Barcelona Traction*,[37] although the ICJ recognized the central role of shareholders as investors, it held that the State of nationality of the majority shareholders (Belgium) of a company incorporated in Canada was not entitled to pursue claims against Spain for damage done to the company.[38] The ICJ Chamber held:

> Notwithstanding the separate corporate personality, a wrong done to the company frequently causes a prejudice to its shareholders. But the mere fact that damage is sustained by both company and shareholder does not imply that both are entitled to claim compensation . . . .In such cases, no doubt, the interests of the aggrieved are affected, but not their rights. Thus whenever a shareholder's interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action; for although two separate entities may have suffered the same wrong, it is only one entity whose rights have been infringed.[39]

The Chamber of the Court suggested, however, that international law may provide for three narrow exceptions in which shareholder claims may be brought, in particular where (i) the rights of shareholders are directly affected, (ii) the company has ceased to exist in the country of incorporation, or (iii) the State of incorporation lacks capacity to take action.

It is interesting to note that the ICJ acknowledged that it was deciding under customary international law, was limited to the exercise of diplomatic protection, and did not rule on the protection of shareholders in a corporation outside of that context under investment protection agreements, for instance. The Court was well aware of the new trends in respect of the protection of foreign investors under the Washington Convention and the growing web of bilateral investment treaties.[40] On this point it held that:

> Considering the important developments of the last half-century, the growth of foreign investments and the expansion of international activities of corporations.

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37 Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), February 5, 1970 (1970), I.C.J. 3, 35–36, 9 I.L.M. 227.

38 For a discussion on the *Barcelona Traction* case, see Ian Laird, *A Community of Destiny—The Barcelona Traction case and the Development of Shareholder Rights to Bring Investment Claims*, *in* International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law (Todd Weiler ed., Cameron May 2005); R. Higgins, *Aspects of the Case Concerning the Barcelona Traction Company*, 11 Va. J. Int'l L (1971).

39 *Barcelona Traction*, I.C.J. 3 (1970), at 35.

40 Judge Jessup in his separate opinion stated the following: "The International Court of Justice in the instant case is not bound by formal conceptions of corporate law. We must look at the economic reality of the relevant transactions and identify the overwhelmingly dominant feature." The overwhelmingly dominant feature in the affairs of Barcelona Traction was "control which may constitute the essential link". *Barcelona Traction*, I.C.J. 3 (1970), at n. 1.

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> and considering the way in which economic interests of States have proliferated, it may at first sight appear surprising that the evolution of law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane . . . . Thus, in the present State of the law the protection of shareholders requires that recourse be to treaty stipulations or special agreements directly concluded between the private investors and the State in which the investment is placed.[41]

The Court identified these BITs and other agreements as a *lex specialis*—thus allowing the conclusion that customary international law had not yet developed and that recourse of shareholders could only be found in international instruments such as BITs or the Washington Convention. It should be noted that 1970 was only four years after the entry into force of the Washington Convention (1966), and there were only a few hundred BITs in existence instead of the thousands that exist today.

This decision drew a considerable discussion[42] and also constituted the basis for Argentina's defense[43] in the numerous claims brought against this country in recent years.

A few years later, when the landscape of investment protection agreements had somewhat evolved, a Chamber of the ICJ, in the case concerning *Elettronica Sicula S.p.A. (ELSI)*,[44] permitted the United States to bring a claim against Italy on behalf of U.S. shareholders with respect to their wholly owned Italian company, ELSI. This case was based on a claim brought by the ELSI shareholders whose plant and assets were requisitioned by local Italian authorities, allegedly interfering with certain rights of the shareholders to own and manage the company. In that case, the Chamber did not rule on the basis of *Barcelona Traction* but rather focused on terms of the governing Treaty of Friendship, Commerce and Navigation, which expressly provided for the protection of U.S. shareholders in Italy.

In a more recent case, at a time when the web of investment agreements is particularly dense, *Guinea v. DR Congo*[45] (*Diallo* case), the ICJ gave credit to the prominent role of the multilateral and bilateral investment treaties and the contracts between investors and host States as the key holders of the protection of shareholders in contemporary international law and held that Guinea as the home state was not able to exercise diplomatic protection against the Democratic Republic of the Congo—the State of incorporation.

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41 *Ibid.*, at 46–47.

42 Recent writings on the rights of shareholders in general, with comments on the *Barcelona Traction* case include C. H. Schreuer, *Shareholder Protection in International Investment Law*, 2(3) T.D.M. (June 2005), S. Alexandrov, *The 'Baby Boom' of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals—Shareholders as 'Investors' under Investment Treaties*, 6 (3) J World Investment & Trade, Geneva (June 2005).

43 Argentina repeatedly stated in its defense that the shareholders are entitled to bring a claim only when their own rights have been infringed and not the rights of the corporation of which they are shareholders.

44 Elettronica Sicula S.p.A. (U.S. v. Italy), I.C.J. Reports, July 20, 1989, 15.

45 Guinea v. DR Congo, ICJ Judgement, May 24, 2007, at paras. 88–90.

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Investment Agreements

Which entities are usually covered by the definition of investment? Only private or also public ones? All legal entities or only those of certain forms? What is the link between the legal person and the Contracting Party that defines its nationality?

Some investment agreements make clear that State-owned entities are also included. For instance, the 2004 U.S. Model BIT and Canada Model FIPA cover governmentally owned or controlled entities. According to Article 1, Definitions, "enterprise" means any entity constituted or organized under applicable law, whether or not for profit, and *whether privately or governmentally owned or controlled . . .*" [emphasis added].

Similarly, Article 13(a)(iii) of the Convention establishing the Multilateral Investment Agency (MIGA) defines eligible investors to include a juridical person "*whether or not it is privately owned . . .*" [emphasis added].

Some investment agreements include, in addition to State entities, the Government itself. For instance, in the 1996 Czech Republic-Kuwait BIT and in the 2001 Belgium-Saudi Arabia BIT, the Government is qualified as an investor.

Some BITs include language indicating that all legal entities, regardless of form, may be considered investors. The U.S. BIT and Canada FIPA, for instance, provide that investors may consist of legal entities "including a corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organization; and a branch of any such enterprise." The Swiss Model BIT also provides that the term "investor" refers to "legal entities including companies, corporations, business associations and other organizations." The German Model BIT, in addition to the above forms of companies, includes also nonprofit entities in the definition of "investor." In its Article 1.2(a), it defines "companies" in respect of Germany to include "any juridical person as well as any commercial or other company or association with or without legal personality . . . *irrespective of whether or not its activities are directed at profit*" [emphasis added].

There is no single criterion or test used by investment treaties to define the link required between a legal person seeking protection under the treaty and the Contracting State under whose treaty the investor asks for protection. Under international law, there are essentially three criteria[46] for determining nationality of legal persons: (i) incorporation, which is used often alone; (ii) the main seat (*siège social*), i.e., where the place of administration is; and (iii) less frequently, control. Most investment treaties use a combination of these criteria.[47] The most common approach is a combination

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46 Judge Jessup, in his Separate Opinion in *Barcelona Traction* said: "[t]here are two standard tests of the 'nationality' of a corporation. The place of incorporation is the test generally favoured in the legal systems of the common law, while the *siège social* is more generally accepted in the civil law systems."

47 A. Sinclair notes that "cultural, economic and political factors will influence which test a particular State will prefer to apply. . . . No question arises as to the validity of the choices, nor is it appropriate to identify a general rule in the abstract because different States legitimately take different approaches *to* qualification for protection" *in The Substance of Nationality Requirements in Investment Treaty Arbitration*, 6(3) ICSID Rev., F.I.L.J. (Fall 2005).

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of place of incorporation and seat, although the combination of incorporation and control and the combination of all three tests is also found.

Incorporation. The United Kingdom is one of the countries which, in the majority of their BITs, use the place of incorporation as the sole test. The UK-El Salvador[48] and the UK-Poland BIT,[49] for instance, define an "investor" as:

> (i) in respect of the United Kingdom: . . . corporations, firms and associations incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which this Agreement is extended. . . .

The United States and Canada are among the countries which rely mainly, but not only, on the place of incorporation test. The U.S.-Uruguay BIT provides that:

> 'enterprise of a Party' means an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there.[50]

The Canada Model FIPA[51]provides that "enterprise means: i) any entity constituted or organized under applicable law. . . ."

Because of its potential opening for treaty shopping, a clause incorporating this criterion may be accompanied by a "denial of benefits" clause which allows the State party concerned to deny treaty protection to a company, under certain circumstances, if it is controlled by nationals of a nonparty. This provision gives the host State the authority effectively to carve out from the definition of "investor" shell companies owned by nationals of a third country or the host State and companies owned by certain third-country aliens.[52]

The Austria-Libya[53] and Austria-Lebanon[54] BITs include a denial of benefits clause:

> A Contracting Party may deny the benefits of this Agreement to an investor of the other Contracting Party and to its investments, if investors of a Non-Contracting Party own or control the first mentioned investor and that investor has no substantial business activity in the territory of the Contracting Party under whose law it is constituted or organized.

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48 UK-El Salvador BIT, December 1, 2001.

49 UK-Poland BIT, December 8, 1987.

50 In the U.S. Model BIT, "enterprise" is further defined as "any entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organization; and a branch of an enterprise."

51 *See* Article 1, Definitions, *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx.

52 *See* B. Legum, *Defining investment and investor: who is entitled to claim?*, Presentation at the Symposium "Making the most of international investment agreements: a common agenda," co-organized by ICSID, OECD, and UNCTAD, December 12, 2005, OECD, Paris.

53 Austria-Libya BIT, entered into force on January 1, 2004.

54 Austria-Lebanon BIT, entered into force on September 20, 2002.

The NAFTA in its Article 1132(2),[55] the new U.S.[56] and Canada[57] Model BITs, the U.S. FTAs with Chile,[58] CAFTA–Dominican Republic,[59] Australia,[60] Colombia,[61] Morocco,[62] Panama,[63] Peru,[64] and the Canada-Chile FTA[65] contain similar language with some variation.

The Energy Charter Treaty (ECT) in its Article 1(7)(a)(ii) defines "investor" with respect to a contracting Party to include a "company or other organization organized in accordance with the law applicable in that Contracting Party."[66] The denial of benefits clause is found in Part III, Article 17:

> Each Contracting Party reserves the right to deny the advantages of this Part to: (1) a legal entity if citizens or nationals of a third State own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized; . . . .

The two qualifications of substantial business connection and ownership or control residing in the territory of an ECT Contracting Party are cumulative.

Finally, the 1995 ASEAN Framework Agreement on Services in its Article VI stipulates that:

> The benefits of this Framework Agreement *shall be* denied to a service supplier who is a natural person of a non-member State or a juridical person owned or controlled by persons of a non-member State constituted under the laws of a member State, but not engaged in substantive business operations in the territory of Member States.

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55 NAFTA Article 1113(2).

56 Article 17 of the US BIT provides as follows:

> 1. A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if persons of a non-Party own or control the enterprise and the denying Party: (a) does not maintain diplomatic relations with the non-Party; or (b) adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Treaty were accorded to the enterprise or to its investments.
>
> 2. A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of the other Party and persons of a non-Party, or of the denying Party, own or control the enterprise.

57 Canada Model FIPA, Article 18.

58 Article 10.11, U.S.-Chile FTA.

59 Article 10.12(2), U.S.-CAFTA-Dominican Republic.

60 Article 11.12, U.S.-Australia FTA.

61 Article 10.12, U.S.-Colombia FTA.

62 Article 10.11, U.S.-Morocco.

63 Article 10.12, U.S.-Panama FTA (under negotiation text as of January 2007).

64 Article 10.12, U.S.-Peru FTA.

65 Article G-13, Canada-Chile FTA.

66 This broad definition is somewhat qualified by Article 17 of the ECT which calls for an inquiry into a company's substantive connection with the State in which it is incorporated (denial of benefits clause).

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Siège social. Some States require that in order to qualify as an investor, a legal person should not only be incorporated in the host country but should also have its "siège social" and/or effective management there.[67] An example of a treaty using the company seat as the basis for attributing nationality is the 2003 Germany-China BIT.[68] The treaty defines "company" to include in respect of Germany "any juridical person as well as any commercial or other company or association with or without legal personality having its seat in the territory of the Federal Republic of Germany. . . ." The France-Singapore BIT[69] in its Article 1(3)(a) restricts its coverage in the case of French "bodies corporate," to "legal persons constituted in France conforming to the French law and having a Head Office in France."

The ASEAN Agreement for the Promotion and Protection of Investments provides that "the term 'company' of a contracting Party shall mean a corporation, partnership or other business association, incorporated or constituted under the laws in force in the territory of any Contracting Party wherein *the place of effective management is situated*"[emphasis added].

Control. The Convention establishing the Multilateral Investment Guarantee Agency (MIGA) combines the tests of the place of incorporation with the company seat but also allows the use of the place of ownership or control as an alternative. Article 13(a)(ii) provides that a legal entity is an eligible investor under the Agency's insurance program provided that "such juridical person is incorporated and has its principal place of business in a member or the majority of its capital is owned by a member or members or nationals thereof, provided that such member is not the host country in any of the above cases."

It is not very common that investment agreements use the test of control to justify coverage of an investor under the treaty. This element can be found in some BITs concluded by Sweden, Belgium-Luxembourg, and the Netherlands.

Article 1 of the Sweden-India BIT[70] uses a combination of incorporation, ownership and control tests and provides that:

> . . . d) 'companies' mean any corporations, firms and associations incorporated or constituted under the law in force in the territory of either Contracting Party, or in a third country if at least 51 per cent of the equity interest is owned by investors of that Contracting Party, or in which investors of that Contracting Party control at least 51 per cent of the voting rights in respect of shares owned by them.

The Belgium/Luxembourg-Philippines BIT[71] does the same:

> 'Investor' shall mean. . . . the 'companies', i.e. with respect to both Contracting Parties, a legal person constituted on the territory of one Contacting Party in

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67 The rationale is different with respect to BITs of EU Member States (e.g., Germany-China BIT). Such BITs extend their benefits to companies which transfer their seat to another Member State without giving up the original form of incorporation.

68 Germany-China BIT, entered into force on November 11, 2005.

69 France-Singapore BIT, entered into force on October 18, 1976.

70 Sweden-India BIT, entered into force on April 1, 2001.

71 Belgium/Luxembourg-Philippines BIT, not entered into force.

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accordance with the legislation of that Party having its head office on the territory of that Party, or controlled directly or indirectly by the nationals of one Contracting Party, or by legal persons having their head office in the territory of one Contracting Party and constituted in accordance with the legislation of that Party.

The Netherlands-Bolivia BIT[72] includes the following additional language:

> ". . . legal persons constituted in accordance with the law of that Contracting Party. . .Legal persons controlled directly or indirectly, by nationals of that Contracting Party, but constituted in accordance with the law of the other Contracting Party.

ICSID Jurisprudence

If a dispute is submitted to ICSID, it must qualify for coverage not only under the investment treaty but also under the ICSID Convention. That means that each Party must be either an ICSID Convention Contracting State or a national[73] of another Contracting State and that their dispute must be a legal dispute arising directly out of an investment under both the ICSID Convention and the investment treaty in question.

With respect to legal persons, a national of a Contracting State is defined in Article 25(2) as:

> Any juridical person which had the nationality of a Contracting State other than the State party to the dispute *on the date on which the parties consented to submit* such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, *because of foreign control*, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

The Convention in its Article 25(2)(a) requires the claimants to establish that they had the nationality of a Contracting State on the date on which the parties consented to ICSID's jurisdiction. Article 25(2)(b) allows a foreign investor and the host State to agree that the local company, established in the host State by the foreign investor in order to make the investment, may be considered as a national of another Contracting State in

72 Netherlands-Bolivia BIT, entered into force on November 1, 1994.

73 With the evolving legal order, the rule of nationality has, however, lost some of is importance. As A. Broches, one of the main drafters of the ICSID Convention, noted: ". . . The significance of nationality in traditional instances of espousal of a national's claim should be distinguished from its relatively unimportant role within the framework of the Convention. In the former case, the issue of nationality is of substantive importance as being crucial in determining the right of State to bring an international claim, while under the Convention it is only relevant as regards the capacity of the investor to bring a dispute before the Centre." A. Broches, *Chairman's Report on the Preliminary Draft of the Convention*, July 9, 1964, doc Z11, *reprinted in* II Documents Concerning the Origin and Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 557, 579–82 (ICSID 1968).

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order that the local subsidiary may have recourse to available ICSID arbitration.[74] These narrowly circumscribed conditions of Article 25(2)(b)[75] allow, exceptionally in practice, a departure from the principle of incorporation or siège social in favor of foreign control.[76]

The ICSID Convention does not make reference to the tests of incorporation or seat. However, arbitral tribunals have more or less uniformly adopted these tests in order to determine corporate nationality. In particular, in cases where the relevant treaties provided for incorporation as the only relevant test, arguments related to the economic reality have not succeeded in preventing tribunals from applying the test that the contracting parties have agreed upon and included in their treaties. In these cases, most tribunals, except one, have refused to pierce the corporate veil and look at the nationality of its owners.

Incorporation. In the cases which follow, the tribunals had to decide on the nationality of a company incorporated under the law of one contracting State but controlled by nationals of the host State.

In *Tokios Tokelés v. Ukraine*,[77] the tribunal held that a company incorporated in Lithuania was entitled to bring a claim against Ukraine under the Lithuania-Ukraine BIT although it was controlled and 99 percent owned by Ukrainian nationals. Tokios Tokelés, the claimant company, was qualified as a Lithuanian investor under the Lithuania-Ukraine BIT that defined corporate nationality by incorporation[78]:

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74 Several cases dealt with this question: *Holiday Inns v. Morocco*, *Klöckner v. Cameroon*; *Amco Asia v. Indonesia*; *Vacuum Salt v. Ghana*; *Aucoven v. Venezuela*; *SOABI v. Senegal*.

75 As explained by A. Broches, the purpose of the control test in the second part of Article 25(2)(b) is to expand the jurisdiction of ICSID: "There was a compelling reason for this last provision. It is quite usual for host States to require that foreign investors carry on their business within their territories through a company organized under the laws of the host country. If we admit, as the Convention does implicitly, that this makes the company technically a national in the host country, it becomes readily apparent that there is need for an exception to the general principle that the Centre will not have jurisdiction over disputes between a Contracting State and its own nationals. If no exception were made for foreign-owned but locally incorporated companies, a large and important sector of foreign investment would be outside the scope of the Convention." A. Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 136 Recueil des Cours 331, 358–59, 361 (1972–II).

76 The Energy Charter Treaty, although using place of incorporation as a criterion for its application to investors, specifically provides the agreement required for the application of Article 25(2)(b) of the ICSID Convention. In its Article 26(7) it states that: "An Investor other than a natural person which has the nationality of a Contracting Party to the dispute on the date of the consent in writing referred to in paragraph (4) and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contacting Party, shall for the purpose of article 25(2)(b) of the ICSID Convention be treated as a 'national of another Contracting State . . . .'"

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

78 The language in the BIT was, "Any entity *established i*n the territory of the Republic of Lithuania in conformity with its laws and regulations."

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> "According to the ordinary meaning of the terms of the Treaty, the Claimant is an 'investor' of Lithuania if it is a thing of real legal existence that was founded on a secure basis in the territory of Lithuania in conformity with its laws and regulations. The Treaty contains no additional requirements for an entity to qualify as an 'investor' of Lithuania.[79]

Ukraine argued, however, that the tribunal should deny jurisdiction on the ground that the Ukrainian owners had incorporated the company in Lithuania for the sole purpose of availing themselves of the protection of the Lithuania-Ukraine BIT. Although the tribunal acknowledged that a number of investment agreements provide for the denial of benefits to entities controlled by the host State's own nationals, it noted that the Ukraine-Lithuania BIT did not do so: "it is not for tribunals to impose limits on the scope of BITs not found in the text."[80] The tribunal held that, consistent with the ICJ's ruling in *Barcelona Traction*,[81] the clear treaty language could only be avoided, and the corporate veil doctrine applied if there was a showing of 'abuse' or 'fraud.'[82] The tribunal found that there was no such abuse or fraud as the founding of Tokios Tokelés predated the Lithuania-Ukraine BIT.[83]

In two other decisions, the tribunals decided along the same lines. In *Rompetrol Group N.V. v. Romania*,[84] Rompetrol, a Dutch company—controlled by a Romanian national—brought a claim against Romania under the Netherlands-Romania BIT. The tribunal upheld jurisdiction by dismissing preliminary objections raised by Romania to the effect that the Dutch company was a mere shell company used by Romanian interests so as to qualify as "foreigners" entitled to bring a claim against the Romanian State under international law. It held that the ICSID Convention left it to States to decide for themselves what kind of nationality tests to apply to prospective users of the ICSID system.[85]

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79 *Tokios Tokelés*, para. 28.

80 *Ibid.*, para. 36.

81 *Barcelona Traction*, *supra* note 37.

82 In *Barcelona Traction*, the ICJ indicated that "[t]he wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations." *Supra* note 37, para. 58.

83 The President of the tribunal, Professor P. Weil, issued a strong dissenting opinion on this part of the decision expressing the view that the ICSID mechanism and remedy were not meant for investments made in the State by its own citizens with domestic capital through the channel of a foreign entity. He stated, "[w]hen it comes to mechanisms and procedures involving States and implying, therefore, issues of public international law, economic and political reality is to prevail over legal structure, so much so that the application of the basic principles and rules of public international law should not be frustrated by legal concepts and rules prevailing in the relations between private economic and juridical players." *Tokios Tokelés*, Dissenting opinion, *supra* note 77, para. 24.

84 Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, Decision on Jurisdiction, April 18, 2008.

85 The arbitrators expressly noted that Prof. Weil's dissenting opinion in the *Tokios Tokelés* case was not "widely approved in the academic or professional literature, or generally adopted by subsequent tribunals."

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> In the Tribunal's view, the latitude granted to define nationality for purposes of Article 25 must be at its greatest in the context of corporate nationality under a BIT, where, by definition, it is the Contracting Parties to the BIT themselves, having under international law the sole power to determine national status under their own law, who decide by mutual and reciprocal agreement which persons or entities will be treated as their 'nationals' for the purposes of enjoying the benefits the BIT is intended to confer.[86]

In the particular case, the tribunal noted that incorporation was the nationality criterion chosen by the parties to the BIT without requiring in addition an examination of ownership or control of the source of investment funds or the effective seat. It added:

> Incorporation in a given jurisdiction is a widely used criterion internationally for determining the nationality of corporate bodies, and States determine corporate nationality by a wide variety of criteria in a wide variety of contexts, as indeed the Respondent acknowledged at the oral hearing. This is a matter of free choice between the pair of States Parties to the BIT under consideration. Hence the question becomes simply, what did these two States themselves agree to of their own free will in concluding the BIT? The Tribunal therefore holds that the definition of national status given in The Netherlands-Romania BIT is decisive for the purpose of establishing its jurisdiction.[87]

In *Victor Pey Casado and Foundation "Presidente Allende" v. Republic of Chile*,[88] the tribunal rejected Chile's claims that Mr. Pey Casado and the Foundation were also Chilean and should be barred from claiming against their own State. The tribunal did not find it necessary to look behind the Foundation's corporate veil to determine if it was actually controlled by Chileans and relied on the tests of incorporation and social seat to determine the nationality of the Foundation, supported by previous ICSID cases (*SOABI v. Senegal* and *Amco Asia v. Indonesia*). The Foundation, incorporated and having its social seat in Spain, filled the condition of nationality according to Article 25 of the ICSID Convention.

DENIAL OF BENEFITS

As already mentioned, some agreements include a "denial of benefits" clause which allows the State party concerned to deny treaty protection to a company, under certain circumstances, if it is controlled by nationals of a non-party. In the *Generation Ukraine v. Ukraine*[89] case, the claimant was a company registered in the United States with a subsidiary in Ukraine. Ukraine invoked Article 1(2) of the U.S.-Ukraine BIT to deny the claimant the advantages of the BIT because the claimant had no substantial business in the United States and was in fact controlled by Canadians.[90] It failed, however,

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86 *Ibid.*, para. 82.

87 *Ibid.*, para. 83.

88 *Victor Pey Casado, supra* notes 26, 27.

89 Generation Ukraine Inc. v. Ukraine, ICSID Case No. ARB/00/9, September 16, 2003.

90 Article 1(2) provides: "Each Party reserves the right to deny to any company the advantages of this Treaty if nationals of any third country control such company and, in the case of a company of the other Party, that company has no substantial business activities in the territory of

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to produce evidence to support the assertion and therefore the objection was not retained. The tribunal concluded that "this [the denial of benefits clause] is not, as the Respondent [Ukraine] appears to have assumed, a jurisdictional hurdle for the Claimant to overcome in the presentation of its case; instead, it is a potential filter on the admissibility of claims which can be invoked by the respondent State."[91]

The tribunal in the jurisdictional phase of the case *Plama v. Bulgaria*[92] offered a detailed analysis of the ECT's denial of benefits clause. In this case, Bulgaria, upon receipt of the request for arbitration, sent to ICSID a letter by which, in accordance with Article 17(1) of the ECT, it denied ECT protection to the claimant on the grounds that the latter, a Cypriot company, was a "mailbox" company with no substantial business activities in Cyprus and that it was not owned or controlled by a national of an ECT State. In Bulgaria's opinion, the ECT's drafters intended to confer on a host State a direct and unconditional right of denial, which may be exercised at any time and in any manner. It added that while the dispute settlement provisions were in Part V of the ECT, they related to claims of violation of Part III substantive standards and that, where the conditions in Article 17(1) were satisfied, this provision operated as a complete bar to the jurisdiction of any ECT tribunal over such Part III claims.[93] The tribunal found that denial of Part III investment protection benefits under Article 17(1) could only be prospective and that it had jurisdiction to hear the merits of these claims, which arose prior to the time the investor was notified of the denial of benefits.

Another issue was whether the denial of benefits under Article 17(1) operates automatically and requires no further action from the host State as argued by the respondent or whether it requires the right to deny to be exercised though positive actions taken by the host State as argued by the claimant. The tribunal adopted the latter approach and held that in its view, the existence of a "right" is distinct from the exercise of that right.[94] It finally decided it had jurisdiction to hear the merits of the case.

Company seat. In the first case under the ASEAN Agreement—which as previously mentioned considers the place of effective management as the criterion for determining the nationality of the company—*Yaung Chi Oo Trading Pte Ltd. v. Government of the Union of Myanmar*,[95] the tribunal observed that the "effective management"

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the other Party or is controlled by nationals of a third country with which the denying Party does not maintain normal economic relations."

91 *Generation Ukraine*, para. 15.7.

92 Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction, February 8, 2005.

93 *See* E. Gaillard, *Energy Charter Treaty: International Centre for Settlement Decision*, 233(66) N.Y.L.J., April 7, 2005; E. Gaillard, *Investment and Investors Covered by the Energy Charter Treaty*, and S. Jagusch & A. Sinclair, *The Limits of Protection for Investments and Investors under the Energy Charter Treaty*, both *in* Investment Arbitration and the Energy Charter Treaty, at 67–73 and 89–103 respectively (C. Ribeiro ed., Juris Net LLC 2006); A. Sinclair, *supra* note 47; and W. Ben Hamida, *La notion d'investisseur*, *in* Investissements Internationaux et Arbitrage (Spécial Arbitrage, Gazette du Palais December 2005).

94 *Ibid.*, paras. 155–65.

95 Yaung Chi Oo Trading Pte Ltd v. Government of the Union of Myanmar, ICSID Additional Facility Rules Case No. ARB/01/1, March 31, 2003, 42 ILM 540 (2003). Yaung Chi Oo

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requirement "was primarily included in the ASEAN Treaty to avoid what has been referred to as 'protection shopping,' i.e., the adoption of a local corporate form without any real economic connection in order to bring a foreign entity or investment within the scope of treaty protection." It finally held that the claimant was a "Company of a Contracting State" other than Myanmar. It noted that unless some indication of improper "protection shopping" exists, the company would be a company of the State of incorporation when the legal requirements of that State on this issue are satisfied, and there are some other "indicia" of management in that State.[96] The tribunal decided that the requirements were satisfied.[97] This is an Additional Facility case which is not covered by the ICSID Convention but interesting nevertheless for the purposes of the application by the tribunal of the "company seat" criterion included in the treaty.

Control. It is not an easy task to determine what signifies control. In *Aguas del Tunari, S.A. v. Republic of Bolivia*,[98] the company initiated the ICSID arbitration proceedings alleging that several acts of Bolivia amounted to an expropriation of its investment in violation of the Netherlands-Bolivia BIT. The majority of the tribunal dismissed Bolivia's objections to jurisdiction.

At the core of Bolivia's objections was the argument that Bolivia did not consent to an arrangement by which a company registered in Bolivia such as AdT could, at any time, restructure itself as a Dutch company in 1999 in an *ex post facto* attempt to claim the benefit of the Netherlands-Bolivia BIT. It argued that the claimant was "controlled" by the U.S.-based Bechtel Corporation, and the Netherlands shareholders were merely "shell" companies which did not exert any real "control."

The tribunal examined the question of whether AdT, for the purposes of the treaty, was a national of the Netherlands in accordance with Article 1(b) of the treaty, which includes "legal persons *controlled directly or indirectly*, by nationals of that Contracting Party, but constituted in accordance with the law of the other Contracting Party."

Trading Pte Ltd, a Singapore-incorporated company, maintained a brewery investment in Myanmar which, it claimed, had been expropriated in violation of the ASEAN Agreement. The fact that the claimant's management spent considerable time in Myanmar attending to its investment prompted Myanmar to claim that the claimant's place of "effective management" had shifted to Myanmar.

96 *Ibid.*, paras. 49 and 62.

97 i) The claimant had a "resident director" in Singapore, and ii) the claimant also conducted certain business activities (procurement) from Singapore. According to the tribunal, with these conditions satisfied, the "nationality of the company's shareholders" was irrelevant, as was the source of the capital.

98 Aguas del Tunari v. Bolivia, ICSID Case No. ARB/02/03, Decision on Jurisdiction, October 21, 2005. The background of the dispute concerns Bolivia's international tender process to privatize water, sewage services, and an electricity generation license in 1998. Aguas del Tunari (AdT) is the locally incorporated Bolivian entity for a consortium led by International Water, Ltd., incorporated in the Cayman Islands, and 100 percent owned by Bechtel Enterprise Holding, a U.S. company. A concession agreement between the Bolivian government and AdT took effect in 1999, and provided for a 40-year relationship between AdT and the Bolivian water and electricity authorities. The concession agreement resulted in significant public controversy in Bolivia, especially among labor organizations and civil society groups.

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The tribunal, after a lengthy analysis of the meaning of the phrase "controlled directly or indirectly" in the treaty, concluded that Bolivia's interpretation would frustrate the treaty's purpose. It concluded "that the phrase 'controlled directly or indirectly' means that one entity may be said to control another entity (either directly, that is without an intermediary entity, or indirectly) if that entity possesses the legal capacity to control the other entity."[99]

> [I]t is not uncommon in practice and—absent a particular limitation—not illegal to locate one's operations in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for example, of taxation or the substantive law of the jurisdiction, including the availability of a BIT.[100]
>
> . . . .
>
> . . . Although titled 'bilateral' investment treaties, this case makes clear that which has been clear to negotiating States for some time, namely, that through the definition of 'national' or 'investors', such treaties serve in many cases more broadly as portals through which investments are structured, organized, and, most importantly, encouraged through the availability of a neutral forum.[101]

The question of the judicial person's nationality could be clarified through an agreement between the host State and the investor. Such an agreement cannot, however, create a nationality that does not exist. An agreement on nationality was very useful in the case *MINE v. Guinea*.[102] An agreement between the parties providing for the settlement of their dispute by ICSID arbitration stated that the parties specified that the investor is Swiss (incorporated in Liechtenstein, a non-ICSID Party but under Swiss control).[103] Definitions of corporate nationality in treaties providing for ICSID jurisdiction will be important for the determination of whether the nationality requirements of Article 25(2)(b) have been met.

Another question that arises is how far tribunals should go in examining foreign control and therefore the nationality of such control. In the following cases, the tribunals dealt with the issue of control from a different angle—when the company is incorporated in the host State but is controlled by nationals of another contracting state.

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99 One of the arbitrators, José Luis Alberro-Semerena, issued a declaration of dissent in which he maintained that Bolivia could not have consented to face arbitration from an unlimited "universe of beneficiaries" and that the tribunal should have undertaken further inquiry as to the "motivations and the timing" of Bechtel's decision to restructure the corporate ownership of the claimant company.

100 *Ibid.*, para. 330(d).

101 *Ibid.*, para. 332.

102 *MINE v. Guinea*, as discussed in Schreuer, *supra* note 16.

103 According to C. Schreuer, "An agreement on the investor's nationality need not be made in the form of an express stipulation. Consent to ICSID's jurisdiction expressed in a direct agreement between the parties implies an understanding that the investor fulfils the Convention's nationality requirements. This would hold true only if two conditions are fulfilled: the host State must have expressed its consent specifically with respect to the particular investor . . . and the parties must have been fully aware of the circumstances surrounding the investor's nationality," *supra* note 16.

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Amco v. Indonesia,[104] *Klockner v. Cameroon,*[105] and *AMT v. Zaire*[106] involved a local subsidiary incorporated in the host State. The protection was granted to the foreign investor for investments made through a local company in the host State.[107] In *Amco v. Indonesia*, for instance, the tribunal looked at the first instance of control[108] and held that "the concept of nationality is there a classical one, based on the law under which the juridical person has been incorporated, the place of incorporation and the place of the social seat. An exception is brought to this concept in respect of juridical persons having the nationality, thus defined, of the Contracting State Party to the dispute, where said juridical persons are under foreign control. [. . .][109]

In *Banro v. Democratic Republic of Congo,*[110] Banro Resource Corporation was the Canadian parent company that signed a concession agreement with the Congolese State. The concession agreement contained an ICSID arbitration agreement, though it was not effective for Banro since Canada was not Party to the ICSID Convention, and no BIT existed between the Democratic Republic of Congo and Canada. Banro Resource Corporation subsequently transferred its rights under the concession agreement to Banro American Resource, a wholly owned U.S. subsidiary—a BIT existed between the Democratic Republic of Congo and the United States The tribunal found that Banro American could not avail itself of its Canadian parent's consent to ICSID arbitration under the concession agreement, as that consent was invalid and could not be transferred due to the fact that Banro Resource did not have the requisite nationality at the time the concession agreement was entered into and therefore could not transfer any valid consent to Banro American. It therefore found that the requirements of Article 25(2)(b) of the ICSID Convention were not fulfilled. The tribunal indicated that:

> In view of the approach adopted by the jurisprudence of ICSID tribunals concerning relationships between companies of the same group, [it] could have addressed the issue of *jus standi* of Banro American in a flexible manner if the issue raised by the present case were limited to the *jus standi* of a subsidiary in the presence of an arbitration clause which concerns the parent company only. But this is not the case.[111,112]

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104 Amco Asia Corporation, Pan American Development Ltd. and PT Amco Indonesia v. The Republic of Indonesia, Decision on Jurisdiction, ICSID Case No. ARB/81/1, September 25, 1983.

105 Klöckner v. Cameroon, Award, ICSID Case No. ARB/81/2, October 21, 1983.

106 American Manufacturing & Trading (AMT) v. Zaire, Award, ICSID Case No. ARB/93/1, February 21, 1997.

107 For a detailed analysis of these decisions and commentaries, see E. GAILLARD, LA JURISPRUDENCE DU CIRDI (Paris, Editions Pedone 2004); C. SCHREUER, *supra* note 16.

108 C. Schreuer points out that there was no need to go further since the determination of the controlling nationality was of no relevance since all the parties involved were Contracting States.

109 *Amco*, p. 396.

110 Banro v. Democratic Republic of Congo, Award, September 1, 2000.

111 *Ibid.*, para. 10.

112 The tribunal added that ". . . in general, ICSID tribunals do not accept the view that their competence is limited by formalities, and rather they rule on their competence based on a review of

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A different decision was reached by the tribunal in the case *Aucoven v. Venezuela*.[113] Venezuela objected to the tribunal's jurisdiction by pointing out that Aucoven[114] was in fact controlled by ICA Holding, a company incorporated under the laws of Mexico, and therefore it could not initiate an ICSID arbitration proceeding. Venezuela claimed that the transfer of 75 percent of Aucoven's shares from ICA Holding to ICATECH (a U.S. company) did not diminish the Holding's control over Aucoven's operations in Venezuela. It further stated that even if the parties had agreed on majority shareholding as constituting control, the pervasive control by Mexican nationals over, and involvement in the affairs of, Aucoven should lead the tribunal to decline jurisdiction. On September 27, 2001, the tribunal upheld jurisdiction on the basis that the tests chosen by the parties to define foreign control were reasonable. The tribunal held that "an arbitral tribunal may not adopt a more restrictive definition of foreign control, unless the parties have exercised their discretion in a way inconsistent with the purpose of the [ICSID] Convention."[115]

It added that "the Convention does not contain any definition of the objective requirements such as 'foreign control' and cited A. Broches saying, "the purpose of Article 25(2)(b) being to indicate the outer limits within which disputes may be submitted to conciliation or arbitration under the auspices of the Centre, the parties should be given 'the widest possible latitude' to agree on the meaning of nationality. Any definition of nationality based on a 'reasonable criterion' should be accepted."[116]

As a result, the tribunal "must respect the parties' autonomy and may not discard the criterion of direct shareholding, unless it proves unreasonable. Direct shareholding confers voting right, and, therefore, the possibility to participate in the decision-making of the company. Hence, even if it does not constitute the sole criterion to define 'foreign control,' direct shareholding is certainly a reasonable test for control."

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the circumstances surrounding the case, and, in particular, the actual relationships among the companies involved.

. . . It is for this reason that [they] are more willing to work their way from the subsidiary to the parent company rather than the other way around. Consent expressed by a subsidiary is considered to have been given by the parent company, the actual investor, whose subsidiary is merely an 'instrumentality.' The extension of consent to subsidiaries that are not designated or not yet created, even following a transfer of shares, is less readily accepted". *Ibid.*, paras. 11–12.

113 Autopista Concesionada de Venezuela [Aucoven] v. Bolivarian Republic of Venezuela, Decision on Jurisdiction, September 27, 2001.

114 The arbitration was brought under the ICSID arbitration clause contained in a concession agreement with Venezuela for the construction and maintenance of two major highways linking Caracas to La Guaira. The claimant is a company incorporated under the laws of Venezuela and owned by ICATECH Corporation, a U.S. company. On January 24, 1996, ICA and Baninsa consortium incorporated the Autopista Concesionada de Venezuela, Aucoven C.A., a Venezuelan corporation, to serve as concessionaire. On December 23, 1996, the claimant entered into the concession agreement with Venezuela.

115 See discussion on the case by E. Gaillard, *supra* note 107; Eric Teynier, *Notion d'investisseur: sentences commentées, in* Les Cahiers de l'Arbitrage, no 2003/2-2nd partie, (Gazette du Palais).

116 A. Broches, *supra* note 73, p. 361.

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The tribunals in both *ADC v. Hungary*[117] and *Rumeli Telekom et Telsim Mobil v. Kazakhstan*[118] saw no reason to "pierce the corporate veil" as requested by the respondents. They both agreed—the tribunal in *Rumeli* citing ADC's holding—that the principle of piercing the corporate veil only applies to situations where the real beneficiary of the business misused corporate formalities in order to disguise its true identity and therefore to avoid liability. This didn't apply to either of these two cases.

However, another tribunal came to a different conclusion. In *TSA Spectrum de Argentina v. Argentina,*[119] two of the three arbitrators deciding over a claim under the Netherlands-Argentina bilateral investment treaty have declined jurisdiction on the grounds that the Claimant could not be considered a national of the Netherlands due to an absence of "foreign control" as required under the ICSID Convention. TSA Spectrum de Argentina SA, had acquired the rights to manage Argentina's radio broadcasting spectrum but fell into a dispute over the alleged mismanagement of the assets in question. It brought a claim against Argentina as a "foreign" investor by virtue of being owned by a Dutch firm and evoked Article 25(2)(b) of the ICSID Convention.

The two arbitrators deemed this "foreign control" requirement to be an objective requirement—one which must be construed by the arbitrators.[120] The dissenting arbitrator held that arbitrators should defer to the wishes of Argentina and the Netherlands as clearly expressed in the relevant BIT and gave emphasis on the protocol to the BIT which notes that certain facts will be accepted as evidence of (foreign) control: being an affiliate of a legal person of the putative home state and holding more than 49 percent of the share capital or a majority of corporate votes.

The majority held that the criterion of "foreign control" imposed a limit beyond which ICSID jurisdiction could not extend—even by a side agreement. Accordingly, arbitrators should pierce the veil of a corporate entity so as to determine whether it is genuinely foreign controlled. In piercing the corporate veil, they did not stop at either the first or the second layer of ownership but inquired as to the ultimate control over the entity in question. They determined that the ultimate control was exercised by an Argentine citizen.[121] The third arbitrator disagreed and held that the criteria set forth in the BIT—i.e., that the Argentine company was a Dutch affiliate and was more than 49 percent Dutch-owned—should be sufficient for purposes of establishing that the claimant was Dutch-controlled. In this regard, he stated that arbitrators should "vindicate, rather than ignore, the agreements reached by two states."[122]

Nature of the company (private, public entity, joint venture). The ICSID definition is not explicit as to whether eligibility is limited to investors who are private entities or

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117 ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary, ICSID Case No. ARB/03/16, Award, October 2, 2006, para. 358.

118 Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan, ICSID Case No. ARB/05/16, Award, July 29, 2008, para. 328.

119 TSA Spectrum de Argentina, S.A. v. Argentine Republic, ICSID Case No. ARB/05/5, Award, December 19, 2008.

120 *Ibid.*, para. 139.

121 *Ibíd.*, para. 162.

122 Dissenting opinion by Grant Andonas, para. 34.

whether they could be State-controlled.[123] ICSID was confronted with this question of the access to the Centre of an investor with legal personality but controlled by a State in the case of *CSOB v. Slovak Republic*,[124] (the State retained 65 percent of the capital). The tribunal noted that the term "investor" in the Convention did not exclusively concern companies with private capital but also concerned companies partially or entirely controlled by a State.[125] It therefore decided that a legal person could have access as an investor to proceedings under ICSID unless it acts as a State agent or undertakes a governmental function.[126]

In the case *Impregilo v. Pakistan,*[127] based on the Italy-Pakistan BIT, the tribunal found that it did not have jurisdiction *ratione personae* because Impregilo was only one of the companies of a joint venture and could not bring a claim on behalf of the others.[128] Citing a treatise on the drafting history of the ICSID Convention, it indicated that "legal personality is a requirement for the application of Art. 25(2)(b) and that a mere association of individuals or of juridical persons would not qualify." As a result, the tribunal found that Impregilo was not able to bring claims on behalf of the joint venture. The tribunal then examined whether Impregilo could make claims on behalf of the other participants in the joint venture. The tribunal reiterated that "consent of the parties is the cornerstone of the jurisdiction of the Centre" and due to the fact that the other investors did not fall within the ambit of the BIT, Impregilo could not make claims on their behalf.

Rights of shareholders to bring claims. Investment protection treaties, in their definitions of investments, very often include shares or participation in companies as forms of investment. An investment may therefore include shareholders that may be controlling or non-controlling; they may be majority or minority and they may be direct or indirect through another company.

The jurisprudence related to investor-State disputes has decided in favor of the right of shareholders to be accepted as claimants with respect to the portion of shares they own or control.[129]

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123 See discussion by S. Manciaux in *Investissements étrangers et arbitrage entre États et ressortissants d'autres États: Trente années d'activité du CIRDI*, *in* 24 Travaux du Centre de recherche sur le droits des marchés et des investissements internationaux (Université de Bourgogne-CNRS, Litec 2004).

124 Ceskoslovenska Obchodni Banka, A.S. (CSOB) v. Slovak Republic, ICSID case ARB/97/4, Decision on Jurisdiction, May 24, 1999.

125 *Ibid.*, para. 16.

126 *Ibid.*, paras. 17, 20–25.

127 Impregilo S.p.A. v. Pakistan, ICSID Case No. ARB/03/3, Decision on Jurisdiction, April 22, 2005.

128 GBC (Ghazi-Barotha Contractors), a joint venture (JV) established under the laws of Switzerland, concluded two contracts (the Contracts) in 1995 with the Pakistan Water and Power Development Authority (WAPDA). The Contracts called for the construction of a barrage downstream and the construction of a channel respectively. Impregilo, an Italian company, was one of the five joint venture participants. The JV was established between one Italian, one German, one French, and two Pakistani companies, and Impregilo was selected to act as "leader" of the JV.

129 C. Schreuer, *supra* note 16.

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Minority shareholders may also rely in certain cases on the inclusion of shares as part of the definition of qualifying investments in the investment treaty concerned and claim for loss of shareholder value rather than for loss on behalf of the company.[130]

In *Lanco v. Argentina,*[131] 18.3 percent shareholding was sufficient to find jurisdiction as an investment. It was the first time an ICSID tribunal expressly recognized a minority shareholder's right to asset claims under an investment treaty.[132] The tribunal noted that there was nothing in the Treaty that required an investor in the capital stock to have either control over the administration of a company, or a majority share, in order to qualify as an investor for the purposes of the Treaty.[133] The tribunal further noted *inter alia* that *Lanco* was liable for all contractual obligations "to the extent of its equity share" and concluded that *Lanco* was a party to the Agreement "in its own name and right".[134]

In *CMS v. Argentina,*[135] the CMS Gas Transition Company (CMS) purchased shares of an Argentine company, Transportadora de Gas del Norte (TGN), pursuant to Argentina's privatization program in 1995. Argentina argued that CMS lacked standing to file its claim because it was merely a minority non-controlling shareholder and thus did not have standing to claim damages suffered by TGN.[136] The tribunal ruled that the Convention did not require control over a locally incorporated company in order to qualify under the Convention. It also ruled that the Convention does not bar a claim brought by a minority non-controlling shareholder such as CMS, observing that previous ICSID tribunals in also finding jurisdiction had "not been concerned with the question of majority [ownership] or control but rather whether shareholders can claim independently from the corporate entity."[137] In affirming the acceptance of this concept, the tribunal referred to the "approach now prevailing in international law in respect of claims arising out of foreign investments."[138]

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130 Other cases which dealt with the rights of the minority shareholders are Compañia de Aguas del Aconquija S.A. & Compagnie Générale des Eaux v. Argentine Republic (the *Vivendi* case), ICSID Case No. ARB/97/3, Decision on Annulment, July 3, 2002; Champion Trading Co. and Others v. Arab Republic of Egypt, ICSID Case No. ARB/02/9 Decision on Jurisdiction, October 21, 2003; LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/01, Decision on Objections to Jurisdiction, April 30, 2004.

131 Lanco Int'l Inc. v. Argentina Republic, Preliminary Decision on Jurisdiction, December 8, 1998, 40 I.L.M. 457, 463 (2001).

132 S. Alexandrov, *supra* note 42.

133 *Lanco*, Sec. 10.

134 *Ibid.*, Secs. 12, 14.

135 CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction, July 17, 2003.

136 The only claim that it could make, argued Argentina, was one regarding direct damages to its shares in TGN (infringement of voting rights), not for its proportionate share of TGN's damages. Because the ICSID Convention does not provide a definition of the term "investment," the tribunal analyzed both the pre-Convention commentary on ownership of shares and a line of cases dealing with the issue of majority ownership of control. The tribunal ruled that the Convention did not require control over a locally incorporated company in order to qualify under the Convention. *Ibid.*

137 *Ibid.*, para. 55.

138 *Ibid.*, para. 49.

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In *Sempra v. Argentina,*[139] the tribunal made findings in line with those cited. Based on the definition of investment and investor in the U.S.-Argentina BIT, it held that "in the light of the very terms of the provision, it [the definition] encompasses not only the majority shareholders but also the minority ones, whether they control the company or not."[140]

In *GAMI v. Mexico,*[141] GAMI, a U.S. company held 14 percent equity interest in Grupo Azucarero Mexico S.A. de C.V. (GAM). After the Mexican government expropriated five of GAM's sugar mills, GAMI initiated a NAFTA claim against Mexico. The tribunal held that GAMI had an independent right to seek redress for damages to its investment and the fact that it was "only a minority shareholder does not affect its right."[142, 143]

Indirect shareholders. In some cases, the claimant is not the immediate shareholder of the affected company. This raises the issue whether an investor can claim for damages inflicted to a company of which it owns shares only indirectly through the intermediary of another company.

In *Azurix v. Argentina*,[144] the tribunal found that "given the wide meaning of investment in the definition in Article I.1(a), the provisions of the BIT [US-Argentina] protect indirect claims."

In *Gas Natural SDG S.A. v. Argentina*,[145] Argentina also maintained that the claimant could not, pursuant to the BIT between Argentina and Spain, qualify as an investor

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139 Sempra Energy International v. Argentina, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction, May 11, 2005. Sempra participated in Argentina's privatization of the gas sector, a program beginning in 1989. It owns 43.09 percent share capital of Sodigas Sur S.A. (Sodigas Sur) and Sodigas Pampeana S.A. (Sodigas Pampeana), Argentine companies that have licenses granted by Argentina to supply and distribute natural gas in several Argentine provinces. It maintained that the suspension of licensee companies' tariff increases that were based on the U.S. producer index and the subsequent pesification of these tariffs pursuant to Law No. 25561, gave rise to a breach of investment protections afforded under the BIT.

140 *Ibid.*

141 GAMI Investments, Inc. v. United Mexican States, Final Award, November 15, 2004.

142 *Ibid.*, at 15, para. 37.

143 The US in its submission argued that ". . . a minority non-controlling shareholder may not bring a claim under the NAFTA for loss or damages incurred directly by an enterprise. A minority non-controlling shareholder has standing to bring a claim only for loss or damage to itself proximately caused by a breach." *Gami*, Submission of the United States of America, June 30, 2003.

144 Azurix Corp. v. Argentina, ICSID Case No. ARB/01/12, Decision on Jurisdiction, December 8, 2003.

145 Gas Natural SDG S.A. v. Argentina, Decision of the Tribunal on Preliminary Questions on Jurisdiction, ICSID Case No. ARB/03/10, June 17, 2005. Gas Natural is a corporation organized under Spanish law and has its principal place of business in Spain. In 1992, the claimant took part in a tender offer by the Argentine government as part of the privatization of its gas sector. It then participated in a consortium that purchased 70 percent of the shares of an Argentine corporation and formed an Argentine company. According to the claimant, it invested in Argentina in reliance on Law No. 23,928 and Decree 2/28 of 1991, which established the parity and convertibility of the Argentine peso with the U.S. dollar. The claimant alleged that the measures taken by the Argentine government pursuant to the emergency law breached the guarantees set forth in the BIT.

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under the BIT as it was only an indirect shareholder of the Argentine company. The tribunal found that the claimant qualified within the definition of investment, clearly stating that "[t]he assertion that a claimant under a bilateral investment treaty lacked standing because it was only an indirect investor in the enterprise that had a contract with or a franchise from the state party to the BIT has been made numerous times, never, so far as the tribunal has been made aware, with success."

In *Siemens v. Argentina,*[146] the underlying BIT between Germany and Argentina defined "investment" to include shares and other forms of interests in legal entities. The claim was brought by Siemens A.G., which wholly owned SNI A.G, another German company, and SITS S.A., an Argentine company. Argentina argued that indirect claims could only be brought if there was express authorization to do so in the treaty. The tribunal rejected Argentina's argument and concluded that the shareholder was allowed to bring proceedings for a wrong inflicted upon an indirect subsidiary:

> The plain meaning of this provision [Article 1(1)(b) of the Treaty] is that shares held by a German shareholder are protected under the Treaty. The Treaty does not require that there be no interposed companies between the investment and the ultimate owner of the company. Therefore, the literal reading of the Treaty does not support the allegation that the definition of investment excludes indirect investments.[147]

In *Enron v. Argentina,*[148] the claimants owned 35.2 percent of the shares in TGS, an Argentine corporation. Enron's shareholdings in the affected local company TGS were not only indirect but involved a number of other locally registered companies and several layers of ownership. Argentina again argued that the governmental measures affected only TGS. The tribunal decided not to repeat the reasoning of the prior ICSID tribunal on this point. It upheld the "concept that shareholders may claim independently from the corporation concerned, even if those shareholders are not in the majority or in control of the company."[149] However, the tribunal did see cause for concern, in particular since several intermediate companies were also involved.[150] It sought and found a solution in Argentina's consent to arbitration—Enron had been specifically invited by Argentina to make its investment and the investors had decision-making powers in the management of TGS.[151] Therefore, Enron had *jus standi* to pursue its claim.

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146 Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8, Decision on Jurisdiction, August 3, 2004.

147 *Ibid.*, para. 137.

148 Enron Corp. and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on Jurisdiction, January 14, 2004.

149 *Ibid.*, para. 39.

150 The tribunal held that ". . . The Argentine Republic has rightly raised a concern about the fact that if minority shareholders can claim independently from the affected corporation, this could trigger an endless chain of claims, as any shareholder making an investment in a company that makes an investment in another company, and so on, could invoke a direct right of action for measures affecting a corporation at the end of the chain. . . . There is indeed a need to establish a cut-off point beyond which claims would not be permissible as they would have only a remote connection to the affected company." *Ibid.*, paras. 50, 52.

151 *See* analysis by C. Schreuer, *supra* note 42.

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In *Noble Energy v. Ecuador,*[152] the tribunal concurred with the previous tribunals which held that an indirect shareholder can bring a claim under the ICSID Convention and under a BIT in respect of a direct and an indirect investment. The tribunal reflected, however, on the number of layers of corporations that could exist between the direct shareholders and the indirect investor. After looking, however, at the two intermediate levels in the case at hand, it held that although there might be a cut-off point, such a point was not reached in the particular case because the relationship between the investment and the direct shareholder on the one hand, and the indirect shareholder on the other, was not too remote. At all relevant times, Noble Energy had been the ultimate parent of all of the subsidiary companies involved in the arbitration, and these subsidiaries were wholly owned either directly or indirectly by Noble Energy.

Non-ICSID Jurisprudence

In *Sedelmayer v. Russia,*[153] the arbitral tribunal has interpreted the notion of "investor" in a way that allowed the protection of an investment made by the intermediary of a company incorporated in a third state.[154] In this case, Sedelmayer, a German national, was the sole owner and CEO of SGC International, incorporated in Missouri, USA. The latter made an investment in Russia in the area of enforcement equipment. When a dispute arose from this activity, Mr. Sedelmayer initiated an arbitration procedure under the Germany-Russia BIT.[155]

The tribunal held that SGC International was a simple vehicle by which Mr. Sedelmayer has transferred his capital to Russia and that he was a *de facto* investor. Although the language of the Treaty did not mention the element of control but only the elements of incorporation and siège social, the tribunal accepted jurisdiction and noted that:

> The question then arises whether an individual who makes his investments through a company might be regarded as an investor—a de facto—investor under the treaty. This question concerns the general issue to what extent the 'theory of control' may be applied [. . .] during recent years, there has been a growing support of the control theory [. . .] In the Tribunal's opinion, the mere fact that the Treaty is silent on the point now discussed should not be interpreted so that Mr. Sedelmayer cannot be regarded as a *de facto* investor.[156]

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152 Noble Energy Inc. and Machala Power Cía. Ltd. v. Republic of Ecuador and Consejo Nacional de Electricidad, ICSID Case No. ARB/05/12, Decision on Jurisdiction, March 5, 2008.

153 Franz Sedelmayer v. The Russian Federation, SCC Award, July 7, 1998.

154 *See* analysis by W. Ben Hamida, *La notion d'investisseur*, La Gazette du Palais, December 2005.

155 The U.S.-Russia BIT was not an option, since it was not in force.

156 One of the arbitrators, Professor S. Zykin, issued a forceful dissenting opinion based in particular on the lack of the criterion of control in the BIT. He concluded that "The Claimant could have made investments personally or through a German company, but instead he preferred to act [. . .] for tax reasons through a company of a third State. It seems unlikely that the purpose

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In *Saluka v. The Czech Republic*,[157] the tribunal honored the validity of the place of incorporation as defined in the BIT between the Netherlands and the Czech Republic. The arbitration arose out of the reorganization and privatization of the Czech bank system. Saluka Investments BV, a Dutch Company, which had acquired shares of the Czech State-owned bank IPB, claimed violations of the BIT. According to the Czech Republic, the real investor was not Saluka but an English-registered company, Nomura Europe (a subsidiary of the Japanese investment Bank). It asserted that Saluka was merely a shell company with no real economic interest in the IPB shares and therefore failed to meet the definition of an investor under the BIT, because, as an agent for the parent corporation Nomura, it could not benefit from the BIT.

The tribunal rejected these arguments and based its decision on the language of the treaty which defined "investors" as "legal persons constituted under the law of one of the Contracting Parties." The tribunal considered the disadvantages of the formalistic test, in particular the risk for "treaty shopping," but respected the contracting parties' choice of definition of "investor."[158]

In *Société Générale v. Dominican Republic,*[159] the tribunal dismissed an argument by the government that the unusually complex and multilayered corporate structure used by Société Générale to hold its investments in EDE Este should disqualify the company's treaty claim. The government argued that the tribunal should consider a cut-off point, after which claims by indirect investors are too tenuous or remote in terms of their connection to the affected company at issue. The tribunal, in exploring whether there should be some limits to the chain of investors who might invoke the BIT, stressed that the France-DR treaty does cover indirect and minority forms of equity interest, thus implying that there may be one or several layers of intermediate companies or interests intervening between the claimant and the investment. Notwithstanding this complex structuring, the tribunal was of the view that the indirect investments by Société Générale should fall under the treaty.

CONCLUSION

Investment agreements apply only to investors and investments made by those investors who qualify for coverage under the relevant provisions, and only these can submit a claim against the host State. The definition is a key element for both identification and jurisdictional purposes.

For natural persons, the definitions in investment agreements generally go beyond citizenship to include residency. The issues are usually not problematic although some

of the 1989 Treaty between Russia and Germany was to encourage such kind of investment and to offer protection [. . .]". Dissenting opinion, paras. 1–4.

157 Saluka Investments B.V. v. The Czech Republic (UNCITRAL), Partial Award of March 17, 2006.

158 *Ibid.*, paras. 240–41.

159 Société Générale v. Dominican Republic, UNCITRAL, LCIA Case No. UN 7927 (France-Dominican Republic BIT), Preliminary Objections to Jurisdiction, September 19, 2008.

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may arise in particular in establishing whether a natural person is a dual national. Here, investment tribunals employ the concept of predominant nationality, essentially inquiring into which of the connections is factually stronger. Where one of the dual nationalities is that of the respondent state, ICSID tribunals must follow the ICSID Convention, which bars suits against a state of which the investor holds nationality, and determine whether or not the claimant has lost or effectively renounced the nationality of the respondent state. An investor's nationality has to be objectively determined. A certificate of nationality, although provides strong evidence it is not a conclusive proof and the tribunals have usually recourse to their own test to determine nationality of natural persons. The ICSID Convention sets some additional requirements in order to establish jurisdiction *rationae personae* and requires the claimants to establish that they have the nationality of a Contracting State on the date of the Parties' consent to ICSID's jurisdiction.

For legal persons, the nationality debate remains by far more complex. The customary international law does not provide much guidance, since it was initially limited to the context of diplomatic protection. Investment treaties specifically define the objective criteria which make a legal person an investor of a Party—traditionally incorporation, siege social and control. In some cases, if a Party does not wish to extend the treaty provision, it may include a "denial of benefits clause". Arbitral tribunals have regularly accepted jurisdiction *rationae personae* for claims of minority and/or indirect shareholders. Arguments related to the economic reality have not succeeded in preventing tribunals from applying the test that the contracting parties have agreed upon and included in their treaties. Tribunals, in their majority, have been very reluctant to pierce the corporate veil in order to reveal the ultimate underlying nationality of the investors.

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Chapter 11

Definition of "Investment": An Open-ended Search for a Balanced Approach

Katia Yannaca-Small

INTRODUCTION

There is no single definition of what constitutes foreign investment.[1] Traditionally, investment in companies has been categorized as either direct or portfolio investment. During the nineteenth century, the predominant form of foreign investment was portfolio investment, but later on the change in transportation and communication infrastructure led to the spread of foreign direct investment.[2] Customary international law and earlier international agreements did not use the notion of investment but, rather,

1 *See generally*, R. DOLZER & C. SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (Oxford University Press 2007); MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION, SUBSTANTIVE PRINCIPLES (Oxford International Arbitration Series, Lukas Mistelis ed., Oxford University Press 2008); K. Yannaca-Small & L. Liberti, *The Definition of Investor and Investment in International Investment Law*, *in* INTERNATIONAL INVESTMENT LAW: UNDERSTANDING CONCEPTS AND TRACKING INNOVATIONS, Chapter 1 (OECD 2008); S. MANCIAUX, ACTUALITÉ DE LA NOTION D'INVESTISSEMENT INTERNATIONAL (2008); D. Krishan, *A notion of ICSID Investment*, *in* I INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW (TJ Grierson Weiler ed., JurisNet LLC 2008); E. Gaillard, *Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice, in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER (Oxford University Press 2009).

2 *See* Yannaca-Small & Liberti, *supra* note 1.

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addressed "foreign property,"[3]dealing in a similar manner with imported capital and other property of resident foreign nationals.[4]

The increase of direct investment in several sectors led to the steady evolution of new forms of investment in which the investor enters a country and markets a product or service but does not own the asset, e.g., license agreements, management contracts, joint ventures, and service and production sharing agreements. In these investments, there is transfer of capital but no establishment of an entity nor is the transaction executed through the stock exchange. A great variety of assets are included today in the definition of investment, and broad definitions have begun to appear in national investment codes and international instruments.

The notion of investment is at the crossroads between economics, law, and international relations. According to one scholar, the dynamic notion of investment appeared in international law and substituted for the static notion of "property." Investment is a dynamic notion because it has a certain duration and movement.[5] The legal definition of investment depends on the object and the objective of the different investment instruments.[6] A narrow approach was followed by earlier agreements which aimed at the gradual liberalization of capital movements and enumerated the transactions covered by these agreements. Today, most international investment instruments, in particular investment protection treaties, start with a broad definition of investment which, if needed, may be limited as a second step.

The OECD Code of Liberalization of Capital Movements[7]is one of the main representative examples of liberalization instruments. To qualify for its coverage as direct investment, the Code requires the combination of several elements: (i) a contribution in capital, (ii) the establishment of durable relations between the investor and the enterprise, iii) the investor should be in a position to exercise a real influence on the management of the company where it had invested.[8] In contrast, investment that may

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3 UNCTAD *Scope and Definition*, UNCTAD Series on Issues in International Investment Agreements, 1999, Vol. II.

4 See, for instance, the OECD Draft Convention on the Protection of Foreign Property, OECD 1967.

5 « . . . la notion d'investissement, notion dynamique, a fait son apparition dans la langue du droit international, et s'est substituée à la notion de bien, notion statique. La notion d'investissement est, en effet une notion dynamique, en ce sens qu'elle ne peut se concevoir que dans la durée et dans le mouvement. . . » P. Juillard, *L'évolution des sources du droit des investissements*, VI Recueil des Cours 24 (Collected Courses of the Hague Academy of International Law 1994).

6 D. Carreau & P. Juillard, Droit International Economique (Dalloz, 2nd ed. 2005).

7 *See* http://www.oecd.org/dataoecd/10/62/39664826.pdf.

8 A similar list of elements is found in the OECD Benchmark Definition of Foreign Direct Investment (Benchmark Definition), which sets the world standard for foreign direct investment statistics. This definition characterizes direct investment as follows:

> Direct investment is a category of cross-border investment made by a resident in one economy (the direct investor) with the objective of establishing a lasting interest in an enterprise resident in an economy other than that of the investor (the direct investment enterprise). The motivation of the direct investor is a *strategic long-term relationship* between the direct

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provide the investor with a return but does not involve control over the company is generally considered portfolio investment.

INTERNATIONAL INVESTMENT AGREEMENTS

The term "investment" in investment agreements is not necessarily identical to the same term used in liberalization instruments. Most multilateral and bilateral investment treaties and trade agreements with investment chapters include a broad definition of investment. They usually refer to "every kind of asset"[9] followed by an illustrative but usually not limitative list of covered assets. Most of these definitions are open-ended and cover both direct and portfolio investment. Their approach is to give the term "investment" a broad, nonexclusive definition, recognizing that investment forms are constantly evolving.

However, there are some agreements which provide a different approach to defining investment, setting forth a broad but exhaustive list of covered economic activities.[10]

NAFTA, in Article 1139, includes an exhaustive list of covered investments. Investments under the NAFTA include FDI, portfolio investment (equity securities), partnership and other interests, and tangible and intangible property acquired "in the expectation . . . of economic benefit or other business purposes." Loan financing is only protected when funds flow within a business group or when debt is issued on a relatively long-term basis (more than three years). Contract rights not falling under other categories of investment are covered only if they involve a "commitment of capital or other resources in the territory of a party . . . to economic activity in such territory." NAFTA complements its exhaustive list of investment categories with a negative definition, establishing certain types of property not to be considered investments, such as money claims arising solely from commercial contracts for the sale of goods or services.

Article 1(6) of the Energy Charter Treaty defines investment as "every kind of asset" and refers to any investment associated with an economic activity in the energy sector.

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investment and the enterprise which allows a *significant degree of influence* by the direct investor in the management of the direct investment enterprise. The '*lasting interest*' is evidenced where the director investor owns at least 10 per cent of the voting power of the direct investment enterprise" [emphasis added]

9 Sometimes they have a circular element, referring to "every asset . . . that has the characteristics of an investment." *See, e.g.*, Article 11.17.4 of the United States-Australia Free Trade Agreement.

10 Rubins uses three categories of International Investment Agreements in order to organize the different approaches to defining investment: those which contain an "illustrative list of elements" (broad definition, most BITs), an "exhaustive list" (NAFTA) or a "hybrid list" (U.S.-Singapore FTA, for instance). *See* N. Rubins, *The Notion of "Investment, in International Investment Arbitration*, *in* ARBITRATING FOREIGN INVESTMENT DISPUTES (N. Horn & S. Kroll eds., Kluwer Law International 2004).

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The broad formula which refers to "every kind of asset" has become a standard definition in most BITs,[11] which contain a general statement followed by a nonexhaustive list of categories of covered investments directly or indirectly controlled by investors of either Party. An exception is the new Canadian Model FIPA, which continues to use the NAFTA approach.[12]

According to some commentators, most BITs take four basic definitional dimensions into consideration: (1) the form of the investment, (2) the area of the investment's economic activity, (3) the time when the investment is made, and 4) the investor's connection with the other contracting State.[13]

Usually, the broad definition is followed by a list of five categories:

i. *Movable and immovable property*—which covers the tangible property traditionally protected by customary international law and earlier international agreements.
ii. *Interests in companies*—which usually covers debt and equity investment (FDI and portfolio).
iii. *Claims to money and claims under a contract having a financial value*—which suggests that investment includes not only property but also contractual rights.[14]
iv. *Intellectual property rights*[15]—these may include trademarks, patents and copyrights. In some investment agreements such as the 2005 UK Model BIT, intellectual property rights include "goodwill", "technical processes" and "know how."
v. *Business concessions under public law*—including concessions to search for, extract and exploit natural resources: German Model BITs (1991 and 2005, Art. 1).

The 2004 U.S. Model BIT and the U.S. FTAs define "investment" broadly as every asset owned or controlled, directly or indirectly, by an investor, "which has the

11 Dolzer & Stevens, Bilateral Investment Treaties (Martinus Nijhoff Publishers 1995).

12 The only significant change in the definition of "investment" in the new model is the exclusion of debt securities issued by government.

13 J. W. Salacuse & N. P. Sullivan, *Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and their Grand Bargain*, Harv. Int'l L.J. 67 (2005).

14 Some agreements, however, such as BITs negotiated by Canada, Mexico, and the United States, exclude from the definition of "investment" claims to money that arise exclusively from commercial contracts for the sale of goods and services. In addition, these BITs exclude from the definition of "investment" debt instruments with short-term maturity periods, usually less than three years (Mexico, Canada).

15 The inclusion of intellectual property rights in investment treaties has been criticized by some developing countries and NGOs. The reason is that the protection exceeds the multilaterally agreed-upon TRIPs standards (TRIPs plus obligations). *See* South Centre, *Intellectual Property in Investment Agreements: The TRIPS-Plus Implications for Developing Countries*, Analytical Note, May 2005, at www.southcentre.org.

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characteristics of an investment," and include a nonexhaustive list of 'forms" such investments may take.[16], [17]

The new Canadian Model has replaced the 1994 FIPA Model's nonexhaustive asset-based definition with the finite but more comprehensive definition of investments based on NAFTA's Article 1139 definition. It distinguishes certain loans from investments by containing highly detailed requirements for a loan to qualify as an investment.[18]

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16 Besides the typical "core" investment types, they also cover various debts instruments, "futures, options and other derivatives" and "turnkey, construction management production, concession, revenue sharing and other similar contracts." They also innovate in that they include explanatory notes, designed to clarify and narrow the broad definition.

> *Footnote 1* stipulates that some forms of debt such as bonds, debentures, and long-term notes that are more likely to have the characteristics of an investment while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services are less likely to have such characteristics. *Footnote 2* provides indications as to whether or not a particular type of license, authorization, permit or similar instrument has the characteristics of an investment: whether a particular type of license, authorization, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit, or similar instrument has the characteristics of an investment. *Footnote 3* clarifies that the term "investment" does not include an order or judgment entered in a judicial or administrative action.

Hence, the "characteristics of an investment include the commitment of capital, the expectation gain or profit, or the assumption of risk," while in case of debt instruments, these would normally have to be long-term.

17 Some forms of debts, such bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics: SFTA 15.1.13; CFTA 10.27; AFTA 11.17.4; CAFTA 10.28; MFTA 10.27; Model BIT 1.

18 IV) a loan to an enterprise

> i) where the enterprise is an affiliate of the investor, or
>
> ii) where the original maturity of the loan is at least three years,

but does not include a loan, regardless of original maturity, to a state enterprise;

> V) i) . . . a loan to or debt security issued by a financial institution is an investment only where the loan or debt security is treated as regulatory capital by the Party in whose territory the financial institution is located, and
>
> ii) a loan granted by or debt security owned by a financial institution, other than a loan to or debt security of a financial institution referred to in i), is not an investment;

for greater certainty:

> iii) a loan to, or debt security issued by, a Party or a state enterprise thereof is not an investment; and
>
> iv) a loan granted by or debt security owned by a cross-border financial service provider, other than a loan to or debt security issued by a financial institution, is an investment if such loan or debt security meets the criteria for investments set out elsewhere in this Article.

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In Article 1.2 of the Belgium-Luxembourg Model BIT (2002), investment is defined as "any kind of asset and any direct or indirect contribution in cash, in kind or in services, invested or *reinvested* in any sector of economic activity" [emphasis added].

Article 1(2) of the Japan-Korea BIT (2003) provides a straightforward definition of investment that includes namely ". . . an enterprise; . . . shares, stocks or other forms of equity participation . . . bonds, debentures, loans and other forms of debt, including rights derived therefrom, . . . rights under contracts, . . . claims to money and to any performance under contract having a financial value[,] intellectual property rights, . . . any other tangible and intangible . . . property . . .". In addition, the term investment includes "the amounts yielded by an investment, in particular, profit, interest, capital gains, dividends, royalties and fees."

"INVESTMENT" AND RELATED JURISPRUDENCE

A provision in a contract or an investment agreement allowing disputes to be submitted to ICSID *a priori* provides the necessary consent required by the ICSID Convention. This does not, however, mean that an ICSID tribunal will have automatically jurisdiction; the requirements imposed by the Convention should be also met. The outer limits of the jurisdiction *ratione materiae* of the Centre are set out in Article 25(1), which provides as follows:

> The jurisdiction of the Centre shall extend to any legal dispute *arising directly out of an investment*, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the centre by that State) and a national of another Contacting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally. [emphasis added]

The term investment is not defined in the Convention, in order to accommodate new and emerging forms of investment. The relevant passage of the World Bank Executive Directors' Report accompanying the Convention states:

> No attempt was made to define the term 'investment' given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (article 25(4)).

However, A. Broches, in his account of these negotiations, noted the following:

> During the negotiations, several definitions of 'investment' were considered and rejected. It was felt in the end that a definition could be dispensed with 'given the essential requirement of consent by the parties'. This indicates that the requirement that the dispute must have arisen out of an 'investment' may be merged into the requirement of consent to jurisdiction. Presumably, the parties' agreement that a dispute is an 'investment dispute' will be given great weight in any determination of the Centre's jurisdiction, although it would not be controlling."[19]

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19 A. Broches, *The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction*, 5 Columbia J. Transnat'l L. 261–80, 268 (1966).

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C. Schreuer,[20] taking into account the *travaux préparatoires*, also indicates that a concerted effort was made to define the term but that the effort failed.

In order to accept jurisdiction under the ICSID Convention, tribunals usually have adopted a dual approach[21]: they consider whether there is an "investment" under both Article 25(1) of the Convention and the relevant investment agreement—called by some the "double keyhole approach"[22] or the "double barreled test."[23] This approach gives parties to ICSID arbitration-wide discretion to describe a particular transaction as investment, although they do not have unlimited freedom in determining what constitutes an investment, and any such determination is not conclusive for a tribunal deciding on its competence. Under Article 41 of the Convention, a tribunal may examine on its own motion whether the requirements of jurisdiction are met.[24] This dual approach, however, gets somewhat blurred[25] if both parties agree to submit the case to ICSID, since this might imply a strong presumption that the case involved an investment.[26]

However, when the dispute is not submitted to ICSID but to another institution with different Rules, such as the International Chamber of Commerce (ICC) or the Stockholm Chamber of Commerce (SCC), or to *ad hoc* arbitration under the UNCITRAL Rules, the dual approach doesn't apply: these Rules do not "filter claims through their own autonomous notion of investment as a condition of jurisdiction *ratione materiae*,"[27] and the tribunals applying these Rules have to consider whether there is an investment

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20 C. Schreuer with L. Malintoppi, A. Reinisch and A. Sinclair, The ICSID Convention: A Commentary (Cambridge University Press, 2nd ed. 2009).

21 "A two-fold test must therefore be applied in determining whether this Tribunal has the competence to consider the merits of the claim: whether the dispute arises out of an investment within the meaning of the Convention and, if so, whether the dispute relates to an investment as defined in the Parties' consent to ICSID arbitration, in their reference to the BIT and the pertinent definitions contained in Article 1 of the BIT." Československa obchodní banka (CSOB), a.s. v. Slovak Republic, ICSID Case No. ARB/97/4, Decision on Jurisdiction, May 24, 1999, para. 251.

22 R. Dolzer & C. Schreuer, *Investors and Investment*, *in* Principles of International Investment Law (Oxford University Press 2008), *supra* note 1.

23 "Under the double-barreled test, a finding that the Contract satisfied the definition of 'investment' under the BIT would not be sufficient for this Tribunal to assume jurisdiction, if the Contract failed to satisfy the objective criterion of an 'investment' within the meaning of Article 25." Malaysian Historical Salvors, SDN, BHD v. Malaysia, ICSID Case No. ARB/05/10, Award, May 17, 2007, para. 55.

24 As the tribunal in the *Joy Mining v. Egypt* case held: "The parties to a dispute cannot by contract or treaty define as investment, for the purposes of ICSID jurisdiction, something which does not satisfy the objective requirements of Article 25 of the Convention. Otherwise, Article 25 and its reliance on the concept of investment, even if not specifically defined, would be turned into a meaningless provision." Joy Mining Machinery Limited v. Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award, August 6, 2004.

25 R. Dolzer & C. Schreuer, *supra* note 1.

26 Fedax N.V. v. Republic of Venezuela, ICSID Case No. ARB/96/3, Decision on Jurisdiction, May 24, 1997, para. 21; RSM Production Corporation v. Grenada, ICSID Case ARB/05/14, Award, March 13, 2009, para. 233.

27 S. Jagusch & A. Sinclair, *The Limits of Protection for Investments and Investors under the Energy Charter Treaty*, *in* Investment Arbitration and the Energy Charter Treaty 73, 75 (C. Ribeiro ed., Juris Publishing 2006).

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according to the relevant investment agreement. Indeed, as mentioned before, many investment treaties are drafted in an open-ended fashion so as to protect all assets, and tribunals hearing alleged treaty breaches in cases governed by non-ICSID arbitration rules typically rely on the four corners of the investment treaty—and its definition of investments—without necessarily resorting to other criteria or tests to determine whether a given asset should qualify as an investment under the treaty.[28] However, in practice, several non-ICSID tribunals have used some "objective" criteria in their analysis.

Uncertainty and a lack of consensus over the definition of investment under the ICSID Convention exist currently among scholars and tribunals, who remain divided among a spectrum of approaches.[29] There are those who endorse the "objectivist approach," for which the notion of investment is autonomous and must be interpreted on the basis of a number of elements, typical features, which, however, according to C. Schreuer,[30] should not be understood as jurisdictional requirements but typical characteristics of investment under the Convention. These elements are the following[31]: (i) the project should have certain duration, (ii) there should be a certain regularity of profit and return, (iii) there is typically an element of risk for both sides, (iv) the commitment involved would have to be substantial, and (v) the operation should contribute to the the host State's development. The expression of these "objective" hallmarks was first mentioned in the *Fedax* case, although it was adopted by the tribunal in *Salini v. Morocco*[32] and spurred significant controversy. The so-called *Salini* "test" relies, however, on four of the five elements mentioned: the fifth element, "regularity of profit,"

28 The Tribunal in *Romak v. Uzbekistan* (UNCITRAL), was not convinced with this approach. In replying to the Claimant's suggestion that the definition investment in UNCITRAL proceedings is wider than in ICSID Arbitration, it held that: " . . . This view would imply that the substantive protection offered by the BIT would be narrowed or widened, as the case may be, merely by virtue of a choice between the various dispute resolution mechanisms sponsored by the Treaty. This would be both absurd and unreasonable . . . There is no basis to suppose that this word had a different meaning in the context of the ICSID Convention than it bears in relation to the BIT"; Romak S.A. v. The Republic of Uzbekistan, PCA Case No. AA280, Award, November 26, 2009.

29 Farouk Yala, *The Notion of 'Investment' ICSID Case Law: A Drifting Jurisdictional Requirement? Some 'Un-Conventional Thoughts on Salini, SGS and Mihaly*, *in* 22(2) Journal of International Arbitration 105–26 (Kluwer Law International), E. Gaillard, *CIRDI, La Chronique des sentences arbitrales*, Journal du Droit International (JurisClasseur, March 2009).

30 Schreuer *et al*, *supra* note 20.

31 *See* Amerasinghe: "The duration of the agreement, the regularity of profit and return, and the surrounding circumstances of the agreement would be relevant factors in the decision [under Art. 25(a), ICSID Convention] . . .Any transfer of resources, whether money, goods, services, or all three could be an investment, depending of course on such other facts as return or profit motive, the spread out feature of return, duration and the like. An ordinary sales contract, therefore, would not normally be an investment"; Amerasinghe (1976), p. 804.

32 In *Salini v. Morocco*, for the first time an ICSID tribunal was explicitly required to determine whether a construction contract can be considered to be an investment for purposes of ICSID jurisdiction. With respect to the qualification of the claimant's rights under the BIT, the tribunal held that the construction contract had created a "contractual benefit having an economic value." These categories of claims being explicitly included in the Italy-Morocco BIT, it came to the conclusion that the transaction was an "investment." Salini Construttori SPA and Italstrade SPA v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, July 23, 2001.

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has been supported by scholars[33] but is not reflected in all of the tribunals which have followed the *Salini* test. However, arbitral tribunals have adopted several variations of this approach, ranging from a strict cumulative application of these criteria to a more flexible, pragmatic approach. Another tribunal[34] has added additional criteria to this list: assets invested in accordance with the laws of the host state—even without a specific language included in the BIT, and assets invested in good faith.[35]

There are also those who endorse the "subjectivist approach"[36] or "intuitive approach,"[37] which allows the tribunals to find, "identify"[38] an investment through usual characteristics and recognize it through these characteristics without however demanding their presence at all times. Under this approach, deference is usually given to the consent of the parties to consider an economic operation as an investment.[39] The parties can add to or subtract elements from this definition and if, in their investment treaty, investment law, investment contract or arbitration agreement, they have agreed to characterize an operation as an investment, it would, under this approach, be sufficient to fulfill the requirement of Article 25 of the ICSID Convention.[40]

The flexible or modified approach used by some recent tribunals appears to be the most appropriate in light the Vienna Convention interpretation rules. This approach considers the term "investment" to have an ordinary meaning in the context of Article 25 of the the ICSID Convention, which means that states do not have total freedom to redefine in their consents to ICSID arbitration. That meaning, however, is a very broad one.

Many BITs limit their protection to investments that have been made "in accordance with the laws and regulations of the host state." Most of the tribunals which analyzed this clause, expressed the view that it applies to the validity of investment and not its character as an investment under the relevant BIT.

Which Transactions Have Tribunals Accepted as Investment?

Until the tribunal in *Fedax N.V. v. Venezuela*[41] was faced with an objection to jurisdiction on the ground that the underlying transactions—promissory notes—did not meet the requirements of an investment under the ICSID Convention, the term "investment" had been broadly understood in the ICSID practice and decisions as well as in scholarly writings. Before this case, ICSID tribunals[42] had, on their own initiative and with

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33 Gaillard, *supra* note 29, citing Schreuer, *supra* note 20; Dolzer & Schreuer, *supra* note 1.

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

35 *Ibid.*, para. 114.

36 Krishan, *supra* note 1.

37 Gaillard, *supra* notes 1 and 29.

38 Gaillard, *supra* note 1.

39 Krishan, *supra* note1.

40 *Ibid*.

41 Fedax NV v. Republic of Venezuela, ICSID Case No. ARB/96/3, Decision on Jurisdiction, July 11, 1997, 37 ILM (1998).

42 Kaiser Bauxite Company v. Government of Jamaica, 1975 1 ICSID Reports (1993), 296; Alcoa Minerals of Jamaica Inc. v. Government of Jamaica 1975, Yearbook Commercial Arbitration,

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little investigation, examined the question whether an investment was involved without a consideration of any specific criteria to assess this question. In each case, these early tribunals reached the conclusion that the investment requirement of the Convention had been met. Since then, ICSID tribunals have deemed a variety of transactions to fall under the definition of investment in accepting jurisdiction *ratione materiae*, i.e., financial instruments (*Fedax v. Venezuela*,[43] *CSOB v. Slovak Republic*[44]); contracts (*Salini v. Morocco*,[45] *PSEG Global Inc. v. Turkey*[46]) and services (*SGS v. Pakistan*,[47]

Vol. IV (1979), 206; Liberian Eastern Timber Corporation (LETCO) v. Government of the Republic of Liberia, 1984, 2 ICSID Reports (1994), 346; Société Ouest Africaine des Bétons Industriels (SOABI) v. State of Senegal, 1988, 2 ICSID Reports (1994), 165; Holiday Inns S.A., Occidental Petroleum Corporation et al. v. Government of Morocco; Case No. ARB/72/1.

43 In *Fedax v. Venezuela, supra* note 41, the Respondent challenged the claimant's argument that promissory notes qualified as investments under the Netherlands-Venezuela BIT and the ICSID Convention, because it did not amount either to foreign direct investment or to portfolio investment carried out through approved stock market transactions. The tribunal disagreed, noting that according to the underlying BIT, the phrasing "every asset" justifies a broad interpretation and that in addition ". . . this interpretation is also consistent with the broad reach that the term 'investment' must be given in light of the negotiating history of the Convention." It held that promissory notes were covered by the definition of investment in both instruments and stated that:

> Loans qualify as an investment within ICSID's jurisdiction . . . Since promissory notes are evidence of a loan and a rather typical financial and credit instrument there is nothing to prevent their purchase from qualifying as an investment under the Convention in the circumstances of a particular case such as this.

44 In *CSOB v. Slovak Republic*, the Respondent argued that the transaction underlying the claimant's case, a loan, did not involve a transfer of resources into the Slovak Republic and therefore, did not constitute an investment. Although loans were not expressly mentioned under the Czech Republic-Slovakia BIT, the tribunal found that the term "assets" and "monetary receivables or claims" was broad enough to encompass loans. CSOB v. The Slovak Republic, ICSID Case No. ARB/97/4, Decision on Jurisdiction, May 24, 1999, 14 ICSID Review-Foreign Direct Investment Law Journal (1999).

45 Salini Construttori SpA and Italstrade SpA v. Kingdom of Morocco, ICSID case No. ARB/00/4, Decision on Jurisdiction, July 23, 2001.

46 In *PSEG Global Inc. v. Turkey*, the dispute concerned a contract for the development of an energy plant in Turkey. Turkey contested the tribunal's jurisdiction, claiming that there was no "investment" as required by the U.S.-Turkey BIT and the ICSID Convention because the Concession Contract merely set the parameters for future negotiation. The tribunal dismissed this argument and held that "both the language of the Contract as well as the circumstances . . . demonstrate an intent by the Parties to be bound in spite of the fact that certain terms still needed to be agreed upon at a later date. It added that:

> A contract is a contract. The Concession contract which exists is valid and legally binding. This conclusion is sufficient to establish that the Tribunal has jurisdiction on the basis of an investment having been made in the form of a Concession Contract . . . whether all or some of the activities undertaken qualify as a part of the investment or are to be regarded as merely preparatory and whether the assets of *the* Project Company constitute an investment" are a "different question pertaining to the merits,"

PSEG Global Inc., The North American Coal Corporation, and Konya Ilgin Elektrik Uretim ve Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5, Decision on Jurisdiction, June 4, 2004.

47 Société Générale de Surveillance (SGS) S.A. v. Pakistan, ICSID Case No. ARB/01/13, Decision on Objection to Jurisdiction, August 6, 2003.

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SGS v. Philippines.[48],[49] However, they have set some limitations as to what can be accepted as an investment and have refused to accept, as such, bank guarantees[50] and preinvestment expenditures (*Mihaly v. Sri Lanka*[51] and *Zhinvali v. Georgia*[52]).

Although ICSID tribunals have been hesitant to recognize contracts related to trade in goods as investment, non-ICSID tribunals have been more inclined to characterize them as such. In the NAFTA context, for instance, tribunals have shown some readiness to accept the interrelation between trade and investment and to retain jurisdiction even when the governmental measures of the host State affect trade rather than investment.

In *Pope and Talbot v. Canada*,[53] the claimant challenged the implementation of the Canada-US Softwood Lumber Agreement and the allocations of export quota that had been made under that Agreement and alleged multiple breaches of the NAFTA. The respondent claimed that "softwood lumber" is a "good" and therefore the dispute related to trade in goods. The tribunal disagreed and, without analyzing the nature of

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48 Société Générale de Surveillance (SGS) S.A v. Philippines, ICSID Case No. ARB/02/6, Decision on Objection to Jurisdiction, January 29, 2004.

49 The disputes in both arose out of the nonpayment by Pakistan and the Philippines respectively, of invoices allegedly due to SGS, a Swiss company, under contracts for the provision of pre-shipment inspection and certification services. In both cases, the tribunals concluded that the contracts in question were qualified as an investment based on a broad definition included in the respective treaties.

50 In *Joy Mining Machinery Limited v. the Arab Republic of Egypt*, the tribunal had to examine whether bank guarantees under the U.K.-Egypt BIT were to be considered an investment. It held the view that a bank guarantee is simply a contingent liability and "to conclude that a contingent liability is an asset under Article 1(a) of the Treaty and hence a protected investment, would really go far beyond the concept of investment, even if broadly defined, as this and other treaties normally do." Joy Mining Machinery Limited v. the Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award on Jurisdiction, August 6, 2004.

51 Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/00/2, Award and Concurrent Opinion of March 15, 2002, 17 ICSID Rev.—FILJ 142 (2002); 41 ILM 867 (2002). Mihaly International Corp., a U.S. company, wanted to build a power plant in Sri Lanka. Although the negotiations between Mihaly and Sri Lanka were never finalized, Mihalyinvested in the preparation of the BOT (build, operate, transfer) agreement and Sri Lanka issued a number of documents guaranteeing the exclusivity of negotiations with Mihaly. The tribunal, constituted under the U.S.-Sri Lanka BIT, held that that preinvestment expenditure is not investment within the meaning of Article 25 of the ICSID Convention and that therefore it lacked jurisdiction. It stated that:

> The Claimant has not succeeded in furnishing any evidence of treaty interpretation or practice of states, let alone that of developing countries or Sri Lanka for that matter, to the effect that pre-investment and development expenditures in the circumstances of the present case could automatically be admitted as "investment" in the absence of the consent of the host state to the implementation of the project.

52 In *Zhinvali Development Ltd. v. Georgia*, Zhinvali mounted a claim under the terms of the Georgian national investment law. The dispute arose out of the firm's negotiations for the rehabilitation of a hydroelectric power plant in Georgia. The firm reclaimed expenses of more than US$26 million incurred during negotiations with the government. However, in the award rendered by an ICSID tribunal, the tribunal argued that these up-front costs do not fall under the definition of investment as set out in the ICSID Convention. Zhinvali Development Ltd. v. Republic of Georgia, ICSID Case No. ARB/00/1, Award of January 24, 2003, not published.

53 Pope & Talbot, Inc. v. Government of Canada, UNCITRAL Award, January 26, 2000.

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the economic activity, qualified Pope and Talbot as an investor and its Canadian subsidiary as an investment. It added, "there is no provision to the express effect that investment and trade in goods are to be treated as wholly divorced from each other . . . ."[54]

In *S.D. Myers, Inc v. Canada*,[55] the U.S. company alleged that Canada violated NAFTA's Chapter 11 by banning the export of PCB waste to the United States where S.D. Myers operated a PCB remediation facility. S.D. Myers claimed that the promulgation of the export ban by Canada was done in a discriminatory and unfair manner. Unlike the *Pope & Talbot* tribunal, the one in *S.D. Myers* looked first at the definition of "investment" contained in NAFTA and found that the Canadian subsidiary was an "enterprise" and therefore among the assets enumerated in Article 1139. In addition, the tribunal held that the trade and investment sections of NAFTA impose cumulative obligations on the Parties.[56]

How Did Tribunals Qualify a Transaction as an Investment Under the ICSID Convention?

The "objectivist" approach or the "Salini" test. In the last few years, some ICSID tribunals have used some "objective" set of criteria/hallmarks to impose limits on the boundaries of "investments" arbitrable under the ICSID Convention. Where "objective" criteria are used, the potential claimants have to squeeze through a narrower door in order to avail themselves of ICSID arbitration—even if their assets might enjoy protection under the investment treaty itself.[57] However, there are several variants to this approach: the decision in *Salini* and the ones that followed adopted these elements in different degrees and some tribunals made a more rigid application of these hallmarks, further restricting the definition of investment.

In *Salini v. Morocco*,[58] with respect to the qualification of the claimant's rights under the ICSID Convention, the tribunal relied on ICSID case law and scholarly writings to conclude that an investment involves four interdependent elements: "contribution,"

54 *Ibid.*, para. 26.

55 S.D. Myers, Inc. v. Government of Canada, Partial Award, November 13, 2000.

56 "The chapters of the NAFTA are part of a 'single undertaking.' There appears to be no reason in principle for not following the same preference as in the WTO system for viewing different provisions as 'cumulative' and complementary. The view that different chapters of the NAFTA can overlap and that the rights it provides can be cumulative except in cases of conflict, was accepted by the decision of the Arbitral Tribunal in Pope and Talbot. The reasoning in the case is sound and compelling. There is no reason why a measure which concerns goods (Chapter 3) cannot be a measure relating to an investor or an investment (Chapter 11)," *Ibid.*, paras. 292–94.

57 The critics of the *Salini* test consider its approach to be an ideological and, therefore, undesirable one which provokes "a putative crisis for the entire investment dispute universe." It narrows the field of transactions which are considered ICSID investments more dramatically than the wording and the *travaux préparatoires* of the ICSID Convention, and "it dilutes neutrality" and aligns the Convention with ideology. In addition, the features it outlines only include direct investment, as other forms of investment; portfolio investment, for instance, does not meet the requirements of that test. *See* Krishan, *supra* note 1.

58 *Salini v. Morocco*, *supra* note 32.

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"certain duration of performance of the contract," "participation in the risks of the transaction," and "contribution to the economic development of the host State of the investment." The tribunal found that the project in question required heavy capital investment, services and other long commitments, involved an evident risk, had a duration of 36 months, and made a contribution to development; therefore, it was qualified as a protected investment. In analyzing these elements, the tribunal held that "in reality, these various elements may be interdependent" and that "these various criteria should be assessed globally even if for the sake of reasoning," they are considered individually.[59]

In *Bayindir v. Pakistan*,[60] the operation at stake was a highway construction contract. In determining whether there was an investment, the tribunal relied once again on the *Salini* test. It held that Bayindir made a significant contribution, both in terms of know-how, equipment and personnel, and also in financial terms. The duration of the contract was considered as a paramount factor to distinguish investments from ordinary commercial transactions, having in mind that the bar should not be put very high (the project extending over three years was deemed sufficient to meet the duration test). The tribunal recognized that besides taking the risk inherent to long-term contracts, Bayindir incurred an obvious risk related to the very existence of a defect liability period of one year and of a maintenance period of four years against payment. On the last feature, while the tribunal recognized that an investment should be significant to the host State's development, it also pointed out that this condition is often already included in the other classic conditions set out in the *Salini* test. The tribunal indicated that all these elements "may be closely interrelated, should be examined in their totality, and will normally depend on the circumstances of each case."[61]

In *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*,[62] the tribunal relied on the *Salini* test to qualify as an investment the activities carried out in connection with the dredging operation of the Suez Canal. It identified the same elements mentioned above as indicative of an investment for purposes of the ICSID Convention and also emphasized that these elements may be closely interrelated, should be examined in their totality and will normally depend on the circumstances of each case. The tribunal found that the amount of work involved and the related compensation showed that the claimants' contribution was substantial. The operation was deemed of such magnitude and complexity that there could be no question as to the involvement of a risk. Last, the tribunal held that it could not be seriously denied that the operation of the Suez Canal was of paramount significance for Egypt's economy and development.

59 *Ibid.*, para. 52.

60 Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Decision on Jurisdiction, November 14, 2005.

61 *Ibid.*, para. 130.

62 Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Decision on Jurisdiction, June 16, 2006.

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The same "objective" features of an investment operation have also been referred to in the *Helnan International Hotels A/S v. The Arab Republic of Egypt*.[63] The tribunal accepted the Respondent's argument that, to be characterized as an investment, a project must show the five "objective" elements and found that the project for the refurbishment and transformation of a hotel into a five-star tourist site did meet these requirements in spite of their excessive narrowness. Twenty-six years was deemed to be of certain duration, the refurbishing activity implied some risk of no commercial success, and the amount of money necessary to transform the hotel into a five-star building and keep such classification was supposed to involve a substantial commitment and to provide the claimant with regular remuneration. As to the contribution to the development of the Egyptian economy, the tribunal held that the importance of the tourism industry in the Egyptian economy made it obvious. According to the tribunal, the project did qualify as an investment under both the ICSID Convention and the BIT between Denmark and Egypt, which by covering "any other rights [. . .] pursuant to contract having an economic value," encompasses the management contract and the obligations deriving from it.

A "Salini plus" approach was introduced by the tribunal in *Phoenix Action v. the Czech Republic*,[64] which examined the term "investment" under both customary international law and the general principles of international law. The tribunal, in declining jurisdiction over the company's claim, held that the owner of Phoenix Action had restructured its ownership of two Czech companies, embroiled in various disputes with the Czech authorities, so that they might be protected by the Israel-Czech Republic BIT and that this constituted "an abuse of rights."

The tribunal, after emphasizing the importance of the Vienna Convention in the interpretation of both the ICSID Convention and the BIT, held that these two instruments also had to be analyzed with due regard to requirements of the general principles of law "such as the principle of non-retroactivity or the principle of good faith."[65] It noted that "sometimes relying on the ordinary meaning of the term 'investment' is insufficient" as in the present case and that the tribunal had to conduct a "contextual analysis of the existence of a protected investment" and "must also take into consideration the purpose of the international protection of the investment."[66] Based on these analytical tools, the tribunal found that the investment was not a "bona fide" investment—as required under the ICSID Convention, defining bona fide investments as ones made in conformity in good faith—a general principle of international law.[67]

The tribunal looked at the *Salini* test and found that it was not entirely relevant in this case, and had to be supplemented. With respect to the element of the contribution to the development of the host State, the tribunal held that "it is impossible to ascertain"

63 Helnan International Hotels A/S v. The Arab Republic of Egypt, ICSID Case No. ARB 05/19,Decision of the Tribunal on Objection to Jurisdiction, October 17, 2006.

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

65 *Ibid.*, para. 77.

66 *Ibid.*, para. 79.

67 *Ibid.*, paras. 100–16.

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and that the approach to be adopted should be centered on the contribution of the investment to the "economy of the host state."[68] Finally, the tribunal enumerated the six elements that have to be taken into account for an investment to benefit from the protection of ICSID: (i) contribution in money or other assets, (ii) a certain duration, (iii) an element of risk, (iv) an operation made in order to develop an economic activity in the host State, (v) assets invested in accordance with the laws of the host state—even without a specific language included in the BIT, and (vi) assets invested in good faith.[69]

Interestingly enough, in *Nreka v. Czech Republic*,[70] a non-ICSID case, the tribunal seems to have imported the *Salini* test. In particular, the tribunal identified characteristics which it held are sometimes used by arbitrators to define "investments," such as that an investment will have "an extended duration and entail some form of risk, will show a certain regularity of profit and return, will not be wholly insignificant in amount, and will contribute to the host State's economic development."

In *Société Générale v. Dominican Republic*,[71] another non-ICSID case, the government argued that the investor had made no real investment or capital contribution but had paid a mere $2 for the U.S. energy firm AES's participation in EDE Este. In challenging treaty protection for such a minimal investment, the government insisted that the arbitrators should look to the preamble of the France-Dominican Republic BIT and in particular the objective of stimulating "transfers of capital and technology" between France and the Dominican Republic "in the interest of their economic development". Société Générale argued that the low purchase price of the EDE Este stake should not be determinative for purposes of assessing whether there was a protected investment under the BIT, that the relevant BIT was drafted broadly so as to protect a wide range of assets as investments.

The tribunal agreed with the claimants in holding that the BIT itself clearly protects a wide (and nonexhaustive) list of assets. The tribunal offered its own view as to the relevance of the role the operation plays in the economic development of the Dominican Republic:

> [] To the extent the shares, concessions under contract and claims and rights to any benefit having an economic value are involved in this dispute, they all qualify for such protection independently from the manner in which they each contribute to stimulating the transfer of capital and technology. This transfer is thus the overall objective but not a specific requirement for each individual form of investment . . . .[72]
>
> The issue of the specific contribution made to the local economy by a transaction of this kind might not be as easy to identify as if a factory was built, but this of course does not disqualify financial investments from protection under the Treaty.

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68 *Ibid.*, para. 85.

69 *Ibid.*, para. 114.

70 Unpublished Decision, reported in the Investment Arbitration Reporter, vol. 11, 2009.

71 Société Générale v. Dominican Republic, UNCITRAL, LCIA Case No. UN 7927, Preliminary Objections to Jurisdiction, September 19, 2008.

72 *Ibid.*, para. 33.

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> The Claimant has convincingly identified as part of such contribution the continuing supply of electricity, the improvement of distribution and the contribution to employment within the country.[73]

A flexible "objectivist" or a pragmatic approach Some tribunals, while adhering to an "objective" analysis based on certain core characteristics of investment, such as contribution, risk, and certain duration, adopted a more flexible approach and declined to endorse all of the constitutive elements invoked in Salini, for instance, but not including in this list the contribution to the economic development of the host State.

In *LESI-DIPENTA v. Algeria*,[74] the basis of the dispute was a contract for the construction of a dam to provide drinking water for the city of Algiers. The respondent challenged the claim that the contract constituted an investment. Drawing from previous cases and the object and purpose of the ICSID Convention, the tribunal acknowledged that some objective criteria emerge and that, in order to constitute an investment for the purposes of the ICSID Convention, (i) the contracting party must have made contributions of economic value, such as loans, materials, labor, and services; (ii) these contributions should extend over a certain period; and (iii) the contributions must entail some kind of risk for the contributor.

The tribunal did not accept a separate "requirement" for the contribution to the economic development of the host State, stating that it was not necessary for the investor to demonstrate this element because it is difficult to establish, and it is implicitly covered by the other three elements. The award stands in line with previous cases in accepting there is an objective meaning to "investment" in the ICSID Convention which must be satisfied, although it supported a broader meaning of the term.

In *Pey Casado et Fondation Presidente Allende v. Chile*,[75] the longest running dispute at ICSID, [76] the tribunal rejected an argument that the shares in the Chilean company were not investments protected by either the bilateral investment treaty or the ICSID Convention. The tribunal held that the shares were protected by the Chile-Spain BIT because they were expressly included in its definition of investment. However, the tribunal accepted that not every investment protected by a bilateral investment treaty

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73 *Ibid.*, para. 35.

74 LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria, ICSID Case No. ARB/05/3, Decision on Jurisdiction, July 12, 2006.

75 Víctor Pey Casado and Président Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2, Award, May 8, 2008.

76 The claim arose out of Augusto Pinochet's coup d'état. Following the coup, Pinochet's government shut down the El Clarin newspaper, which was sympathetic to the previous president, Salvador Allende, and dissolved the company that owned it. One of the claimants, Victor Pey Casado, owned shares in that company. After fleeing to Spain, Mr. Pey Casado joined with other former friends of Allende to establish the philanthropic Salvador Allende Foundation to promote freedom of the press and democratic values. When he returned to Chile in the late 1980s, he was unable to secure any remedies related to his losses in Chilean courts and turned to the Chile-Spain Bilateral Investment Treaty. He was joined by the Salvador Allende Foundation, to which he had donated 90 percent of his shares.

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will also be protected by the ICSID Convention—investments that do not make a contribution of certain duration and involve risk will not be protected by the ICSID Convention, regardless of whether they are protected by a bilateral investment treaty. The tribunal held that the shares in the Chilean company displayed these features. It rejected previous decisions stating that investments that do not contribute to the host State's development are not protected under the ICSID Convention.[77] According to the tribunal, the sentence of the Preamble on "the need for international cooperation for economic development" does not establish a required element for investment under the Convention but merely reflects that such "'economic development' would be a desirable and natural *consequence* of investment."[78]

The tribunal in *Romak S.A. v. The Republic of Uzbekistan*[79], although a non-ICSID case, undertook a thorough analysis of the definition of investment, considering the Claimant's argument that such definition may vary depending on the investor's choice between UNCITRAL and ICSID arbitration, as an unreasonable proposition:

> [. . .] it would be unreasonable to conclude that the Contracting Parties contemplated a definition of the term "investments" which would effectively exclude recourse to the ICSID Convention and therefore render meaningless—or without *effet utile*—the provision granting the investor a choice between ICSID and UNCITRAL Arbitration.[80]

The tribunal held that although the point of departure remains the ordinary meaning of the term "investment" under the BIT, there is an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a *contribution* that extends over a *certain period of time* and that involves some risk". The tribunal was comforted in this analysis by the reasoning adopted by other arbitral tribunals (essentially ICSID), "which consistently incorporates contribution, duration and risk as hallmarks of an 'investment'."[81]

THE CONTRIBUTION TO THE ECONOMIC DEVELOPMENT AS A CONDITION SINE QUA NON

A strict interpretation of the "Salini" test with the contribution to the economic development as a condition sine qua non was adopted by an *ad hoc* Committee and a tribunal. The *ad hoc* Committee was formed to annul the *Patrick Mitchell v. Republic of Congo* award.[82] At the root of the ad hoc Committee's decision to annul the arbitral award was the finding that the original arbitration tribunal had "manifestly exceeded its power" and failed to state its reasons for finding that Mr. Mitchell had made "investments" in

77 *Ibid.*, para. 232.

78 *Ibid.*

79 *Romak S. v. Uzbekistan*, *supra* note 28.

80 *Ibid.*, para. 195.

81 *Ibid.*, para. 207.

82 Patrick Mitchell, who operated a small law firm, Mitchell & Associates, in the DRC, had earlier convinced an ICSID arbitration tribunal that his business had been expropriated contrary to the 1984 bilateral investment treaty (BIT) between the United States and Zaire (now the DRC), Patrick Mitchell v. Democratic Republic of the Congo, ICSID Case No. ARB/99/7, Decision on the Application for the Annulment of the Award issued on November 1, 2006.

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the DRC which were covered under the relevant BIT and the ICSID Convention.[83] The ad hoc Committee examined previous ICSID cases and identified the four main "objective" characteristics of "investments," among them the "essential" requirement that investments contribute to the economic development of the host State and found that the original tribunal had failed to explain the reasoning as to why it held that Mr. Mitchell's legal consulting firm could be deemed to have been an "investment" in the DRC:

> As a legal consulting firm is a somewhat uncommon operation from the standpoint of the concept of investment, in the opinion of the ad hoc Committee it is necessary for the contribution to the economic development or at least the interests of the State, in this case the DRC, to be somehow present in the operation. If this were the case, qualifying the Claimant as an investor and his services as an investment would be possible; furthermore it would be necessary for the Award to indicate that, through his know-how, the Claimant had concretely assisted the DRC, for example by providing it with legal services in a regular manner or by specifically bringing investors"

Ultimately, the *ad hoc* Committee held that the tribunal's failure to state its reasons seriously affected the coherence of the reasoning as to the existence of an "investment" both in terms of the jurisdictional requirements of the ICSID Convention, as well as the U.S.-Zaire Bilateral Investment Treaty—thus providing grounds to annul the entire arbitral award. This decision has been criticized, not only because it went beyond the *ad hoc* Committee's limited mandate by undertaking an analysis having more the characteristics of an appeal, but also because, for the first time, it brought the contribution to the economic development of the host State into the first line as a major required element of an "investment."

The tribunal in *Malaysian Historical Salvors, SDN, BHD v. Malaysia*[84] declined jurisdiction in a case involving a salvage operation off the coast of Malaysia. The investor, Malaysian Historical Salvors, had retrieved some 24,000 pieces of Chinese porcelain from the Strait of Malacca in the early 1990s. Much of the porcelain was sold at auction in 1995 for $3.4 million (U.S.). Malaysian Historical Salvors later alleged that it received a smaller share of the profits than promised under its contract with Malaysia. The company sought relief through international arbitration under the UK-Malaysia BIT. In coming to a decision on jurisdiction, the sole arbitrator wrestled with whether the company had an "investment" in Malaysia within the meaning of the ICSID Convention. The unusual nature of the salvage company's activities meant that some of the *Salini* criteria were either not met, or met superficially. The arbitrator paid particular attention to whether the contract made a significant contribution to the economic development of host State and ultimately decided that the retrieved treasure did not make a significant contribution to the Malaysian economy. The claim that local

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83 This decision by the *ad hoc* Committee has been since widely criticized as going beyond the mandate of annulment. See, for instance, an analysis and a critical commentary by E. Gaillard in « Chronique des Sentences Arbitrales, CIRDI », Journal du Droit International, Janvier, Février, Mars 2007.

84 *MHS v. Malaysia*, *supra* note 23.

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residents were employed to "wash, pack, inventory and photograph the porcelains" did not meet the "quantity or quality" envisaged by ICSID jurisprudence, nor should cultural and historical benefits be conflated with economic benefits:

> . . . this benefit is not of the same quality or quantity envisaged in previous ICSID jurisprudence. The benefits which the Contract brought to the Respondent are largely cultural and historical. These benefits, and any other direct financial benefits to the Respondent, have not been shown to have led to significant contributions to the Respondent's economy in the sense envisaged in ICSID jurisprudence.[85]

Having decided that Malaysian Historical Salvors' contract with Malaysia did not constitute an investment under the ICSID Convention, the sole arbitrator found it unnecessary to determine whether it met the definition of an investment under the UK-Malaysia BIT.

This award has also been criticized[86] not only because it focused exclusively on the ICSID Convention to discern the notion of an investment and disregarded the relevant BIT but also because it focused, as did the *ad hoc* Committee in *Patrick Mitchell*, on a "secondary" factor of the *Salini* test, the contribution to economic development, despite the fact that most of the tribunals which had applied the test did not consider this element of primary importance. In addition, it limited the definition of this "contribution" by requiring it to be "positive and significant", thereby excluding contributions of small scale.

The award, has been subsequently annulled by a divided *ad hoc* Committee.[87] The dissenting member of the *ad hoc* Committee agreed with the sole arbitrator's analysis and the *ad hoc* Committee in *Patrick Mitchell* and stressed that, in his opinion, there are some "outer limits" to ICSID jurisdiction, which consent of the parties cannot breach. The dissent argued that these "outer limits" defining an ICSID investment comprise a substantial and significant contribution to the economic development of the host State which, although not expressly stated in the text, "can be worked out from the context."[88] The dissent also maintained that this substantial and significant contribution is indeed a condition of ICSID jurisdiction. The dissent's analysis relies on the assertion that the intention of the drafters of the ICSID system was to create an arbitral institution which was distinguished by its concern for the goal of economic development (see decision of the Committee's majority).

The "subjectivist" or "intuitive" approach, i.e., focus on the parties' consent, as demonstrated in the relevant investment agreement. In the antipode, some tribunals view the term "investment" in the ICSID Convention as a requirement controlled by the consent of the parties. According to this approach, any transaction may be

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85 *Ibid.*, para. 132.

86 Y. Andreeva, *Salvaging or Sinking the Investment? MHS v. Malaysia Revisited*, *in* The Law and Practice of International Courts and Tribunals 7, 161–75 (2008).

87 Malaysian Historical Salvors, SDN, BHD v. Malaysia, Decision on the Application for Annulment, April 16, 2009.

88 Dissenting Opinion attached to the Decision on the Application for Annulment, by Judge Mohamed Shahabuddeen, para. 14.

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included or excluded from the meaning of investment by the parties' consent (the "subjectivist" approach), included in an investment agreement (treaty or contract).

In *Azurix v. the Argentine Republic*,[89] the tribunal limited its review to the language of the BIT. It decided that a concession contract qualified as an investment given the wide meaning conferred upon this term in the BIT, under which investment includes "any right conferred by law or contract":

> The tribunal is satisfied that the investment described by Claimant in its Rejoinder on Jurisdiction is an investment protected under the terms of the BIT and the Convention: (a) Azurix indirectly owns 90% of the shareholding in ABA, (b) Azurix indirectly controls ABA, and (c) ABA is party to the Concession Agreement and was established for the specific purpose of signing the Concession Agreement as required by the Bidding Terms.[90]

In *Enron v. Argentina*,[91] the tribunal held that,since the ICSID Convention did not attempt to define 'investment,' this task was left largely to the parties to bilateral investment treaties or other expressions of consent, and it decided that minority shareholders' interests fall within the broad definition of the U.S.-Argentina BIT.[92]

In *Fraport v. The Philippines*,[93] the tribunal also held that the definition of the term "investment" is to be left to the parties:

> The boundaries of this Tribunal's jurisdiction are delimited by the arbitration agreement, in the instant case, both the BIT and the Washington Convention. Article 25 of the Washington Convention, which provides, *inter alia*, parameters of jurisdiction *ratione materiae*, does not define "investment", leaving it to parties who incorporate ICSID's jurisdiction to provide a definition if they wish. In bilateral investment treaties which incorporate an ICSID arbitration option, the word "investment" is a term of art, whose content in each instance is to be determined by the language of the pertinent BIT which serves as a *lex specialis* with respect to Article 25 of the Washington Convention.[94]

In *Biwater v. Tanzania*,[95] the respondent objected to the jurisdiction of the tribunal, claiming that Biwater's management contracts were not an investment according to Article 25(1) of the ICSID Convention. Arguing that, since the transaction in question was worthless, i.e., a "loss leader," the *Salini* test couldn't be met: the elements of risk and commitment were not present and, therefore, there was no investment. The tribunal

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89 Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Decision on Jurisdiction, December 8, 2003.

90 *Ibid.*, para. 65.

91 Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on Jurisdiction, January 14, 2004.

92 *Ibid.*, para. 42

93 Fraport AG Frankfurt Services Worldwide v. Republic of the Philippines, ICSID Case No. ARB/03/25, Award, August 16, 2007.

94 *Ibid.*, para. 305.

95 Biwater Gauff (Tanzania) Ltd v. Tanzania, ICSID Case No. ARB/05/22, Award, July 24, 2008.

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took a different view, following the "intuitive approach."[96] It questioned the existence of a true definition of investment and stated that in its view, "there is no basis for a rote, or overly strict, application of the five *Salini* criteria in every case. These criteria are not fixed or mandatory as a matter of law. They do not appear in the ICSID Convention." In addition it held that:

> . . . the Salini test itself is problematic if, as some tribunals have found, the 'typical characteristics' of an investment as identified in that decision are elevated into a fixed and inflexible test, and if transactions are to be presumed excluded from the ICSID Convention unless each of the five criteria are satisfied. This risks the arbitrary exclusions of certain types of transaction from the scope of the Convention. It also leads to a definition that may contradict individual agreements [] as well as a developing consensus in parts of the world as to the meaning of 'investment' (as expressed e.g. in bilateral investment treaties). If very substantial numbers of BITs across the world express the definition of 'investment' more broadly than the Salini test, and if this constitutes any type of international consensus, it is difficult to see why the ICSID Convention ought to be read more narrowly.[97]

The tribunal considered a more flexible and pragmatic approach to the meaning of investment, which "takes into account the features identified in *Salini*, but along with all the circumstances of the case, including the nature of the instrument containing the relevant consent to ICSID." It also noted that several tribunals have in the past approached the issue of the meaning of investment by reference to the parties' agreement.[98] It concluded that the claimant's investment is protected by the applicable BIT even if it is unprofitable.[99]

A similar approach was taken by the tribunal in *RSM Production Corporation v. Grenada*.[100] Its analysis on jurisdiction focused on two issues: (i) to what extent the arbitration clause in the Agreement established ICSID jurisdiction and (ii) whether "an investment" existed in this case for the purpose of Article 25 of the ICSID Convention. In determining the first of these issues, the tribunal drew a distinction between the consent to arbitration, on the one hand, and the objective conditions of "an investment," on the other, and confirmed that the parties might not by their agreement confer jurisdiction on an ICSID tribunal where their operation is clearly not an investment. The tribunal agreed that there are certain objective elements of "an investment," which an ICSID tribunal must ensure exists when assuming jurisdiction over the dispute to avoid an abuse of power.[101] The tribunal also agreed with the contention of RSM, and rulings in earlier ICSID cases, that the parties' express designation of ICSID is

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96 Gaillard, *supra* note 29.

97 *Biwater v. Tanzania*, *supra* note 95, para. 314.

98 The tribunal made reference, *inter alia*,to Philippe Gruslin v. Malaysia, ICSID Case No. ARB/99/3, Award of November 27, 2000; AES Corporation v. Argentine Republic, ICSID Case No. ARB/02/17, Decision on Jurisdiction of April 26, 2005; *Azurix v. Argentina*, *supra* note 89*; Fraport v. Philippines, supra* note 93.

99 *Biwater v. Tanzania*, *supra* note 95, para. 316.

100 RSM Production Corporation v. Grenada, ICSID Case No. ARB/05/14, Award, March 13, 2009, para. 130.

101 *Ibid.*, para. 235.

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indicative that the parties themselves have regarded the dispute as one of investment and creates a *presumption* that the transaction is "an investment."[102]

Grenada argued that Article 25 established an "objective" jurisdictional standard, the five hallmarks of an investment, as recognized by the ICSID jurisprudence and legal doctrine: these hallmarks must be applied *cumulatively.* The tribunal rejected this argument, stating:

> they do not constitute 'the jurisdictional criteria in Article 25(1) of the ICSID Convention' or 'the Article 25(1) test' as the Respondent refers to them. Thoroughly absent from Article 25, they are but benchmarks or yardsticks to help a tribunal in assessing the existence of an investment, and their proponents or users rightly insist on the flexibility with which they should be used by a tribunal.[103]

Emphasizing the importance of the rules of treaty interpretation in defining the term "investment" and insisting on the primary role played by the investment agreement was the line adopted by the *ad hoc* Committee in *MHS v. Malaysia*, which considered itself "on firm ground in resorting to the customary rules on interpretation of treaties as codified in the Vienna Convention." In submitting that the treaty itself has an important role to play in the definition of investment, it stated that:

> It is those bilateral and multilateral treaties which today are the engine of ICSID's effective jurisdiction. To ignore or depreciate the importance of the jurisdiction they bestow upon ICSID, and rather to embroider upon questionable interpretations of the term 'investment' as found in Article 25(1) of the Convention, risks crippling the institution.[104]

In following the treaty interpretation rules[105] and criticizing the sole arbitrator for having, in his analysis, ignored the terms of the BIT at hand, the majority of the *ad hoc* Committee held that:

> The "ordinary meaning" of the term "investment" is the commitment of money or other assets for the purpose of providing a return. In its context and in accordance with the object and purpose of the treaty—which is to promote the flow of private investment to contracting countries by provision of a mechanism which, by enabling international settlement of disputes, conduces to the security of such investment —the term "investment" is unqualified.[106]
>
> Judicial or arbitral construction going further in interpretation of the meaning of 'investment' by the establishment of criteria or hallmarks may or may not be regarded as plausible, but the intentions of the draftsmen of the ICSID Convention, as the *travaux* show them to have been, lend those criteria (and still less, conditions) scant support"[107]

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102 *Ibid.*, para. 236.
103 *Ibid.*, para. 241.
104 Malaysian Historical Salvors, SDN, BHD v. Malaysia, ICSID Case No. ARB/05/10 Decision on the Application for Annulment. April 16, 2009.
105 *Ibid.*, para. 57.
106 *Ibid.*, para. 58.
107 *MHS v. Malaysia*, Decision on the Application for Annulment, *supra* note 104, para. 69.

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The *ad hoc* Committee went on a lengthy analysis of the *travaux préparatoires* prior to the ICSID Convention and found that, in the light of the history of the preparation of the ICSID Convention and of the analysis of the Report of the Executive Directors in adopting it, "the failure of the Sole Arbitrator even to consider, let alone apply, the definition of investment as it is contained in the Agreement to be a gross error that gave rise to a manifest failure to exercise jurisdiction."[108]

In *Panthechniki Contructor and Engineers v. The Republic of Albania*,[109] the sole arbitrator expressed scepticism as to some of the criteria which have been used by ICSID tribunals in order to characterize an investment for the purposes of jurisdiction under the ICSID Convention. He held that the *Salini* test only describes broad characteristics of an investment and the elements that have been said to make up the test cannot be elevated to jurisdictional requirements, in particular because some of them (*e.g.* "sufficient" duration and contribution to the economic development of the host State) involve subjective judgment. He emphasized that it is not for arbitral tribunals to be policy-makers.[110] He took the view that, "for ICSID arbitral Tribunals to reject an express definition desired by two State parties seems a step not to be taken without the certainty that the Convention compels it."[111] He acknowledged that some transactions, such as a "pure" sales contract, could be so simple and instantaneous that they could not amount to an investment under the Convention no matter what a BIT may say. However, Albania had not come close to showing the present case to be outside of the scope of investment under the Convention. The sole arbitrator found it cleary sufficient that the Claimant had committed resources and equipment to carry out infrastructure development in Albania. He did not consider it his role "to construct a line of demarcation with the presumption that it would be appropriate for all cases."

Investments in Accordance with Host State Law

Although the tribunal in *Phoenix v. The Czech Republic* considered conformity with host state law to be a necessary element of the test to qualify a transaction as a protected investment, even when the relevant BIT is silent on this point, this element has usually been used when it is present in the text of the relevant BIT. Many BITs limit their protection to investments that have been made "in accordance with the laws and regulations of the host state."[112] Such provisions can be found, for instance, in the Turkey-Pakistan BIT, which provides in its Article 1(2):

> The term investment in conformity with the hosting Party's laws and regulations shall include every kind of asset. . . ."

108 *Ibid.*, para. 74.

109 Panthechniki S.A.Contructor and Engineers v. The Republic of Albania, ICSID Case ARB/07/21, Award, July 30, 2009.

110 *Ibid.*, para. 45.

111 *Ibid.*, para. 42.

112 However, such clauses are not only included in the definition of investment, but they are also found in other provisions of a BIT, such as on admission of investment.

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The BIT between Germany and the Philippines determines that:

> The term 'investment' shall mean any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State . . .

Tribunals have held consistently that these clauses refer to the legality of an investment and not to its definition.[113]

In *Salini v. Morocco*,[114] Morocco argued that the transaction in question, a construction contract, was not an investment because it had not taken place "in accordance with the laws and regulations" of Morocco. The tribunal rejected this argument and held that:

> In focusing on the 'categories of invested assets . . . in accordance with the laws and regulations of the aforementioned party' this provision refers to the validity of the investment and not its definition. More specifically, it seeks to prevent the Bilateral Treaty from protecting investments that should not be protected, particularly because they would be illegal.[115]

In *LESI-DIPENTA v. Algeria*,[116] the tribunal also held that:

> [T]he reference by the provision to the requirement of the conformity to the applicable laws and regulations does not constitute a formal recognition of the notion of investment as defined by Algerian law in a restrictive manner, but in line with a standard and perfectly justified rule, the exclusion of the protection for all investments that have been made in violation of the fundamental principles that apply.[117]

In *Tokios Tokelès v. Ukraine*,[118] Ukraine objected to the tribunal's jurisdiction because of some defects in the registration of the investment under the Ukrainian law. The tribunal rejected this objection and found that:

> [e]ven if we were able to confirm the Respondent's allegations, which would require a searching examination of minute details of administrative procedures in Ukrainian law, to exclude an investment on the basis of such minor errors would be inconsistent with the object and purpose of the Treaty.[119]

The first time such a clause was the basis for denying jurisdiction was in *Inceysa Vallisoletane v. El Salvador.*[120] In this case, the tribunal dedicated a significant part of its decision to analysis of the role of this clause in the Spain-El Salvador BIT. After noting that it was perfectly "valid and common" for contracting states to exclude from

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113 C. Knahr, *Investments in accordance with host state law*, 4(5) TDM (September 2007).

114 *Salini v. Morocco*, *supra* note 32.

115 *Ibid.*, para. 411.

116 Consortium Groupement LESI and DIPENTA v. Algeria, ICSID Case No. ARB/03/08, Award, January 10, 2005.

117 *Ibid.*, para. 24, unofficial translation from the original French text.

118 Tokios Tokelės v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, April 29, 2004.

119 *Ibid.*, para. 83.

120 Inceysa Vallisoletane S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award, August 2, 2006.

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their consent certain types of disputes,[121] the tribunal concluded that the existence of these provisions "clearly indicates that the BIT leaves investments made illegally outside of its scope and benefits."[122] Interestingly, the tribunal based its analysis of the legality of Inceysa's investment on the general principles of law: good faith, *nemo auditur propriam turpitudinem allegans* (which the tribunal interpreted to mean "nobody benefits from its own fraud"), public policy, and the prohibition of unlawful enrichment. In this analysis, it found that Inceysa had violated all four principles by having misled Salvadoran officials, having made misrepresentations at the initial bidding stage and generally having resorted to fraud to obtain a benefit that it would not have obtained otherwise.

The tribunal in *Fraport v. Philippines*[123] denied jurisdiction on the grounds that the actions of Fraport had not been in accordance with the law of the host State. The members of the tribunal were divided as to whether the examination of this clause should be a jurisdictional question or whether it belonged to the merits, as one arbitrator argued in his dissenting opinion. In determining whether the investor's behaviour was in accordance with the relevant Philippine law, the tribunal looked at the domestic law and in particular the legislation that had allegedly been violated by the investor, which contains certain restrictions on the holding of shares by foreigners.[124] In this analysis, the tribunal emphasized the question of the good faith of the investor.[125] The tribunal found that Fraport intentionally structured its investment in order to gain a prohibited management and control of the project,[126] and the majority of the tribunal held that there was no investment and therefore no jurisdiction *ratione materiae*. The dissenting arbitrator took the view that since Fraport's shareholdings constituted an investment according to the BIT, the requirement that the investment "be accepted according to the host state law" should not be interpreted as a jurisdictional impediment: "the purpose of these provisions is not to condition the right to arbitrate on the minute compliance by the investor at all times and in all respects with the domestic law and regulation of the host State." At this point, he referred to the *Tokios Tokelès* tribunal, which had stated that "to exclude an investment on the basis of such minor errors would be inconsistent with the object and the purpose of the treaty."

In *Desert Line v. Yemen*,[127] the tribunal rejected the objection to jurisdiction based on Article 1 of the BIT, which defined as protected investments those accepted in accordance with the respective laws and regulations. It also rejected the idea that the

121 *Ibid.*, para. 184.

122 *Ibid.*, para. 206.

123 *Fraport v. the Philippines, supra* note 93

124 *Ibid.*, para. 309.

125 According to C. Knahr, the tribunal took a different approach than the one taken by the tribunal in *Tokios Tokelès*, where the tribunal made an objective assessment whether the alleged violations were severe or just minor errors. The *Fraport* tribunal took a subjective approach "finding that it was possible for an investor to violate domestic legislation of the host state in good faith because the law in question might not be entirely clear." C. Knahr, *supra* note 113.

126 *Ibid.*, paras. 319–22.

127 Desert Line Projects LLC v. Republic of Yemen, ICSID Case No. ARB/05/17, Award, February 6, 2008.

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investment had to be subject to a specific acceptance procedure in order to be protected and agreed with the previous tribunals,[128] in the *Inceysa* and *Fraport* cases for instance, that such "references [to local laws and regulations] in treaties are intended to ensure the *legality* of the investment by excluding investments made in breach of fundamental principles of the host State's law, e.g., by fraudulent misrepresentations or the dissimulation of true ownership."[129] The tribunal found no such illegality in this case.

As to the issue of a "certificate," the tribunal acknowledged that, while some States do require investments to be identified in order to use the protection of a relevant BIT, a clear reference to a specific regulation or to the document to be required in each treaty Party and the issuing authority was necessary. Absent such specific indication in the Oman-Yemen BIT, the tribunal concluded that a particular certificate from the Yemen General Investment Authority "was not necessary to bring the investment under the ambit of the BIT."[130] Based on the "uncontradicted written and oral evidence in the case," the tribunal concluded that the respondent had "waived the certificate requirement, and is estopped from relying on it to defeat jurisdiction."[131]

CONCLUSION

Although there is an accepted "economic" definition of investment in liberalization instruments, the "legal" definition remains one of the most controversial issues of international investment law and arbitration. The language in most BITs and investment protection agreements as to what qualifies as an investment, remains very broad and general. For ICSID cases, the ICSID Convention does not offer any specific guidance either, since its drafters declined to adopt a definition which might unduly restrict its scope, which left to the parties a fairly large scope to agree upon what they consider an investment under their consent to ICSID arbitration. It also left it to the ICSID tribunals to determine, through the application of the normal rules of treaty interpretation, whether and to what extent the term "investment," as used in the ICSID Convention, limits that scope.

Given the fact that the ICSID Convention does not define "investment," different approaches have been favored by arbitral tribunals. Before *Fedax v. Venezuela*, ICSID tribunals examined whether an investment was involved without reference to any specific controlling criteria to assess this question, and, in each case, reached the conclusion that the investment requirement of the Convention had been met. Since then, a great number of operations have been accepted as investments based on the relevant investment agreements. Subsequently, some tribunals, under the so-called *Salini* test, applied four "objective" criteria/hallmarks, to determine what is an investment under the ICSID Convention, including the criterion of the contribution to the economic development of the host State. Arbitral tribunals have followed different variations of

128 *Ibid.*, para. 102.
129 *Ibid.*, para. 104.
130 *Ibid.*, para. 116.
131 *Ibid.*, para. 118.

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this approach. Other tribunals preferred to give priority to the consent of the parties as expressed in the relevant investment agreement.

Criticisms have been expressed with respect to the tribunals' strong reliance either on the *Salini* test alone or to the strict parties' consent as reflected in the relevant BIT to give meaning to the term "investment" for purposes of ICSID jurisdiction in the absence of a definition within the ICSID Convention. The introduction of the general principles of international law as possible indicia for the definition of investment adds an additional element to the debate. It seems, however, that by embracing any of these approaches strictly, a tribunal risks moving away from the fundamentals of treaty interpretation as set out in the Vienna Convention on the Law of Treaties. By examining the ordinary meaning of the treaty term in good faith and taking appropriate guidance from the context and the treaty's object and purpose, several tribunals asserted that the notion of investment has an "inherent" meaning which involves a contribution, a reasonable duration, some risk and the expectation, although uncertain, of a return. It would not appear entirely consistent with this approach to find further restrictions which progressively exclude from the coverage of the ICSID Convention, disputes which are otherwise considered investment disputes under the relevant bilateral or multilateral investment agreement. Nor would it seem appropriate to exclude the prospect of evolution and eventually expansion in the understanding of what constitutes investment. Moreover, a reference to the preparatory work of the ICSID Convention would confirm, if need be, that this was not the intent of its founding fathers.

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Chapter 12

Burden of Proof Regarding Jurisdiction

By Baiju S. Vasani and Timothy L. Foden***

GENERAL PRINCIPLES REGARDING BURDENS OF PROOF

It is trite law to state that "he who asserts must prove." A well-established general principle of law holds that an actor must prove the facts on which he relies in support of his claim—*Actori incumbit probatio*.[1] This maxim holds true regardless of whether the actor is a claimant asserting a claim for damages or a respondent seeking counterclaims, proffering defenses or requesting interim or provisional measures, document discovery, and the like.

But while this maxim may be true for most issues, how does it affect a situation where a respondent party argues that the tribunal is without jurisdiction to hear the claims or counterclaims in the first place? In this case, does the respondent party, as the "moving party," have to prove the lack of jurisdiction? Or is it the claimant who is in fact claiming jurisdiction, who has to prove its existence? Or in light of the fact that jurisdiction is a matter for the tribunal to decide for itself, even *sua sponte*, does neither party hold the burden of proof on this issue?

Other legal truisms may sketch out a rough answer to this question. For instance, one principle states that the onus of proof is on him who affirms, and not on him who denies—*ei qui affirmat non ei qui negat incumbit probatio*.[2] This principle, supported

* Partner, Crowell & Moring, adjunct professor at Georgetown Law Center.

** Associate, Crowell & Moring.

1 *See* Mojtaba Kazazi, Burden of Proof and Related Issues 54, 221 (Kluwer Law 1996); Salini Costruttori S.P.A. et al. v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/02/13, Award, January 31, 2006.

2 *See* Mojtaba Kazazi, Burden of Proof and Related Issues 54, 221 (Kluwer Law 1996); Salini Costruttori S.P.A. et al. v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/02/13, Award, January 31, 2006.

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by the majority of ICSID case law laid out here, suggests that the claimant party, as the party affirming that the tribunal has jurisdiction, carries the burden of proof.

However, there appears to be a minority view among tribunals stating that the party claiming a negative proposition (i.e., that something does not exist) bears the burden of proving that negative fact,[3] such as claiming the absence of jurisdiction. However, these cases are outweighed (in number, though not necessarily in correctness) by those stating that the claimant bears the burden of proving a tribunal's jurisdiction, even where the respondent has filed jurisdictional objections.

WHO BEARS THE BURDEN OF PROOF AT THE JURISDICTIONAL PHASE?

The Claimant Bears the Burden of Proving the Tribunal's Jurisdiction

A majority of different international arbitral tribunals have determined that the claimant bears the burden of showing that the arbitral tribunal has jurisdiction to consider the dispute.

ICSID. A number of ICSID tribunals[4] have relied on the test set forth by Judge Higgins in her dissenting International Court of Justice (ICJ) opinion in the *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*[5]:

> The Court should . . . see if, on the facts as alleged by [Claimant], the [Respondent's] actions complained of might violate the Treaty articles . . . Nothing in this approach puts at risk the obligation of the Court to keep separate the jurisdictional and merits phases . . . and to protect the integrity of the proceedings on the merits . . . what is for the merits (and which remains pristine and untouched by this approach to the jurisdictional issue) is to determine what exactly the facts are, whether as finally determined they do sustain a violation of [the treaty] and if so, whether there is a defense to that violation . . . . In short, it is at the merits that one sees "whether there really has been a breach.[6]

3 *Ibid.*, at 369.

4 Cited in *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Decision on Jurisdiction, April 11, 2007, at para. 139; *see also* Saipem S.p.A. v. People's Republic of Bangladesh, ICSID Case No. ARB 05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, March 21, 2007, at para. 85; United Parcel Service of America, Inc. v. Canada ("*UPS*"), Arbitration under Chapter 11 of the North American Free Trade Agreement, November 22, 2002, Award on Jurisdiction, at 35–37; Telenor Mobile Communications A.S. v. The Republic of Hungary, ICSID Case No. ARB/04/15, Award, September 13, 2006, at n.17; Jan de Nul NV, et al. v. Egypt, ICSID Case No. ARB/04/13, Decision on Jurisdiction, June 16, 2006, at 70.

5 1996 ICJ Reports 803, 16.

6 *Ibid.*, at n. 6.

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Further,

> The only way in which, in the present case, it can be determined whether the claims of [Claimant] are sufficiently plausibly based upon the . . . [t]reaty is to accept *pro tem* the facts as alleged by [Claimant] to be true and in that light to interpret [the relevant articles of the treaty] for jurisdictional purposes, that is to say, to see if on the basis of [Claimant's] claims of fact there could occur a violation of one or more of them.[7]

An important case following the Higgins approach is *Plama Consortium Limited v. Republic of Bulgaria*, where the claimant argued that the tribunal had jurisdiction under a Bilateral Investment Treaty (BIT), the Energy Charter Treaty (ECT), and the ICSID Convention.[8] The tribunal followed the Higgins test to determine who had the burden of proof in the "face of [the respondent's] preliminary objection to its jurisdiction on" the grounds that a party's claims do not fall under the treaty invoked.[9] The tribunal cited other ICSID tribunals that invoked the Higgins framework in deciding claims by claimant investors against respondent states in determining that it "was up to the claimant to present its own case as it saw fit; that, in doing so, the claimant must show" that the facts it alleged were capable of falling under the relevant portions of the appropriate treaty.[10] The tribunal went on to say, in language that has since been quoted elsewhere, that it did "not understand that Judge Higgins' approach [was] in any sense controversial."[11] Ultimately, using this approach, the tribunal found, *inter alia*, that the claimant had presented sufficient facts to establish that (1) it was an "investor" under Article 1(7) of the ECT that had legal identity in Cyprus despite the respondent's argument that it was a mere "mail box company," (2) the dispute related to an "investment," and (3) the respondent's actions might have violated the protection obligations imposed upon it by Part III of the ECT.[12]

Moreover, other tribunals have echoed the approach of the *Oil Platforms* case by proceeding in a similar manner. For instance, in *Impregilo S.p.A. v. Islamic Republic of Pakistan*,[13] the claimant assumed that it "satisfied the burden of proof required at the jurisdictional phase" by presenting prima facie evidence of treaty breaches. The tribunal agreed that the burden was on the claimant in stating that it would determine its jurisdiction by assuming, *pro tem*, that the claimant could establish the facts upon which it relied and assess whether those facts established breaches of the BIT.[14]

The tribunal came to a similar conclusion in *Pan American Energy, LLC, et al. v. The Argentine Republic*,[15] where it stated that the claimant had to "demonstrate that

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7 Cited in *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, October 28, 2005, at para. 118.

8 *Ibid.*, at para. 116.

9 *Ibid.*, at para. 118.

10 *Ibid.*, at para. 119.

11 *Ibid.*; *Siag*, *see supra* n. 4, at para. 140.

12 *Plama*, *see supra* n. 7, at paras. 31, 126, 128, 131–32, 151.

13 Impregilo S.p.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/3, Decision on Jurisdiction, April 22, 2005, at para. 79.

14 *Ibid.*, at paras. 263, 266.

15 Pan American Energy, LLC, et al. v. The Argentine Republic, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, July 27, 2006, at para. 50.

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prima facie its claims fall under the relevant provisions of the BIT for the purposes of jurisdiction." The tribunal's task was to take the claims as they were and determine whether, as formulated, they fit into the "jurisdictional parameters set out by the relevant treaty instrument."[16] In other words, the tribunal had to determine whether the claimant's claims, if well founded, established violations of the relevant BIT.[17] Several other tribunals have used this approach or the Higgins test just described, in stating that the claimant bore the burden of proof.[18]

Similarly, in *Bayindir Insaat Turizm Ticaret ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, the claimant assumed that it had the burden—after the respondent's objections during the jurisdictional phase—of showing *prima facie* evidence of its claims that it had made an "investment" under the terms of the relevant BIT and that Pakistan had violated the BIT in breaching a contract formed under it.[19] The tribunal relied on *Impregilo* in confirming that the burden of proof at the jurisdictional phase was on the claimant.[20]

In *Telenor v. Hungary*,[21] the claimant was unable to carry its burden of showing prima facie evidence that Hungary had violated the BIT in indirectly expropriating its investment and, thus, was unable to establish the tribunal's jurisdiction.[22] The tribunal stated that "any claimant resisting objections to jurisdiction" must cross an "initial threshold" by adducing facts "showing a *prima facie* case in favor of jurisdiction if the arbitration is to proceed to a hearing on the merits."[23] Further, separate tribunals appeared to adopt similar prima facie requirements in *UPS*, *Jan de Nul*, and *Maffezini v. The Kingdom of Spain*.[24]

Heightened Burdens Requiring the Claimant to Establish Jurisdiction

Keith Highet argued in favor of a hybrid approach rather than the typical prima facie standard in his dissenting opinion in *Waste Management Inc. v. The United*

16 *Ibid.*, at para. 51.

17 *Ibid.*

18 *Saipem*, *see supra* n. 4, at paras. 83–86; Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/00/2, Award, March 15, 2002, at paras. 29–30, 32 (stating that the claimant had to establish the existence of jurisdiction of the Centre and the tribunal).

19 Bayindir Insaat Turizm Ticaret ve Sanayi A v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, November 14, 2005, Decision on Jurisdiction, at paras. 61, 85, 142, 189.

20 *Ibid.*, at paras. 193–97.

21 Telenor Mobile Communications A.S. v. Republic of Hungary, ICSID Case No. ARB/04/15, Award, September 13, 2006.

22 *Ibid.*, at paras. 34, 68, 80, 100.

23 *Ibid.*, at para. 34.

24 *See UPS*, *supra* n. 4, at paras. 33–34, 37; *see Jan de Nul*, *supra* n. 4, at paras. 69–71 (stating that claimant must present a prima facie case on the merits); Maffezini v. Spain, ICSID Case No. ARB/97/7, Decision of the tribunal on Objections to Jurisdiction, January 24, 2000, at para. 69 (stating that claimant had only to show that, if true, his allegations would give him standing to bring the case).

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Mexican States.[25] Mr. Highet's dissenting opinion stated that "the normal rule of burden of proof" required the respondent to first make a prima facie "credible claim" that jurisdiction does not exist.[26] Once the respondent establishes such a claim, the burden shifts to the claimant to adduce sufficient evidence and argument so that jurisdiction may be perceived to exist "by a reasonable preponderance of the evidence."[27] Further, Mr. Highet cautioned tribunals to "tread carefully" and not to arrive precipitously at "the drastically preclusive effect" of a denial of jurisdiction in a situation where—although procedural complications might have been avoided—jurisdiction still survives as a legal matter.[28]

More recently, an ICSID tribunal in *Phoenix Action, Ltd. v. The Czech Republic*, placed a heightened burden on the claimant to establish jurisdiction.[29] The claimant, an Israeli investor, argued that the tribunal had to accept its allegations regarding jurisdiction as true.[30] The tribunal stated acceptance of factual allegations was only half of the test and employed a heightened pleading standard at the jurisdictional phase which it referred to as a "double approach":

> factual matters should provisionally be accepted at face value, since the proper time to prove or disprove such facts is during the merits phase. But when a particular circumstance constitutes a critical element for the establishment of the jurisdiction itself, such fact must be proven, and the Tribunal must take a decision thereon when ruling on its jurisdiction. In our case, this means that the Tribunal must ascertain that the prerequisites for its jurisdiction are fulfilled, and that the facts on which its jurisdiction can be based are proven.[31]

In other words, if jurisdiction rests on alleged facts that are in material dispute between the parties, the tribunal cannot accept the facts as true and must decide upon the contested facts.[32]

Additionally, an ICSID tribunal has suggested that where the respondent challenges an tribunal's jurisdiction on the grounds that the claimant, a natural person, is not a national of another contracting state, the tribunal will require the claimant to prove his nationality to establish the tribunal's jurisdiction. In *Soufraki v. The United Arab Emirates*,[33] the *ad hoc* Committee, reviewing the decision of the original tribunal, stated that the claimant had the burden of proving his nationality and that if he failed to do so, the tribunal would "not have jurisdiction to hear the case on the merits."[34]

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25 Waste Management v. The United Mexican States, ICSID Case No. ARB/98/2, Dissenting Opinion, June 2, 2000, at para. 9.

26 *Ibid.*

27 *Ibid.*

28 *Ibid.*

29 Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/05/5, April 15, 2009, Award, at paras. 58–64.

30 *Ibid.*, at para. 58.

31 *Ibid.*, at paras. 61–64.

32 *Ibid.*, at para. 63.

33 Soufraki v. The United Arab Emirates, ICSID Case No. ARB/02/7, June 5, 2007, Decision of the *Ad Hoc* Committee on the Application for Annulment of Mr. Soufraki, at paras. 78, 108–09.

34 *Ibid.*, at para. 109.

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The claimant presented the original tribunal with certificates of Italian nationality, which, in normal circumstances, would constitute prima facie evidence that would shift the burden to the respondent. In this instance, however, the tribunal found that such evidence was fraught with irregularities and did not shift the burden to the respondent.[35] In short, the claimant's evidence did not meet the prima facie standard. The tribunal had significant doubts as to the authenticity of the certificates, and, according to the *ad hoc* Committee, correctly required the claimant to *prove* his identity to the satisfaction of the tribunal under international rules of evidence regarding admissibility.[36] The claimant was unable to do so.[37]

Indeed, it would appear that some tribunals have found that doubts raised by the respondent can even *heighten* a claimant's burden. In *CCL v. Kazakhstan*,[38] the tribunal stated:

> In consequence hereof it must be a procedural requirement that a Claimant party, requesting arbitration on the basis of the Treaty, provides the necessary information and evidence concerning the circumstances of ownership and control, directly or indirectly, over [Claimant-investor] at all relevant times. This is especially the case when reasonable doubt has been raised as to the actual ownership of and control over the company seeking protection. In the present case, by [Mr. X]'s admission, the sole activity of [Claimant-investor] since the termination of the Agreement by the Kazakh courts, and the sole asset of [Claimant-investor], is the arbitration initiated against [Respondent-Kazakhstan]. This activity is financed solely by a group of shareholders allegedly owning 49 per cent of the shares in [the Holding Company], and the economic outcome of the arbitration is fixed to be shared with five sixths to the shareholder group and one sixth to [Mr. X]. This explanation places the burden of proof on [Claimant-investor] to prove that [Mr. X] is in control of the decisions to be made in the arbitration or generally in control, directly or indirectly, of [Claimant-investor].
>
> [. . .]
>
> Under the circumstances, the Arbitral tribunal does not find it necessary to determine in further detail what ownership or control is necessary under the Treaty to be entitled to demand under the Treaty. The Tribunal finds, on the evidence before it, that [Claimant-investor] has not provided any degree of probability, let alone proof, that U.S. citizens or companies have any degree of control, directly or indirectly, over [Claimant-investor]. The Arbitral Tribunal therefore concludes that it has not been established that the Tribunal has jurisdiction on the basis of the Treaty."

Iran-United States Claims Tribunal. Like those at ICSID, several decisions of the Iran-United States Claims tribunal support the argument that the claimant must allege sufficient facts to establish the tribunal's jurisdiction. In *George W. Drucker, Jr. v. Foreign Transaction Company et al.*,[39] the tribunal found that because the claimant was

35 *Ibid.*, at paras. 16, 75, 109.

36 *Ibid.*, at paras. 75, 109–113.

37 *Ibid.*, at paras. 113–14.

38 CCL v. Republic of Kazakhstan, SCC Case No. 122/2001, Jurisdictional Award (2003). Excerpts from *Stockholm International Arbitration Review* (2005) 1 SIAR 123.

39 Kazazi at 110–11; Award No. 379-121-2, July 22, 1988, at para. 34.

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unable to "meet his burden of proof of ownership" of the company on whose behalf he had brought claims against the respondent, the tribunal did not have jurisdiction over the dispute. Additionally, in *Creditcorp International, Inc. et al. v. Iran Carton Company*,[40] the tribunal dismissed the case because the claimants failed to carry the burden of proving that their claims were on behalf of a U.S. national, which was a necessary condition for the tribunal's jurisdiction.

Therefore, the weight of ICSID and other arbitral authority indicates that, for most claims, the burden of proving the tribunal's jurisdiction is on the claimant.

The Respondent Bears the Burden of Proof

Rompetrol. In *Rompetrol Group N.V. v. Romania*,[41] the respondent objected to the jurisdiction of the tribunal on the grounds that the claimant was not a foreign investor, and the suit did not arise out of a foreign investment because the "investor" was actually a Romanian national bringing his claim through a Dutch "shell company." In considering this issue, the tribunal stated:

> It will be seen that the jurisdictional objection entails issues of fact (whether the investments were and are under [the claimant's] dominant control; whether the origin of the investment funds was Romanian), and issues of law (what effect such factual circumstances would have on the Tribunal's jurisdiction to hear a complaint by the investor). The issues of fact are ones which the Respondent bears the burden of proving according to the requisite standard, in order to sustain the claims of law it bases on them. The Parties are in dispute over both the issues of fact and the issues of law.[42]

The tribunal ultimately dismissed the respondent's jurisdictional objections.[43] The tribunal based this dismissal on the relevant bilateral investment treaty and ICSID Convention law governing whether the claimant was an "investor" within the meaning of the BIT.[44] The tribunal found that the claimant was an investor and stated that "there was no need for the Tribunal to consider whether the Respondent [had] met its burden of establishing its factual allegations in respect of any of those issues."[45]

In *Desert Line Projects LLC v. Republic of Yemen*,[46] the tribunal also appears to move toward a showing of proof by respondent:

> Under these circumstances, the Respondent has not come close to satisfying the Arbitral Tribunal that the Claimant made an investment which was either

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40 KAZAZI at 109–10; Award No. 443-965-2, October 12, 1989, at para. 6.

41 Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, April 18, 2008, at para. 50.

42 *Ibid.*, at para. 75 (emphasis in original).

43 *Ibid.*, at para. 116.

44 *Ibid.*, at para. 110.

45 *Ibid.*

46 Desert Line Projects LLC v. Republic of Yemen, ICSID Case No. ARB/05/17, Award, February 6, 2008.

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> inconsistent with Yemeni laws or regulations or failed to achieve acceptance by the Respondent.[47]

Other notable cases discussing this proposition. In the aforementioned *Siag* case, the claimants advanced the argument that the respondent bore the burden of proof with regard to each of its jurisdictional objections.[48] The claimants relied on the expert opinion of Professor Reisman, who stated, "Egypt, as the party advancing the objections to jurisdiction following a *prima facie* showing by the Claimants, bears the burden to prove their elements."[49] The respondent asserted that, despite the fact that it had raised the objections to the tribunal's jurisdiction in the case, the burden of proof lay with the claimants to prove they were not Egyptian nationals at the time of the dispute.[50] The tribunal applied the Higgins test and considered whether the claimants had presented prima facie evidence at this stage of the proceedings.[51] The tribunal determined that the claimants had presented prima facie evidence that they were Italian nationals, able to avail themselves of ICSID arbitration.[52] Further, the respondent did not demonstrate that the claimants acquired that nationality as a mere expedient to bringing their claims.[53] Thus, the tribunal had jurisdiction.[54]

Finally, in *Canfor Corp., et al. v. United States of America*, the tribunal stated that it would rely on the Higgins test and require the claimant to satisfy the tribunal that it met certain jurisdictional requirements, such as the requirement that a claim be brought by a claimant investor under certain articles of the North American Free Trade Agreement (NAFTA) and that other preconditions and formalities were met.[55] However, the tribunal stated:

> . . . where a respondent State invokes a provision in the NAFTA which, according to the respondent, bars the tribunal from deciding on the merits of the claim, the respondent has the burden of proof that the provision has the effect which it alleges. That means in the present case that the United States has the burden of proof that Article 1901(c) bars the submission of claims with respect to antidumping and countervailing duty law to arbitration under Chapter 11 of NAFTA.[56]

The tribunal cited to a NAFTA panel decision on import restrictions stating that it had been previously concluded that "a contracting party invoking an exception to the General Agreement bore the burden of proving that it had met all of the conditions of that exception."[57]

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47 *Ibid.*, at para. 105.

48 *See Siag*, *supra* n. 4, at para. 99.

49 *Ibid.*, at para. 99.

50 *Ibid.*, at para. 138.

51 *Ibid.*, at para. 139.

52 *Ibid.*, at paras. 173, 193–94.

53 *Ibid.*

54 *Ibid.*, at para. 200.

55 Canfor Corp., et al. v. United States of America (Consolidated NAFTA Arbitration, UNCITRAL Rules), Decision on Preliminary Question, June 6, 2006, at paras. 167–76.

56 *Ibid.*, at para. 176.

57 *Ibid.*, at para. 184.

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Neither Party Bears the Burden of Proving the Tribunal's Jurisdiction

ICSID. In examining a range of arbitral decisions, one case stands out as taking a centrist ground from those requiring the claimant (in most cases) or the respondent (in a limited number of cases) to prove the existence of the tribunal's jurisdiction. In *Grand River Enterprises Six Nations, Ltd. et al. v. U.S.*,[58] the parties differed as to who bore the burden of proof on disputed facts that directly impacted the existence of jurisdiction under NAFTA.[59] The claimants argued that the respondent, as the party objecting to the tribunal's jurisdiction, bore the burden of proof on the matter.[60] Conversely, the respondent argued that the claimants had to show that the tribunal had jurisdiction.[61] Both parties presented significant amounts of evidence, which the tribunal considered.[62] Ultimately, the tribunal stated that it was not necessary to determine which party had the burden of going forward with the evidence because both parties had produced sufficient evidence to inform a decision.[63]

ICC. Under the International Chamber of Commerce (ICC) arbitration rules, when any question is raised as to the jurisdiction of an arbitral tribunal, the tribunal follows a two-stage proceeding.[64] At the first stage, one of the parties can raise objections concerning the existence of an agreement to arbitrate a dispute.[65] At that stage, the ICC's Court must satisfy itself of the prima facie existence of such an agreement.[66] After this determination, the ICC Court allows the tribunal to make a subsequent determination of its jurisdiction.

While this language suggests that the ICC Court determines whether the tribunal has jurisdiction following a party's objections, this process seems more akin to the instructions issued by the Secretary-General of ICSID for the parties to proceed to arbitration after one party notes a preliminary objection to ICSID jurisdiction through correspondence. A leading international arbitration treatise suggests that, in actual fact, the ICC Court's determination of prima facie jurisdiction is similar to a rubber stamp, allowing arbitration to proceed after verifying the initial documentary submissions for a clause providing for ICC arbitration.[67]

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58 Grand River Enterprises Six Nations, Ltd. et al. v. United States (NAFTA/UNCITRAL Arbitration), Decision on Objections to Jurisdiction, July 20, 2006, at para. 37.

59 *Ibid.*, at para. 37.

60 *Ibid.*

61 *Ibid.*

62 *Ibid.*

63 *Ibid.*

64 Alan Redfern & Martin Hunter, Law and Practice of International Commercial Arbitration § 5-39 (4th ed. 2004).

65 *Ibid.*

66 *Ibid.*

67 *Ibid.*, at § 5-40.

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ICJ. Importantly, the ICJ has, in at least one instance, stated that neither the claimant nor the respondent has the burden of proof in showing that a tribunal does or does not have jurisdiction over a dispute.[68] In the *Fisheries Jurisdiction Case*, Spain argued that Canada, as the party objecting to the Court's jurisdiction, had the burden of showing that a treaty reservation it claimed exempted the dispute between the parties from ICJ jurisdiction did in fact prohibit the ICJ from hearing the case.[69] The Court pointed out:

> . . . establishment or otherwise of jurisdiction [was] not a matter for the parties but for the Court itself. Although a party seeking to assert a fact must bear the burden of proving it . . . this has no relevance for the establishment of the Court's jurisdiction, which is a 'question of law to be resolved in the light of the relevant facts. That being so, *there is no burden of proof* to be discharged in the matter of jurisdiction. Rather, it is for the Court to determine from all the facts and taking into account all the arguments advanced by the Parties . . . . [70]

In a separate and oft-cited opinion in that case, Judge Koroma stated that it was not necessary to delve into the various arguments regarding the burden of proof in the matter because the Court's task remained the same, to determine its own jurisdiction in light of the relevant treaty provisions.[71]

A similar approach was taken by the ICJ in the *Case Concerning Border and Transborder Armed Actions* (*Nicaragua v. Honduras*),[72] where the tribunal recognized the litigants' respective arguments as to who bore the burden of proof in proving the Court's jurisdiction but ultimately stated that "[t]he Court will therefore in this case have to consider whether the force of the arguments militating in favour of jurisdiction is preponderant, and to 'ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it.'"

It is important to note, however, that the ICSID tribunal in *Saipem*[73] specifically rejected the approach taken in this line of cases.[74] The respondent, Bangladesh, cited the *Fisheries Jurisdiction* opinion in arguing, *inter alia*, that neither party bore the burden of proof.[75] The Court stated that while it realized that it was indisputable that the tribunal determined its own jurisdiction without being bound by the arguments of the parties, the *Fisheries Jurisdiction* opinion had no bearing on the required test that a claimant must prove the tribunal's jurisdiction by showing prima facie evidence.[76]

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68 Fisheries Jurisdiction Case (Spain v. Canada), 1998 I.C.J. 432, 1998 WL 1797317.

69 *Ibid.*, at para. 36.

70 *Ibid.*, at para. 37 (emphasis added).

71 *Ibid.*, at para. 51.

72 Case Concerning Border and Transborder Armed Actions (Nicaragua v. Honduras), 1989 I.C.J. 68, at para. 16, 1988 WL 168500, at *76.

73 *See Saipem*, *supra* n. 4.

74 *Ibid.*, at paras. 89–91.

75 *Ibid.*, at para. 89.

76 *Ibid.*, at paras. 90–91.

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WHO BEARS THE BURDEN OF PROOF REGARDING SPECIFIC JURISDICTIONAL OBJECTIONS?

Having concluded that the weight of ICSID jurisprudence places the burden of proof on the claimant to demonstrate the existence of the tribunal's jurisdiction in general, a brief breakdown of various jurisdictional issues highlights any nuances and anomalies,

The National Identity of the Natural Person Claimant is in Dispute

In *Soufraki v. The United Arab Emirates*, the burden of proof is on the claimant, but the burden shifts to the respondent if prima facie evidence of nationality is produced.[77] In *Siag*, the burden of proof is also on the claimant to prove his or her national identity, despite the claimant's argument that those objecting have the burden of establishing the lack of a tribunal's jurisdiction.[78]

The Claim Does Not Arise Out of an "Investment"

In *Pan American v. Argentina*,[79] *Saipem v. Bangladesh*,[80] *Mihaly v. Sri Lanka*,[81] *Jan de Nul v. Egypt*,[82] *and Plama v. Bulgaria*,[83] the claimant had the burden of producing prima facie evidence that an "investment" existed within the meaning of the BIT or the Energy Charter Treaty respectively (in *Plama*).

In *Malaysian Salvors*, the claimant had to show that the contract fell within the definition of "investment" as found under Article 25(1) of the ICSID Convention (Article 25(1)), as well as the definition of "investment" as contained in the BIT."[84]

Claimant is Not an "Investor" Within the Meaning of the BIT/Treaty

In *Maffezini*, the claimant had the burden of proving that he was an Argentine "investor" in a Spanish company, thus giving rise to diversity of citizenship.[85] In *Plama*, the

77 *See Soufraki*, *supra* n. 33, at para. 110.
78 *See Siag*, *supra* n. 4, at paras. 138–40, 193, 200.
79 *See Pan American Energy*, *supra* n. 15, at paras. 48–51, 138–39.
80 *See Saipem*, *supra* n. 4, at para. 111.
81 *See Mihaly*, *supra* n. 18, at paras. 29–32.
82 *See Jan de Nul*, *supra* n. 4, at paras. 69–71, 95, 104.
83 *See Plama*, *supra* n. 7, at paras. 131–32.
84 Malaysian Historical Salvors, SDN, BHD v. Malaysia, ICSID Case No. ARB/05/10, Decision on Jurisdiction, May 17, 2007, at para. 43.
85 *See Maffezini*, *supra* n. 24, at paras. 65, 68–70.

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claimants had the burden of proving that they were "investors under the ECT."[86] In *Rompetrol*, however, that burden fell on the respondent.[87]

Case Already Litigated Through Domestic Courts

In *Jan de Nul*, the claimant had the burden of establishing that the instant ICSID dispute was different from a dispute heard by the Egyptian courts where the respondent advanced claims of res judicata and claimed that harms caused by any court decision arose before the entry of the most recent BIT into force.[88]

In *Rompetrol*, the respondent had the burden of proving that the dispute was essentially domestic in character and should have been litigated through Romanian courts.[89] In *Saipem*, the claimant had the burden of showing that Bangladesh had consented to ICSID arbitration for claims based on decisions of its courts, but the tribunal appeared to opt out of deciding the matter at this stage of the proceedings.[90]

Dispute Arose Prior to the Entry of the BIT into Force

In *Jan de Nul*, the claimant had to prove that its claims arose after the entry into force of the most recent BIT between the contracting states.[91]

Dispute Barred by a Provision of the BIT/Treaty

In *Canfor*, in the NAFTA context, the respondent bore the burden of proof in establishing that a particular treaty provision barred arbitration of particular claims.[92]

ONCE THE TRIBUNAL DETERMINES WHO HAS THE BURDEN OF PROOF, WHAT STANDARD OF PROOF IS APPLICABLE AT THE JURISDICTIONAL PHASE?

Tribunals Typically Require the Claimant to Meet a Prima Facie Standard to Establish a Tribunal's Jurisdiction

There is a wealth of support for the argument that a claimant need only show prima facie evidence of the tribunal's jurisdiction to prevail at this stage of the proceedings.[93]

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86 *See Plama*, *supra* n. 7, at para. 128.

87 *See Rompetrol*, *supra* n. 41, at paras. 66, 71, 110.

88 *See Jan de Nul*, *supra* n. 4, at paras. 69–71, 114–31.

89 *See Rompetrol*, *supra* n. 41, at paras. 50, 110.

90 *See Saipem*, *supra* n. 4, at paras. 137–38.

91 *See Jan de Nul*, *supra* n. 4, at paras. 69–70, 110–36.

92 *See Canfor*, supra n. 55, at para. 176.

93 *See, e.g.*, *Bayindir*, *supra* n. 19, at paras. 193–97; *Telenor*, *supra* n. 4, at paras. 34, 68; *Impregilo*, *supra* n. 13, at para. 79; *Pan American*, *supra* n. 15, at para. 50. *See also* AMCO v. Indonesia,

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But what is required to present a prima facie case? The tribunal in the *Continental Casualty v. Argentina*[94] case explained what a prima facie examination entailed in terms of the factual and legal foundation of the case. The tribunal concluded that the claimant's presentation is decisive with respect to the facts, unless respondent presents evidence to the contrary.

> In order to determine its jurisdiction, the Tribunal must consider whether the dispute, as presented by the Claimant, is *prima facie*, that is at a summary examination, a dispute that falls generally within the jurisdiction of ICSID and specifically within that of an ICSID Tribunal established to decide a dispute between a U.S. investor and Argentina under the BIT. The requirements of a *prima facie* examination for this purpose have been elucidated by a series of international cases. The object of the investigation is to ascertain whether the claim, as presented by the Claimant, meets the jurisdictional requirements, both as to the *factual subject matter* at issue, as to the *legal norms* referred to as applicable and having been allegedly breached, and as to the *relief* sought. For this purpose the presentation of the claim as set forth by the Claimant is decisive. The investigation must not be aimed at determining whether the claim is well founded, but whether the Tribunal is competent to pass upon it.
>
> As to the *facts of the case*, the presentation of the Claimant is fundamental: it must be assumed that the Claimant would be able to prove to the Tribunal's satisfaction in the merits phase the facts that it invokes in support of its claim. This does not mean necessarily that the 'Claimant's description of the facts must be accepted as true,' without further examination of any type. The Respondent might supply evidence showing that the case has no factual basis even at a preliminary scrutiny, so that the Tribunal would not be competent to address the subject matter of the dispute as properly determined. In such an instance the Tribunal would have to look to the contrary evidence supplied by the Respondent and should dismiss the case if it found such evidence convincing at a summary exam.
>
> . . . .
>
> As to the *legal foundation* of the case, in accordance with accepted judicial practice, the Tribunal must evaluate whether those facts, when established, could possibly give rise to the Treaty breaches that the Claimant alleges, and which the Tribunal is competent to pass upon. In other words those facts, if proved to be true, must be

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ICSID Case No. ARB 81/1, Decision on Jurisdiction, September 25, 1983, I ICSID Reports 389, 405; Int'l Thunderbird Gaming Corp. (U.S.) v. Mexico (UNCITRAL), Procedural Order No. 4, December 24, 2003 (the decision in *Thunderbird* does not contradict *AMCO*: it appears that the factual determination will be performed by the tribunal at the merits phase; the jurisdictional requirement being satisfied by establishing a prima facie claim); Desert Line Projects LLC v. Yemen, ICSID Case No. ARB/05/17, Award, February 6, 2008; *see Siag*, *supra* n. 4; *see Saipem*, *supra* n. 4; Helnan International Hotels A/S v. Arab Republic of Egypt, ICSID Case No. ARB/05/19, Decision on Jurisdiction, October 17, 2006; Azurix v. Argentine Republic, ICSID Case No. ARB/01/12, Award, July 14, 2006; El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, Decision on Jurisdiction, April 27, 2006.

94 Continental Casualty Company v. Argentina, ICSID Case No. ARB/03/9, Decision on Jurisdiction, February 22, 2006.

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> "capable" of falling within the provision of the BIT and of having provoked the alleged breach.[95]

It is important to note, however, that for the claimant to discharge its prima facie burden to prove that the tribunal has jurisdiction, it must more than merely "label" its claims without any proof.[96] In *Pan American*, the tribunal explained this proposition:

> . . . [f]or if everything were to depend on characterizations made by a claimant alone, the inquiry to jurisdiction and competence would be reduced to naught, and tribunals would be bereft of the *compétence de la compétence* enjoyed by them under Article 41(1) of the ICSID Convention.[97]

Similarly, mere assertions that a dispute is within the tribunal's jurisdiction are not conclusive.[98] Moreover, the showing must satisfy the tribunal that jurisdiction is evident for each provision of the BIT or convention under which the claimant seeks to invoke the tribunal's jurisdiction.[99]

As stated previously, other cases have required the claimant to show facts that the tribunal would assume, *pro tem*, were true in order to establish a violation of the relevant BIT or treaty to establish jurisdiction.[100] Finally, several cases do not explicitly state the standard of proof applicable but simply state that the burden falls on the claimant (in most cases) or the respondent (in a limited number of cases).[101]

A number of tribunals, however, while adopting the prima facie standard, have stated that under certain circumstances a more thorough inquiry is required. In *SGS v. Pakistan*, the tribunal noted:

> [I]f the facts asserted by the Claimants are capable of being regarded as alleged breaches of the BIT consistently with the practice of ICSID tribunals, the Claimant should be able to have them considered on their merits . . . We do not exclude the possibility that there may arise a situation where the Tribunal may find it necessary at the very beginning to look behind the Claimant's factual claims but this is not such a case.[102]

Similarly, in *PSEG v. Turkey*, the tribunal explained:

> The Tribunal is aware that the *prima facie* test has been applied in a number of cases, including ICSID cases such as *Maffezini*[7] and *CMS*,[8] and that as a general approach to jurisdictional decisions it is a reasonable one. However, this is a test that is always case-specific. If, as in the present case, the parties have views which

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95 *Continental Casualty Company*, at paras. 60–63.

96 *See Pan American*, *supra* n. 15, at para. 50.

97 *Ibid.*

98 *See UPS*, *supra* n. 4, at para. 34.

99 *Ibid.*

100 *See Saipem*, *supra* n. 4, at paras. 83–86 (also referring to the prima facie standard); *see Plama*, *supra* n. 7, at para. 118; *see Jan de Nul*, *supra* n. 4, at paras. 69–71.

101 *See Mihaly*, *supra* n. 18, at para. 30; *see Rompetrol*, *supra* n. 41, at para. 75; *see Maffezini*, *supra* n. 24, at para. 69; *see Canfor*, *supra* n. 55, at paras. 170–76 (also referring to prima facie standard); *see UPS*, *supra* n. 4, at paras. 33–37; *see Siag*, *supra* n. 4, at paras. 138–41.

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

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> are so different about the facts and the meaning of the dispute, it would not be appropriate for the Tribunal to rely only on the assumption that the facts as presented by the Claimants are correct.
>
> The Tribunal necessarily has to examine the facts in a broader perspective, including the views expressed by the Respondent, so as to reach a jurisdictional determination, keeping of course separate the need to prove the facts as a matter pertaining to the merits. This is what the Tribunal will do.[103]

The tribunal in *AES v. Argentina* discussed the burden of proof based on the prima facie standard. However, when the respondent questioned the "probative value" of the evidence submitted by the claimant to prove its ownership and control, the tribunal held:

> It is consequently for the Tribunal to appreciate whether it is satisfied at this stage that the material and information provided by AES is accurate for evidencing its ownership and control of all the companies concerned. In this respect, the Tribunal notes that production of expert and witnesses reports is common practice in international arbitration. [. . .]
>
> Without excluding the possibility of requiring Claimant, later in the course of proceedings, to produce further evidence of ownership and control of its subsidiaries in Argentina, pursuant to Rule 34 mentioned above as well as to Article 1 of the Protocol of the US-Argentina BIT, the Tribunal considers that it was so far sufficiently informed and has no reason to consider in essence the kind of material produced by AES in this respect to be inaccurate.[104]

Preponderance of the Evidence

As mentioned earlier, Mr. Highet stated in his dissenting opinion in *Waste Management* that, following a respondent's jurisdictional objection, a claimant must show that the tribunal has jurisdiction by a preponderance of the evidence.[105] More often, this is the standard for a claimant's burden of proof showing on the merits.

Some Tribunals Require Conclusive Evidence of Jurisdiction

As previously discussed, the ICSID tribunal in *Phoenix Action Ltd.* went beyond the prima facie standard and required any facts upon which its jurisdiction rested to be *proven*.[106] In such situations, mere allegations were not enough.[107]

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103 PSEG Global, Inc., The North American Coal Corporation, and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v. Turkey, ICSID Case No. ARB/02/5, Decision on Jurisdiction, June 4, 2004.

104 AES Corporation v. The Argentine Republic, ICSID Case No. ARB/02/17, Decision on Jurisdiction, at paras. 83–84, April 26, 2005.

105 *Waste Management Inc.*, Dissenting Opinion, *see supra* n. 25, at para. 9 (citing Southern Pacific Properties (Middle East Limited [SPP (ME)]) v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, May 20, 1992).

106 *See Phoenix Action Ltd.*, *supra* n. 29, at paras. 62–64 (emphasis added).

107 *Ibid*.

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Further, some non-ICSID tribunals have indicated that a claimant has a duty to establish the tribunal's jurisdiction by showing more than prima facie evidence. For instance, the joint dissenting opinions of two ICJ judges in the *South West Africa Cases* stated that "the burden of establishing the jurisdiction of the Court lies on the party asserting it and this must be established conclusively."[108] In fact, these judges went on to say that the applicants had to show "beyond a reasonable doubt" that the tribunal had jurisdiction.[109] Other ICJ opinions support this proposition.[110] However, in light of the *Saipem* tribunal's rejection of any analogy of burden of proof in ICSID with ICJ jurisprudence, it seems unlikely that any ICSID tribunal would apply this standard.

CONCLUSION

Recent decisions in international arbitration law suggest that the burden of proof at the jurisdictional phase is an issue in flux. Despite a long line of decisions relying on the Higgins framework that places a prima facie burden on the claimant to establish the tribunal's jurisdiction, there have been significant departures from this approach in recent years. Recent tribunals have, *inter alia*, mandated that claimants *prove* facts crucial to the existence of jurisdiction[111] or have required respondents, as the objecting party, to prove that jurisdiction did not exist.[112] Such decisions underscore the still-dynamic nature of international investment arbitration as a jurisprudential system.

108 Kazazi at 340; South West Africa Cases, ICJ Reports 1962, Joint Dissenting Opinion of Judges Sir Percy Spender and Sir Gerald Fitzmaurice, at 473.

109 *Ibid.*

110 *Ambatielos* (*Greece v. United Kingdom*), Merits, ICJ Reports 1953, p. 29.

111 *See Phoenix Action Ltd.*, *supra* n. 29, at paras. 62–64.

112 *See Rompetrol*, *supra* n. 41, at para. 75.

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Chapter 13

Attribution

*Georgios Petrochilos**

INTRODUCTION

Not all acts which occur within the jurisdiction of a State can engage its international responsibility. The conduct in question must be that of the State. Attribution is the legal operation by which the allegedly wrongful deed is connected to the State as the doer. This is a legal, rather than simply factual, operation, because the connecting factors rest on a legal characterization of the actor or the act, or both. Nevertheless, attribution is not a legal fiction: the connecting factors must exist in fact. This distinguishes attribution from certain domestic-law categories of liability for acts of third parties, such as agency and mandate. Attribution is concerned with identifying acts which are in fact those of the State.

Attribution is a necessary condition for international responsibility, but it is not sufficient. Responsibility for a wrongful act arises when the act is both attributable and in breach of an international obligation of the State. But identifying which acts are attributable to the State permits the cause of action to take shape. If land owned by a foreign investor has been occupied without valid justification, the rules of attribution will determine whether the State can be said to be responsible for the occupation itself,[1] rather than for a failure to avert the occupation or expel the occupants thereafter.[2]

* Freshfields Bruckhaus Deringer, Paris.

1 For example, on the basis that the land has been occupied by the army of the state or by private persons incited by state officials. *See* Tradex Hellas SA v. Albania (1999), 5 ICSID Reports 70, paras. 116, 123–25, 135–36, 147, 165–69, 175, 198; and *cf.* Yeager v. Iran (1987-IV) 17 IUSCTR 92, paras. 35–36.

2 *Cf. U.S. Diplomatic and Consular Staff in Tehran*, ICJ Reports 1980, 3, paras. 58 *et seq*. and Wena Hotels Ltd v. Egypt (Merits) (2002) 41 ILM 896, paras. 85, 88, 99.

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Those are distinct causes of action, each involving separate legal duties on the part of the State.[3] The rules of attribution help identify which conduct may be actionable.

A caveat must be entered at the outset. There is nothing to prevent States from undertaking obligations in respect of conduct that would not be attributable to them; nor is this a rare occurrence in treaty practice. Often, an obligation of this kind is expressed as a duty to ensure that any person involved in a certain activity will comply with certain standards.[4] In other cases, the substantive obligation will more broadly call for the achievement (or the avoidance) of a specified result, by means left entirely to the discretion of the State. If, for example, the obligation is to take all measures necessary to achieve certain production quotas, it is no defence that the conduct of the entity that has been charged with meeting the quotas is not attributable to the State. What matters is only whether or not the objective has been attained.[5] Similarly, if the obligation is to prevent a certain activity from occurring at all (e.g., an anti-competitive practice or the production of land mines), then it does not matter whether or not the prohibited activity was undertaken by a person whose acts are attributable to the State.[6] In short, it is accurate to say that the rules of attribution are generally applicable but incorrect to suggest that they are always applicable or in the same way.

Investment treaties on the whole do not contain special rules of attribution, so they are to be read in the light of general international law in that respect.[7] In addition to their direct application to questions of responsibility, rules of attribution may also be indirectly relevant to questions of standing and eligibility of State-owned entities acting as investors, under Article 25(2)(b) of the ICSID Convention[8] and investment treaties.

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3 See further the examples discussed by Dolzer & Schreuer, Principles of International Investment Law (2008) 204–05; and contrast the approach of the European Commission with that of the European Court of Human Rights in *Castello Roberts v. UK*, regarding the way in which disciplinary action by headmasters in private schools could result in responsibility of the state: (1995) 19 EHRR 112, 119–20 (Commission); and Series A, No 247-C (1993) paras. 27–28 (Court). *Cf. also* Concluding Observations of the Committee on Economic, Social and Cultural Rights: Iran, UN Doc E/C.12/1993/7 (1993) para. 7 (responsibility of state for not preventing issuance of *fatwahs* by religious authorities).

4 *See* UN Convention on the Law of the Sea (Montego Bay, December 10, 1982) 1833 UNTS 3, Article 139; the examples from treaty practice in Christenson, (1990–91) 12 Mich. J. Int. L. 312, 356; and note 74 below in respect of the Energy Charter Treaty and the NAFTA Agreement.

5 *Cf.* GAMI Investments v. Mexico (2005), 44 ILM 545, paras. 52–110 (sugar programme); and EC Commission Communication to the Member States: Application of Articles 92 and 93 of the EC Treaty, [1993] OJ C307/3, para. 21 and the references to case law (state aid: status of bodies administering aid and source of funding for such aid irrelevant).

6 *See* Young, James & Webster v. UK, Series A, No 44 (1981) para. 49 (obligation of the UK was to prohibit closed-shop employment arrangements; unnecessary to find whether acts of the British Railways Board engage the international responsibility of the UK).

7 An exception is Article 2 of the 2006 prototype French BIT, *reprinted in* Dolzer & Schreuer, *see supra* note 3, at 360, which deals with federated states of federal unions, regions, local bodies, and entities for whose international relations a contracting state is responsible. The provision restates parts of the general law of attribution but does not vary it.

8 See the *CSOB* case and *cf. Peter Pázmány University* case, *see infra* notes 109 and 68.

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The rules of general international law on attribution have been codified by the International Law Commission (ILC) in the Draft Articles on Responsibility of States for Internationally Wrongful Acts.[9] The ILC Articles purport to codify custom, and several of their provisions have been considered by international tribunals to do so.

The provisions in the ILC codification are formulated at a high level of abstraction and do not lend themselves to mechanical application. While the provisions muster consensus as general propositions of law, their application in specific cases has led to inconsistent outcomes. Notably, there are well-known difficulties in respect of the test of "direction or control" in Article 8.[10] Indeed, difficulties appear at the threshold, with the definition of the core concept of "State organ" in Article 4. There is a need for clarity. The concept of organ is fundamental to the categorizations in the ILC Articles in several ways:

- The categories of attribution are mutually exclusive, and the initial question in every case is whether the conduct concerned is that of an organ. If the relevant conduct can be attributed to a State on the basis that it was committed by one of its organs, the inquiry stops there. The remaining special cases of attribution, including in particular the case of entities empowered to exercise "elements of the governmental authority" (Article 5), can apply only when the conduct concerned is not that of an organ.[11]
- The principle for acts of State organs is plenitude of attribution: *all* acts of *any* State organ are attributable[12] because international law regards the State as a single unit ("unity of the State"). By contrast, the remaining cases of attributable conduct proceed on special rules, whereby the conduct in question has to be demonstrated to be attributable in the circumstances: conduct in the exercise of elements of the governmental authority; conduct on instructions, direction, or control of the State; conduct by "agents of necessity" exercising, in fact, elements of the governmental authority; conduct by insurrectional movements; and private conduct adopted by the State as its own.
- The basic distinction between plenary and specific attribution has evidentiary implications in the cases of specific attribution.

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9 ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, Annex to UN GA Res 56/83 (2001), reprinted with commentaries in [2001-II(1)] YBILC 30 (which is the source for the Second Reading Commentary cited in this chapter). The ILC Articles were adopted in their entirety on second reading in 2001, but the provisions on attribution (Chapter II of Part One, Articles 4–11) were initially adopted on first reading much earlier, in 1973–74 (Articles 5–15), with substantially the same content. Part One (Articles 1–35) was then adopted on first reading in 1980. The first reading of all provisions (Articles 1–60, plus two annexes) was completed in 1996, and that text appears at [1996-II(2)] YBILC 58.

10 *See, e.g.*, Cassese, (2007) 18 EJIL 649.

11 There is the exception of conduct by an organ which is not attributable to the state because the organ had been placed at the disposal of, and was acting for, another state (see ILC Article 7) or an international organization.

12 With the narrow exception of "private" conduct manifestly unconnected with the exercise of the functions assigned to the organ. *See* ILC Article 7 and Second Reading Commentary, paras. (7)–(8); and *ibid.*, para (13) to Article 4.

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While the ILC provisions on attribution may suffer from excessive conceptualization and categorization,[13] they are the standard terms of discourse and pleading in practice. This chapter has the limited ambition of focusing on certain difficulties that arise with the rules of attribution in the context of investment treaties. It first examines the distinction—fundamental in principle but not always clear in life—between State organs and entities empowered to exercise elements of the governmental authority. Two further discrete issues are then discussed: the supposed category of non-attributable or "non-justiciable" acts of State organs, and the question whether rules of attribution are relevant to representations and contractual obligations.

WHAT ARE STATE ORGANS?

ILC Article 4 reads as follows:

CONDUCT OF ORGANS OF A STATE

> 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
>
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

Article 4, the core provision on attribution, amalgamates and refines the first-reading Articles 5, 6, and 7(1) and is reflective of customary international law.[14]

The primary purpose of Article 4 is to establish the cardinal principle of the unity of the State, which it does in categorical terms in paragraph (1). It puts to rest disagreements, as late as in the 1920s, on whether acts of subordinate ("minor") officials and the independent judiciary were attributable to States.[15] Practice, jurisprudence, and scholarship had been directed mainly to that matter of principle. The status of a given person or entity as an organ of the State had not caused difficulties in practice, and no comprehensive definition of organs had been proffered. Terms such as "agents and representatives,"[16] "officials," "officers," and "public servants"[17] were used without

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13 *See* BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 445 (7th ed. 2008).

14 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Judgment*, ICJ REPORTS 2007, para. 385.

15 *See* Ago Third Report, [1971-II(1)] YBILC 199, paras. 106–35; and Guerrero's preparatory report for the 1930 Codification Conference, Annex to League of Nations Doc C.46.M.23.1926.V, 122–31, *reprinted in* Rosenne (ed.) *League of Nations Committee of Experts for the Progressive Codification of International Law [1925–1928]* vol. 2 (1972) 118. The related question of *ultra vires* acts is dealt with in ILC Article 7 and further discussed by Fischer, *La Responsabilité Internationale de l'État pour les Comportements* Ultra Vires *de ses Organes* (1993); and Amerasinghe, *Diplomatic Protection* (2008) 241 *et seq*.

16 *See Questions relating to Settlers of German Origin in Poland*, PCIJ, Series B, No 6 (1925) 22.

17 *See Massey* (1927), 4 RIAA 155, para. 6 (U.S.-Mexico General Claims Commission).

any attempt to rely on a general theory about organs.[18] The need for a specific definition of organs arose precisely because of the principle of the unity of the State, in ILC Article 4(1) and because of the special cases of attribution which concern conduct by persons or entities that cannot be considered as organs and are dealt with in subsequent Articles.

It comes therefore as little surprise that the text of Article 4 is less helpful in providing a concrete definition of State organs. It does say that an organ is a person or entity with a "position . . . in the organization of the State" (paragraph (1)), and that in ascertaining the organization of the State its own internal law is highly relevant though not dispositive (paragraph (2)). It might be fair to say that Article 4 is more in the nature of a description rather than a definition. The accompanying commentary is rather circular[19]:

> The reference to a "State organ" covers all the individuals or collective entities that make up the organization of the State and act on its behalf.

Professor (later Judge) Ago, the Special Rapporteur primarily responsible for the formulation of the text that was adopted on ILC's first reading, provided definitions of a similar kind, both at the ILC and judicially:

> [T]he machinery of the State, through which it manifests its existence and performs its functions.[20]
>
> [P]ersons or groups directly belonging to the State apparatus and acting as such.[21]

One searches in vain for specific identifying features to determine whether an entity or person belongs to the "organization," "machinery," or "apparatus" of the State.[22] Indeed, the legislative history suggests that no single criterion can serve this purpose.

The problem is not ILC's draftsmanship. There is a genuine difficulty here which reflects the inherent tension between two fundamental tenets of international law. The first tenet is that international law does not tell States how to structure themselves as organizations.[23] The State as a subject of international law is distinct from each State's own conception (if any) of its legal personality on the domestic law plane.[24] The second tenet is that States are as a rule accountable only for acts that can be attributed to them,[25]

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18 However, in *Tay* (1928), 4 RIAA 391, 400, the U.S.-Mexico General Claims Commission referred to "persons concerned with the discharge of governmental functions, whatever their precise status may be under domestic law."

19 ILC Second Reading Commentary, para. (1) to Article 4.

20 Ago Third Report, *see supra* note 15, para. 116.

21 *See Military and Paramilitary Activities (Merits)*, ICJ Reports 1984, 181, 188 (Sep Op Ago).

22 Ago Third Report, *see supra* note 15, paras. 106–35.

23 With limited exceptions in treaty or customary law, for example, relating to diplomatic and consular envoys.

24 *See* Anzilotti, *Cours de Droit International* (1929, *reprinted* 1999) 53–54.

25 ILC Article 2 reads as follows:

> There is an internationally wrongful act of a State when conduct consisting of an action or omission:
>
> (a) is attributable to the State under international law; and
>
> (b) constitutes a breach of an international obligation of the State.

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and the principal basis of attribution is the one concerning State organs. The logical difficulty which ensues is that international law will attribute to a State all acts of those persons or entities that *it* has decided to endow with the status of an organ but, given that no two States are alike, no generally valid definition of an organ seems to be capable of formulation in concrete terms.[26] As we will see, this difficulty is unavoidable to an extent, but principle and authority do help clarify a number of discrete points.

Internal Law is the Source of Legal Data, Not Classifications

It is true generally that domestic law is a factual element from the perspective of international law,[27] and the position cannot be different in respect of the characterization of a person or entity as an organ. The domestic law of a State is inherently unlikely to provide a comprehensive definition of who can engage its responsibility on the international plane. Generally, that is not a question with which internal law needs to concern itself.[28] Where it does, the position in domestic law may well be utterly irrelevant to international law.[29] To be sure, domestic law may classify persons or organs for Constitutional, administrative, budgetary, or judicial review purposes. Thus, in South Africa, courts and judicial officers are excluded from the Constitution's definition of organs[30]; but, for the purposes of judicial review, an organ includes "any person for whose debt an organ of State contemplated [by the relevant statute] is liable."[31] Neither the former exclusion nor the latter inclusion appears germane to international law.

Paragraph (2) of ILC Article 4 is to be understood accordingly. The status of a person or an entity as an organ in domestic law is not a matter of labeling. Doubtless in many cases in practice it will be true that "[w]here the law of a State characterizes an entity as an organ, no difficulty will arise".[32] But as we have seen internal-law classifications can be positively misleading.

The data necessary to answer the question whether a person or entity has the status of an organ are to be found in internal law.[33] Clearly only internal law can provide the

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26 *Cf.* the difficulties encountered in the definition of "states" for the purposes of the European Convention on State Immunity: Suy in *L'Immunité de Juridiction et d'Exécution des États* (1971) 257.

27 *See Certain German Interests in Polish Upper Silesia (Merits)*, PCIJ, Series A, No 7 (1926) 19.

28 "The internal law of a State may not classify, exhaustively or at all, which entities have the status of 'organs'": ILC Second Reading Commentary, para. (11) to Article 4.

29 *Cf. Maritime Delimitation and Territorial Questions* (Qatar v. Bahrain) *(Jurisdiction)*, ICJ Reports 1994, 112, paras. 26–27 (Constitutional limitations on Foreign Minister's power to conclude treaties).

30 *See* section 239 of the South Africa Constitution, Act No 117 of 1996 ([1996] Government Gazette No 17678).

31 *See* section 1(vii) of the Institution of Legal Proceedings Against State Organs Act No 40 of 2002 ([2002] Government Gazette No 24112).

32 ILC Second Reading Commentary, para. (11) to Article 4.

33 Internal law is to be understood broadly, as encompassing not only black-letter rules but also "practice and convention" in the relevant legal system: Crawford First Report, UN Doc A/CN.4/490/Add.5 (1998) para. 167.

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factual foundation for the assessment that international law is called upon to make. But it is equally clear that the characterization of an organ by international law does not and cannot rely on bare classifications in domestic law. International law is concerned with the reality of the status of the relevant person or entity, not with internal-law labels. While this was clear both from Ago's report and from the ILC commentary on first reading,[34] the text of the relevant provision ("any State organ having that status under the internal law of that State")[35] had been misunderstood as a "formulaic" cross-reference to domestic law.[36] This was one of the reasons which prompted Special Rapporteur Crawford to propose that paragraph (2) in Article 4 be eliminated altogether.[37] Neither the General Assembly Sixth Committee nor the ILC thought this was desirable,[38] but it is debatable whether the revised paragraph (2) of Article 4 is a substantial improvement on the first-reading text.

The legislative intent in Article 4(2) was described as follows[39]:

> Paragraph 2 of Article [4] recognized the significant role played by internal law in determining the status of a person or an entity within the structural framework of the State. That role was decisive when internal law affirmed that a person or an entity was an organ of the State . . . . The commentary would also explain the supplementary role of international law in situations in which internal law provided no classification or an *incorrect* classification of a person or an entity.

It would be wrong, it is submitted, to read into this statement that international law will consider as an organ whatever entity may be called, for whatever purposes, an organ in domestic law. The exercise of characterization in international law is necessarily more involved. If an entity is expressly classified as an organ in internal law, this will be highly relevant in the analysis under international law, but it will not be dispositive. Where internal law provides no classification, there will be nothing for international law to "correct": the analysis proceeds unaided. International law has a "corrective" role when internal law denies the status of an organ, not as a matter of labeling but as a matter of *liability* of the State or the government for acts of the relevant person or entity. As we will see in the following paragraphs, assertions of lack of status of organ are made in most cases in respect of entities with separate legal personality and liability on the domestic law plane.

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34 *See* Ago Third Report (note 15 above) para. 120; and ILC First Reading Commentary, [1973-II] YBILC 191, para. (10) to Article 5 (citations omitted).

35 Article 5 of the first-reading provisions.

36 *See, e.g.*, the observations of the U.S., UN Doc A/CN.4/488 (1998) 36.

37 *See* Crawford First Report (note 33 above) para. 167; and *ibid.*, UN Doc A/CN.4/490/Add.6 (1998), 2 (Note 3 to revised Article 5).

38 The discussion in the Sixth Committee is summarized in UN Doc A/CN.4/496 (1999) paras. 118–19. On the reactions within the ILC, see notably 2553rd mtg., [1998-I] YBILC 232, para. 29 (Pellet) and 239, para. 57 (Simma); 2555th mtg., [1998-I] YBILC 243, para. 11 (Pellet).

39 Statement of the Chairman of the Drafting Committee (Simma), [1998-I] YBILC 289, para. 77 (emphasis added).

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Institutional Separateness

The State as a unitary entity is an abstraction of international law. Constitutional principles of separation of powers and administrative and budgetary necessities mean that there are discrete units at different levels of hierarchy and accountability. Some have legal personality, some not. It would be wrong on principle and authority to regard separate legal personality as precluding the status of organ under international law.

Thus, Libya was unsuccessful in arguing that a concession granted by the Ministry of Oil and Gas did not create obligations on the part of the State because of the Ministry's separate legal personality. It was said that to accept Libya's argumentation would amount to denying the principle of the unity of the State.[40] In an immunity from execution case, the Russian Federation was unsuccessful in contending that it was not liable to pay on an award rendered against the Government on the basis that the Government and the Federation were two separate legal persons in Russian law.[41] A separate agency with its own personnel, charged with preparing environmental policy and issuing environmental regulations as an *órgano desconcetrado* in Mexico's Ministry of Environment was without difficulty (or opposition) held to be an organ of the State.[42]

Generally, the allocation of separate competencies among discrete units with intersecting lines of command or accountability, and the existence or not of separate legal personality, are "matter[s] of governmental machinery"[43] which are irrelevant to international law. Thus, in Britain certain executive (as opposed to policy) units have agency status and no legal personality[44]; while a host of other separate "non-departmental public bodies" may or may not have separate legal personality, depending on the appropriate degree of independence from central government and their specific function (which may be regulatory, supervisory, advisory, (until recently) adjudicatory, etc).[45] In America, the Board of Governors of the Federal Reserve System is able to perform regulatory functions in its own name and without approval from other agencies.[46] It is impossible to see why separate legal personality should automatically disqualify such bodies from organ status in international law when it is plain that they are part of the machinery of State and have institutionally no separate "private" purpose of their own.[47]

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40 *See* Texaco Overseas Petroleum Co v. Libya (Jurisdiction) (1975), 53 ILR 392, 413 (para. 23(a)).

41 *See* Compagnie Noga d'Importation et d'Exportation SA v. Russian Federation, 361 F.3d 676 (2d Cir. 2004).

42 *See* TECMED SA v. Mexico (2003), 10 ICSID Reports 134, paras. 36, 151.

43 *See* Baccus SRL v. Servicio Nacional del Trigo [1957] 1 QB 438 (CA), 23 ILR 160, 162-163 (an immunity case relating to a unit with separate legal personality but within the Ministry of Agriculture, responsible for grain imports).

44 *See* Cabinet Office, *Executive Agencies: A Guide for Departments* (October 2006) 2–3.

45 *See* Cabinet Office, *Public Bodies: A Guide for Departments* (June 2006) Ch 2.

46 *See* Federal Reserve Act 1913 (as amended), in particular 12 USC 248.

47 It has been held on this basis that certain entities exercising "core state functions" are not to be regarded as "agencies" or "instrumentalities" under the U.S. Foreign Sovereign Immunities Act, 28 USC 1604, notwithstanding their separate legal personality. *See* Transaero, Inc v. La

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It is also impossible to see how independence of action or decision-making should be a disqualifying factor. Acts of the judiciary are indisputably attributable to the State, even though the judiciary is independent from other branches of government. The same may be said of ombudsmen and financial-services and competition regulators, as it may also be said of regulatory or advisory bodies in which participate private persons representing private interests.[48] Independence is part of the institutional characteristics of those entities, but it is not given in order for those entities to pursue purposes separate from those of government: hence, independence of this kind should not impede their characterization as organs.

Nevertheless, a broad criterion of "public function" also appears irrelevant. The status of organ reflects the fact that a person or entity has been created by the State as such, not the nature of the functions vested in that person or entity.[49] That is clear from the existence of ILC Article 5, which is concerned with entities that are not organs but nevertheless entrusted with "elements of the governmental authority." So the acts of a private arbitral tribunal[50] or an ecclesiastical internal disciplinary body[51] do not engage the responsibility of the State as organs of it. Conversely, there is no closed list of functions that can be entrusted to organs. If a State regards the dissemination of news, commodity trading, or the commercialization of railways as activities to be conducted by government bodies, their acts are attributable to the State.[52] It is for that reason that ILC Article 4(1) states that attribution is not affected by "whether the organ exercises

Fuerza Aerea Boliviana, 30 F.3d 148, 153 (DC Cir. 1994): "We hold that armed forces are as a rule so closely bound up with the structure of the state that they must in all cases be considered as the 'foreign state' itself, rather than a separate 'agency or instrumentality' of the state. . . . [I]t is hard to see what would count as the 'foreign state' if its armed forces do not. Any government of reasonable complexity must act through men organized into offices and departments. If a separate name and some power to conduct its own affairs suffices to make a foreign department an 'agency' rather than a part of the state itself, the structure of section 1608 will list too far to one side." Iran's Ministry of Defence was held to be part of the state of Iran on that basis; *see* Ministry of Defense and Support for the Armed Services of Iran v. Cubic Defense Systems, Inc., 495 F.3d 1024, 1035–36 (9th Cir. 2007).

48 Thus, it appears not to have been doubted in *GAMI* that the *Comité de la Agroindustria Azucarera*, which was to implement objectives set out in a Decree and included in its composition representatives of sugarcane growers and mills, was an organ of Mexico; *see GAMI* (note 5 above) paras. 53, 75.

49 *See* Ago Third Report (note 15 above) para. 170.

50 *See, e.g.*, Case 102/81 Nordsee Deutsche Hochseefischerei v. Reederei Mond Hochseefischerei [1982] ECR 1095, para. 12; KR v. Switzerland App No 10881/84, (1987) 51 DR 83.

51 *Cf* Holy Monasteries v. Greece Apps Nos 13092/87, 13984/88, Series A, No 301-A (1994) para. 49.

52 And so TASS (the "Telegraph Agency of the Soviet Union at the USSR Council of Ministers") was held to an organ of the Soviet Union for purposes of state immunity; *see* Krajina v. TASS Agency [1949] 2 All ER 274; and Yessenin-Volpin v. Novosti Press Agency, 443 F. Supp 949, 852 (S.D.N.Y. 1978). *See also* the *Baccus* case (note 43 above); and British Rail International, Inc v. Office and Professional Employees International Union, 63 ILR 5 (National Labour Relations Board, 1967). Further examples from the jurisprudence on state immunity include a museum (Telkes v. Hungarian National Museum, 38 NYS (2d) 419 (S. Ct, 1942), 10 ILR 576) and a tourism board (Tribunal Civil Seine, October 17, 1936, Société Viajes v. Office National du Tourisme Espagnol, 8 ILR 277).

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legislative, executive, judicial or any other functions." The provision is drafted in terms "of extension, not limitation."[53] There is no "*a priori* distinction between organs which can commit internationally wrongful acts and those which cannot."[54] If a State chooses to create an organ, for whatever reason or purpose, the conduct of that organ can engage its responsibility.

The picture that emerges is that an organ is an entity that institutionally belongs to the State because (a) it has been created by the State; and (b) the functions assigned to it are functions of the State, as opposed to functions to be pursued for the entity's own account. In sum, if an entity has no *institutional separateness*, it should be considered as a State organ.[55] While this cannot be a mechanical test given the divergences in the ways in which States organize themselves, it does not merely call for a preponderance-of-links analysis either. Relevant indications will include, notably: whether the entity's functions are fully controlled by law (as opposed to being subject to freedom of contract); whether it is subject to judicial review and/or governmental control or oversight; whether it has prerogatives of power that private individuals cannot lawfully exercise; or whether it is funded exclusively by the State. Although the analysis is not reducible to a single criterion, it does help explain why separate legal personality and independent decision making in some instances matter and in some instances do not. The reason why a regulatory agency with separate legal personality must be regarded as an organ while a church should not be so regarded is that the agency has no separate institutional purpose; while the church has its own, spiritual purpose which it typically pursues for its own account, not on behalf of the State. Public functions that a church may exercise (such as the celebration of weddings) are ancillary to its primary institutional purpose.[56]

Thus, separate legal personality appears to be able to raise at most a presumption of institutional separateness, against characterization as a State organ.[57] In particular, a corporation organized under private law and with a commercial purpose should in principle be regarded as a separate entity pursuing goals of its own, i.e., to make profits

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53 ILC Second Reading Commentary, para. (6) to Article 4. See further Crawford First Report (note 33 above) para. 174.

54 ILC First Reading Commentary [1973-II] YBILC 191, para. (16) to Article 5.

55 *Cf.* the test of "institutional and operational independence" developed by the European Court of Human Rights, initially in the context of Article 34 ECHR, which gives standing to "non-governmental organization[s]"; *see* Radio France et al. v. France App No 53984/00, ECHR 2003-X, paras. 24 *et seq*, in particular 26 (whether legal entity "participate[s] in the exercise of governmental powers or run[s] a public service under government control"). The test was subsequently extended to the question of state responsibility for acts of regional and local authorities and state-owned enterprises; *see* Mykhaylenky et al. v. Ukraine App No 35091/02, ECHR 2004-XII, para. 44; Lisyanskiy v. Ukraine App. No 17899/02, April 4, 2006, paras. 19–20.

56 *Cf.* Parochial Church Council of the Parish of Aston Cantlow and Wilmcote v. Wallbank [2003] UKHL 37 (a case about the notion of "public authority" under section 6 of the UK Human Rights Act 1998).

57 Emilio Agustin Maffezini v. Spain (2000), 5 ICSID Reports 396, paras. 40 *et seq* and Salini v. Morocco (Jurisdiction) (2001), 6 ICSID Reports 400, paras. 30–35 appear to proceed on that basis.

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for its shareholders.[58] If the corporation neither is accorded immunity in its home State nor seeks immunity abroad, that would corroborate its non-governmental purpose.[59]

The presumption of separateness appears to be rebuttable in the following cases:

- *Overwhelming governmental purpose:* Where a State-owned commercial corporation has been assigned considerable non-commercial functions (e.g., to construct and run hospitals or schools, to build roads, etc) such that the commercial activities can be seen essentially or simply as a way to fund the non-commercial ones, it may be arguable that the corporation is no more than an arm of the State.
- *Separateness ignored in internal law:* There are cases where domestic law treats an entity as part of the organization of the State notwithstanding its separate legal personality and (possibly) commercial activities,[60] in particular because the entity is under the direction of the State.[61]
- *Institutional insufficiency:* When an entity is not self-sufficient in terms of making and implementing decisions for its own account (for example, it has no management or supervisory organs of its own) but rather has to rely on other State organs,[62] its separate personality may appear to be an artefact without legal significance.
- *Executive agency role:* When a corporation's exclusive purpose is to administer public-infrastructure contracts that are approved or negotiated by a supervising Ministry (or terminated at its behest),[63] it is arguable that the corporation should

58 *See* ILC Second Reading Commentary, para. (6) to Article 8; and Amco Asia Corp v. Indonesia (Merits) (1984), 1 ICSID Reports 414, paras. 162–63 (stressing the for-profit purpose of the corporation).

59 Article 17(2) of the 1961 Harvard Draft Convention (Sohn & Baxter, (1961) 55 AJIL 545) excludes from the definition of states "any . . . enterprise normally considered as commercial which is owned in whole or in part by a State . . . if such enterprise is, under the law of such State, a separate juristic person with respect to which the State neither accords immunity in its own courts nor claims immunity in foreign courts." The explanatory notes (to be found in the final draft, 1974, in García-Amador, Sohn, Baxter, *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (1974) 135, 257) say that "The word 'enterprise' itself calls attention to the fact that the activity must be one normally considered to be of a commercial nature."

60 *See* Saipem SpA v. Bangladesh (Jurisdiction and Provisional Measures) (2007) paras. 145–46.

61 *See* Sea-Land Service, Inc v. Iran et al. (1984-II) 6 IUSCTR 149 ("Respondent Ports and Shipping Organization . . . is the government instrumentality in Iran charged with the administration and control of Iranian port facilities, and was . . . under the direction of the Ministry of Roads and Transportation").

62 Contrast Jan de Nul NV and Dredging International NV v. Egypt (Merits) (2008) para. 161 (statute creating the Suez Canal Authority as a public agency provided for independent budget and commercial purpose, "without any commitment of the governmental systems and conditions"; held that the Authority was not part of the Egyptian state for ILC Article 4 purposes).

63 In LESI SpA & ASTALDI SpA v. Algeria (Merits) (2008) it was held, without reasoning, that the National Dams Agency was not an organ of Algeria in the sense of ILC Article 4. The tribunal appears to have regarded as dispositive that the Agency had (as Algeria pleaded) financial autonomy and its own management organs; *ibid.*, paras. 97 *et seq.*, in particular 105. Yet the tribunal went on to find that the Agency had very limited decision-making autonomy under the relevant texts of Algerian law, being an "instrument" of implementation of projects and policies decided by a Direction Council consisting of various ministry officials (in which

have the status of an organ.[64] That a government may wish to confine contractual liability resulting from such contracts is doubtless proper; but it does not seem to be relevant, or in any event decisive, for the purposes of responsibility for breaches of international law.

- *Complete dependence:* When there is in fact, if not in law, "strict control" by the State and "complete dependence on the State," which makes the entity's "supposed independence . . . purely fictitious," "it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely related."[65] It appears that neither State supervision (even if strict[66]) nor support (financial or otherwise) is of itself constitutive of "strict control."[67] Nevertheless, there is authority for the view that the test is one of "specific control," which might not necessarily extend to operational decisions.[68] Indeed, the *Himpurna* tribunal went farther, to hold that Indonesia was responsible for an application by Pertamina in the Indonesian courts to enjoin arbitration proceedings between Indonesia and a foreign investor, on the footing that,

the Agency's Director General had only a consultative role); *ibid.*, paras. 107–09. *See also* Case 249/81 Commission v. Ireland [1982] ECR 4005, para. 15, where Ireland was held responsible for the acts of the Irish Goods Council, an unincorporated body which relied mostly on public funds, whose management committee was appointed by the Irish government Ministers, and whose "aims and broad outline of [action]" were fixed by the government.

64 *Cf.* Himpurna California Energy Ltd v. PLN (Final Award) (2000) 25 YCA 11, paras. 84–112 (special governmental team comprising ministers created by Decree to renegotiate state-owned company's contracts and generally oversee its operations; company could not plead governmental acts as events excusing liability for failure to perform agreement with foreign counterparty).

65 *Convention on the Prevention and Punishment of Genocide* (note 14 above) paras. 391–92, where the Court adopted the terminology of "*de facto* organs." See to the same effect ICC 12913/2005, Capital India Power Mauritius I v. Maharashtra Power Development Corp Ltd et al. (2005) 20(5) Mealey's Int. Arb. Rep C-1, 17 (state-owned corporation was "agent-in-place" of Indian federated state and electricity board, and "could not have and did not have any independence of objective or action"); and First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 629 (1983) (a state immunity case).

66 *See* Impregilo SpA v. Pakistan (Jurisdiction) (2005), 12 ICSID Reports 245, para. 209.

67 *See Convention on the Prevention and Punishment of Genocide* (note 14 above) para. 388.

68 See *Venable* (1927), 4 RIAA 219, para. 9 (U.S.-Mexico General Claims Commission) (conduct by Mexico's National Railway's attributable on the basis of "government control"); Human Rights Committee, Communication No 61/1979, UN Doc CCPR/C/15/D/61/1979 (1982) para. 9.1 (censorship by the Finnish Broadcasting Corporation held to engage responsibility of Finland on the basis that "the State holds a dominant stake (90 percent) and [the Corporation] is placed under specific government control"). *Cf. Peter Pázmány University*, PCIJ, Series A/B, No 61, 207 (1933) 231–32 (whether control of state over University was so extensive for its distinct legal personality to disappear, preventing the state from espousing its claim as one of its "nationals"). The "effective authority or at least . . . decisive influence" test articulated by the European Court of Human Rights in Ilaşcu et al. v. Moldova and Russia App. No 48787/99, July 8, 2004, para. 392, may or may not relate to this inquiry. It is unclear whether the Court was proceeding on the basis that Transdniestrian authorities were to be regarded as organs of Russia rather than acting under the direction or control of Russia.

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given Pertamina's "organic dependence" from and "juridical subservience" to the government, the relevant question was "not whether the Government *does* control Pertamina, but whether it is structurally *in a legal position* to do so."[69]

In the cases above, the question is not whether separate legal personality has been set up as an instrument of fraud. One does not seek to determine whether separate legal personality should be pierced. As noted, the existence of separate legal personality or the lack of it has never been regarded as dispositive of an entity's status as an organ. The question is, rather, whether the entity concerned has institutionally any "private" purpose separate from that of government. If it does, in many cases in the practice of investment law the subsequent question will be whether the entity nevertheless has been empowered to exercise elements of the governmental authority. These are cases to which we now turn.

PARA-STATAL ENTITIES

States (like international organizations[70]) often entrust some of their functions to autonomous or separate entities. Such entities typically have the form of a special public-law body, a statutory corporation organized under private law, a purely private corporation, or a charity. In most cases, empowerment will be by way of delegation of a power that the State hitherto exercised. In some cases, however, empowerment will consist in recognition by the State of a function historically exercised by a separate entity (e.g., policy directives issued by the official Party, or civil status acts performed by the church). In all cases, exercise of the relevant function is only part of the entity's activity or overall purpose—or else the entity should be characterized as an organ. But it does not matter whether the function has been delegated to advance the entity's principal purpose (as is the case for a church with authority to levy taxes, or for a transport company with authority to police its stations[71]) or for the State's own purposes of decentralization (as is the case for prison facilities run by private operators, or for privatized former monopolies with some vestiges of regulatory power). What matters is the empowerment to exercise authority normally reserved to the State, because a State "cannot avoid its obligations by delegating its authority to bodies outside the core government."[72]

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69 Himpurna California Energy Ltd v. Republic of Indonesia (Interim Award) (2000) 25 YCA 112, paras. 118 *et seq.*, in particular para. 125 (emphasis in original).

70 *See* the *Worms* case (note 103 below).

71 These were the examples given by Germany in its response on Point VI of the Bases of Discussion drawn up by the Preparatory Committee of the 1930 Codification Conference; *see* League of Nations Doc C.75.M.69.1929.V, 90–91, *reprinted in* 2 League of Nations Conference for the Codification of International Law [1930] (Rosenne ed., 1975).

72 United Parcel Service of America v. Canada (Jurisdiction) (2002), 7 ICSID Reports 288, para. 17.

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Such entities are dealt with in ILC Article 5 (corresponding to the first-reading Article 7(2)), which reads as follows:

CONDUCT OF PERSONS OR ENTITIES EXERCISING ELEMENTS OF GOVERNMENTAL AUTHORITY

> The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Article 5 seeks to iron out inconsistencies of treatment that may result from Article 4: "If the same public function were performed in one State by organs of the State proper and in another by para-State institutions, it would indeed be absurd if the international responsibility of the State were engaged in one case and not in the other."[73]

The concept of "governmental authority," which is central to Article 5, is also used in special treaty provisions requiring States to ensure, as a substantive obligation, that certain entities (e.g., monopolies or State enterprises) "act in a manner consistent with" the obligations of the State under the treaty.[74]

The exercise of attribution here has two steps: first, whether the person or entity is "empowered . . . to exercise elements of the governmental authority"; second, whether the "person or entity is acting in that capacity in the particular instance." In the first step, it is clear that empowerment is the only relevant criterion: strictly, State participation in, control over, or support to the entity are irrelevant.[75]

The core concept of "elements of the governmental authority" ("*prérogatives de puissance publique*," "*atribuciones del poder público*") is common to both steps. Difficulties arise both in respect of its definition and in respect of the further requirement that the relevant conduct be taken "in that capacity."

Content of "Governmental Authority"

Article 5 envisages an "empowerment." It is therefore clear that the relevant authority must derive from the special status of government and be specifically granted to the

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73 ILC 1251st mtg, [1974-I] YBILC 8 (para. 16) (Ago).

74 *See* Article 22(3) of the Energy Charter Treaty and Articles 1502(3)(a) and 1503(2) of the NAFTA Agreement. In *Genin v. Estonia* (2001), 6 ICSID Reports 241, para. 327, such a provision in the U.S.-Estonia bilateral investment treaty seems to have been treated as a rule of attribution, while the better view would be that it set forth a separate substantive-law obligation on the part of the contracting states; *see* Limited Liability Company Amto v. Ukraine (2008) para. 112.

75 ILC First Reading Commentary, [1974-II(1)] YBILC 277, para. (18) to Article 7. Curiously, this elementary point is not always reflected in the literature or practice on investment-treaty claims; *see* Dupuy in State Entities in International Arbitration 69, 79 (Gaillard & Younan eds., 2008) (the criterion is essentially functional "but it can also be one of control"); and *Salini v. Morocco (Jurisdiction)* (note 57 above) and *LESI* (note 63 above), both of which adopted a two-pronged "structural" and "functional" test. Other cases, in particular *Maffezini* (note 57 above), may be explicable on the basis that the tribunals were seeking to determine attribution on the basis of status either as a state organ or as a para-statal entity; for further references see Dolzer & Schreuer (note 3 above) 204.

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person or entity concerned. Authority that private persons may exercise lawfully by virtue of the general law is not governmental.

In many cases, such special authority will entitle the grantee to prerogatives of power—that is, the power to issue measures that are in themselves binding and may be enforced by lawful coercion. The existence of such prerogatives indicates the existence of a public function.[76] Awarding quotas, approving exports, and imposing fines are examples. But governmental authority is not coextensive with prerogatives of power.[77] There are many instances where the grant of authority consists in entitling the entity, to the exclusion of any other person, to take some action, but where the action itself cannot be described as being binding or enforceable by coercion. A prerogative to negotiate oil concessions,[78] float State bonds,[79] or issue policy directives[80] will proceed from a special grant of authority: these are not activities open to all under the general law. Conduct in the performance of such activities, though not "binding" in an ordinary sense, can be very relevant, particularly in an investment context. If a body has an exclusive power to give guidance to a regulator, and it issues a policy recommendation that purports to change fundamentally the existing regulatory framework, it may be crucial for the investor to be able to challenge the guidance separately from or collaterally to any subsequent action by the regulator.[81]

A further but related issue here is whether what is "governmental" in nature has a set meaning. It is clear both from the texts on which the ILC relied[82] and from the work

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76 *See* Italy v. Cuba, Award of January 15, 2008, para. 163; Case C-188/89 Foster v. British Gas plc [1990] ECR I-3313, para. 20.

77 Comments by governments on the ILC first-reading text did not deal with the point in clear-cut terms. See the observations of Chile ([1980-II(1)] YBILC 95 (para. 11)) and the UK (UN Doc A/CN.4/488 (1998) 37), which stressed the exercise of "governmental prerogatives and powers" or "a degree of authority." *But see Canada–Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R (WTO Appellate Body, 1999) para. 97 (defining the concept of "governmental power" as involving "the effective power to 'regulate,' 'control,' or 'supervise' individuals, or otherwise 'restrain' their conduct through the exercise of lawful authority").

78 *See EnCana* and *Petrolane* (note 112 below).

79 A hypothesis left open in the *Norwegian Loans* case, where France contended that Norway was responsible for conduct by two state-owned banks, but the claim was dismissed on unconnected jurisdictional grounds. France's argument rested both on government control over the banks and the functions performed by them: Reply (1957), *Pleadings*, vol. I, 405–07. Judges Lauterpacht and Read agreed with France, but the former did not give reasons and the latter relied on the Norwegian government's "advice, instruction and approval" in the acts complained of by France: ICJ Reports 1957, 36 (Sep Op Lauterpacht) and 96 (Sep Op Read).

80 *See* Ago Third Report (note 15 above) para. 165.

81 *Cf.* the circumstances in Laker Airways Ltd v. Department of Trade [1977] QB 643 (CA); and Christian Federation of Jehovah's Witnesses in *France v. France* App. No 53430/99, ECHR 2001-XI ("pernicious effects" of reports by parliamentary commissions of inquiry resulting in adverse tax and similar measures). This issue is raised in the pending NAFTA case of *William Ralph Clayton et al v. Canada* (environmental assessment and recommendation by a panel of academics appointed by the government endorsed by governmental decision rejecting project).

82 The 1927 *Institut de Droit International* text (*reprinted in* [1956-II] YBILC 227) provided in Article II that "The State is responsible for the act of corporate bodies exercising public functions in its territory." Basis of Discussion No 16 in the League of Nations 1930 Codification

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within the ILC itself that regulatory, executive, and adjudicatory functions are to be regarded as governmental.[83] But such functions do not necessarily exhaust the province of government. Special Rapporteur Ago spoke of "public functions which serve in the interests of the community,"[84] which suggests that the analysis should take account of the conception of public functions in each particular country. However, in its first-reading commentary, the ILC referred to entities "empowered, if only exceptionally and to a limited extent, to exercise specified functions which are akin to those *normally* exercised by organs of the State,"[85] which might suggest an objectively fixed conception of what is "governmental."

Such a reading would not accord with the practice of States, and it does not reflect the views, at any rate the current views, of the ILC. To illustrate, independent commissions of inquiry, trading in certain goods, and the provision of health services are in some countries, but not all, regarded as governmental functions. Certain functions are regarded as "inherently governmental" in some countries,[86] but one country's traditions can hardly be used as a universal guide. The position is that Article 5 encompasses certain "core" functions that are generally regarded as being governmental (regulatory, executive, adjudicative) and may also encompass functions that are regarded as governmental in the particular state concerned.

Core functions include issuing currency, the celebration of acts affecting civil status, levying taxes, performing currency exchange controls,[87] adopting or implementing monetary policy, supervision of the banking sector,[88] enforcing monetary judgments,[89]

Conference (*reprinted ibid.,* 222; quoted as part of the ILC Second Reading Commentary, para. (4) to Article 5) provided: "A State is responsible for damage suffered by a foreigner as the result of acts or omissions of such corporate entities (communes, provinces, etc) or autonomous institutions as exercise public functions of a legislative or administrative character . . .". (Basis No 16 was not discussed in the Conference, but it was prepared on the basis of observations received from governments to a questionnaire prepared by the Preparatory Committee (*reprinted ibid.*, 221).)

83 *See* ILC 1253rd mtg, [1974-I] YBILC 16, para. 26 (Reuter); and Observations by the Chairman of the Drafting Committee (Hambro), [1974-I] YBILC 152, para. 9.

84 Ago Third Report (note 15 above) paras. 165, 170; and ILC 1251st mtg, [1971-I] YBILC 5, para. 16: "tasks of common interest," "specific services for the community or . . . functions considered to concern the community" (Ago).

85 ILC First Reading Commentary, [1974-II(1)] YBILC 277, para. (18) to Article 7; reiterated in the ILC Second Reading Commentary, para. (3) to Article 5 (emphasis added).

86 See for the position in U.S. law Chesterman, (2008) 19 EJIL 1055, 1070 *et seq*.

87 *See* Cour de Cassation, November 3, 1952, Époux Martin v. Banque d'Éspagne (1953) 80 JDI 654 (an immunity case).

88 *See Genin* (note 74 above) para. 327.

89 *Cf.* the Montano case, Moore, *International Arbitrations* vol. II (1898) 1630, 1637 (Peru v. U.S., 1808); and the judgment of the Polish Constitutional Court in Case SK 26/03 (January 20, 2004), summarized at www.trybunal.gov.pl. By contrast, a bankruptcy-estate administrator, operating subject to court supervision, was held not to exercise "judicial or State functions": Plama Consortium Ltd v. Bulgaria (Merits) (2008) para. 253; to the same effect *Venable* (note 68 above) para. 22.

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administering natural resources, privatization of state-owned assets,[90] administration of expropriated assets,[91] customs and immigration controls,[92] supervision of regulated professions,[93] setting social insurance contributions,[94] and responsibility for public infrastructure projects (such as irrigation and road-building).[95]

Non-core functions may include, for example, promotion of investments, management of non-performing private sector loans, investing through sovereign wealth funds, the provision of health services, sanitation, telecommunications, and education. There, it seems that the reach of the entity's authority will be of particular relevance. The entity may have power, for example, to handle bank accounts of third parties[96] or to terminate a contract on grounds of public policy or on instructions by the government.[97] In fact, both Special Rapporteur Crawford and the ILC took the view that in such cases the inquiry is more involved[98]:

> It is another thing to identify precisely the scope of "governmental authority" . . ., and it is very doubtful whether article [5] itself should attempt to do so. Beyond a certain limit, what is regarded as "governmental" depends on the particular society, its history and traditions. Of particular importance will be, not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised, and the extent to which the entity is accountable to government for their exercise. The commentary can give guidance on these questions, but they are essentially questions of the application of a general standard to particular and very varied circumstances.

To illustrate, conduct by energy monopolies has been held to engage the responsibility of the State, when such corporations operate in a highly regulated environment and have responsibility for the maintenance or operation of the relevant infrastructure,

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90 *See, e.g.*, Helnan International Hotels A/S v. Egypt (Jurisdiction) (2006) para. 93; and the discussion in the text to notes 133 *et seq*.

91 See the case of Iran's Foundation for the Oppressed, discussed at ILC Second Reading Commentary, para. (2) to Article 5, with reference to Iran-U.S. Claims Tribunal authority; and Caron in Lillich & Magraw, *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (1998) 133–34.

92 *See* ILC Second Reading Commentary, para. (2) to Article 5; *Yeager v. Iran* (note 1 above) para. 43; and William L Pereira Associates, Iran v. Iran (1984-I) 5 IUSCTR 198 (acts of Revolutionary Guards exercising immigration etc functions at the Tehran airport, held to be attributable to Iran as acts of agents of necessity (ILC Article 9), which also requires a showing of exercise of governmental authority.

93 *See* Casado Coca v. Spain, Series A, No 258-A (1994) para. 39 (Barcelona Bar Council, a public-law corporation, engaged responsibility of Spain).

94 *See* BdB v. Netherlands (Communication No 273/1989), Human Rights Committee, *Report 1989*, UN Doc A/44/40 (1989) 286, para. 6.4; Nahlik v. Austria (Communication No 608/1995), Human Rights Committee, *Report 1996*, UN Doc A/51/40 vol. II (1996) 259, para. 8.1.

95 *See Salini v. Morocco (Jurisdiction)* (note 57 above) and *LESI* (note 63 above).

96 *See Maffezini* (note 57 above) para. 78.

97 *See LESI* (note 63 above).

98 Crawford First Report (note 33 above) para. 193; reiterated in the ILC Second Reading Commentary, para. (6) to Article 5.

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security, or supply, etc.[99] A further example is the administration of bankruptcy estates: in some legal systems, the administrator is an "officer of the court," while in others a person acting for the collective benefit of the creditors (under supervision of the court). That some legal systems' conception of administrators as "officers of the court" may lead to a classification of them as organs under ILC Article 4 does not mean that, in all other legal systems, administrators are to be regarded as exercising elements of the governmental authority.[100]

Acts in Exercise of Governmental Authority

The further inquiry called for by Article 5 is whether "the person or entity is acting *in that capacity* in the particular instance." This requires that the putatively attributable conduct be specifically authorized by internal law "as involving the exercise of governmental authority . . . it is not enough that [internal law] permits activity as part of the general regulation of the affairs of the community."[101]

Thus, managerial decisions by a State-owned entity about treatment of staff which are taken on the basis of general labor law cannot give rise to a claim for infringement of the freedom of association.[102] In the same way, contractual and commercial activities not specifically mandated by the grant of authority as part of the entity's special function, and on terms no different from those of (or in competition with) private actors, are not attributable.[103] By contrast, pressure by an autonomous regulator on a television group to adopt a particular corporate structure, by indicating that the existing structure does not comply with the relevant regulatory regime (which the regulator had powers to enforce), was without difficulty held to be attributable to the State.[104]

On one view, the requirement of "acting in that capacity" calls for a showing, not that the relevant acts were taken *in* exercise of governmental authority, but rather that they were in themselves *an* exercise of special prerogatives of power. The notion seems to be that governmental authority is synonymous with the exercise of sovereign authority or prerogatives of power. The *Jan de Nul* tribunal held so, stressing the French rendition of "elements of the governmental authority," "*prérogatives de puissance publique.*"[105] In the circumstances, the tribunal held that conduct by the Suez

99 See the *Foster* case (note 76 above); and Nykomb Synergetics Technology Holding AB v. Latvia (2003), 11 ICSID Reports 158, section 4.2, on which see further Hobér, (2008) 25(5) J Int. Arb. 545, 560.

100 U.S. Commissioner Nielsen thought so in his dissent in *Venable* (note 68 above), 4 RIAA 244–45, but he appears to have been wrong; *see* note 89 above.

101 ILC Second Reading Commentary, para. (7) to Article 5.

102 *See* X v. Ireland App. 4125/69 (1971) 14 YBECHR 219.

103 *See* United Parcel Service of America v. Canada (Merits) (2007) paras. 74–78; EDF Services Ltd v. Romania (2009) paras. 196–198; Case 18/60 Worms v. High Authority [1962] ECR 195.

104 *See* CME Czech Republic BV v. Czech Republic (2001), 9 ICSID Reports 121, paras. 189–90, 539–74; and Lauder v. Czech Republic (2001), 9 ICSID Reports 66.

105 "What matters is not the '*service public*' element, but the use of '*prérogatives de puissance publique*' or governmental authority": *Jan de Nul (Merits)* (note 62 above) para. 170. The tribunal

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Canal Authority was not attributable to Egypt, on the basis that the Authority had acted "like any contractor" might have in an infrastructure project.[106] It seems that the tribunal regarded conduct that could be actionable under a contract as inherently non-attributable commercial conduct. This is difficult to square with authority[107] and with the tribunal's own prior ruling on jurisdiction.[108]

On the one hand, it is clear that the analysis under Article 5 must focus on the act itself, rather than the context of it, which may well be a broad policy formulated by the State.[109] It is also clear that framing the analysis in broad terms of "public service" or "acts for the benefit of the community" will not be helpful. A commercial provider of supplies to the armed forces is on no view exercising governmental authority.[110] And, for State-owned entities, an element of utility or service to the public at large is probably inherent in the participation of the State in the entity. Those considerations do not show how or why the entity is different, and should in international law be treated differently, from a purely private entity. But, on the other hand, the answer to that question cannot be secured by requiring that the act itself must be one which a private individual in no circumstances may ever undertake (such as the issuance of binding ordinances or the use of administrative compulsion). Though in many cases governmental authority will involve regulatory or administrative power, exactly what powers a State sees fit specifically to grant to the entity for the accomplishment of its governmental functions is a matter for that State alone.[111]

As noted, the State performs many acts, such as providing administrative guidance for example, which are not "binding" in the sense of being self-executing or enforceable by administrative coercion. It is difficult to see a good reason for considering such acts as non-attributable on that narrow ground. Thus, failure by a State-owned oil company, charged with the conduct of national oil policy, to assist a private contractor in exporting oil equipment has been considered an expropriatory act attributable to the State. The refusal to consent to exportation, in itself a purported exercise of a contractual right, was held to have been "undertaken in the governmental capacity granted . . . under internal

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was not dealing with the question whether the relevant acts could disclose a cause of action under an investment treaty, but rather with the question whether they were attributable to the state in the first place.

106 *Ibid.*, para. 169.

107 In addition to the authority cited below *see* Condorelli, (1984-VI) 189 RdC 9, 71–76 and the authorities there.

108 *See* Jan de Nul NV and Dredging International NV v. Egypt (Jurisdiction) (2006) para. 80 ("the fact that a dispute involves contract rights and contract remedies does not in and of itself mean that it cannot also involve treaty breaches and treaty claims").

109 *Cf.* Ceskoslovenska Obchodni Banka AS v. Slovak Republic (2004), 13 ICSID Reports 181, paras. 17, 20, 23–25.

110 *See, e.g.*, 7 Spinedi, Forum International 273, 277 (2005).

111 In *UPS v. Canada (Merits)* (note 103 above), Canada argued that "governmental authority" under Articles 1502(3)(a) and 1503(2) of the NAFTA Agreement "requires that the authority referred to is coercive, that is, that the exercise of the power has a binding effect simply through its exercise." The tribunal thought that "the argument is certainly strong," but in the circumstances it did not need to resolve it; *ibid.*, para. 79.

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law," that capacity being the exclusive power to conclude oil contracts.[112] In the same way, commercial-management decisions by a private individual (not official) charged with the task of administering enemy property have been held to be attributable.[113]

Some of the confusion here may be due to the fact that the term "*prérogatives de la puissance publique*" is also used in the law of State immunity.[114] But the intention there is not to capture "governmental authority" but the facially narrower category of "sovereign authority." However that may be, there are three substantive difficulties with importing notions from the law of sovereign immunity in the application of Article 5:

- Immunity operates as a procedural bar, which does not prejudge the legal rules (of domestic or international law) under which the act should be determined on the merits or the appropriate forum for such determination. By contrast, non-attribution excludes wrongfulness at the threshold as a matter of international law.
- The law of State immunity recognizes that a separate entity may be legitimately regarded as part of the State if it has been "entrusted with public functions." Those entities may be entitled to immunity so far as the claim concerns "acts performed by the entity in the exercise of sovereign authority (*acta jure imperii*)."[115] That the entitlement to immunity concerns only certain *acts* does not detract from the acknowledgment that the *entity* is properly claimed to be part of the State.
- Even in the law of State immunity, it is recognized that the distinction between "sovereign" and "commercial" acts is purposive, because an act cannot be severed from its context: "It is not possible to classify the nature of any human activity without reference to its purpose."[116] To illustrate, it may be relevant that the diversion of a cargo of goods to a certain State served political purposes[117] or that dissipation of assets was in pursuance of the government's broader policy.[118] If such considerations are to be taken into account, *Jan de Nul* would have been decided differently if, say, the Suez Canal Authority had entered the contracts in furtherance of Egypt's obligations under an international treaty to carry out clearance works.[119] Yet the test articulated by the *Jan de Nul* tribunal left no room for such considerations.

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112 *See* Petrolane, Inc. et al. v. Iran et al. (1991) 27 IUSCTR 64, paras. 85–97. The tribunal's *obiter* observations in EnCana Corp v. Ecuador (2006), 12 ICSID Reports 427, paras. 154–61 were made on a similar predicate. *Cf.* also Repsol YPF Ecuador SA v. PetroEcuador (2004) para. 120 ("primacy of public interest over private interest is reflected in the content of the contract").

113 *See Société Anonyme de Filatures de Schappe* (1954), 13 RIAA 598, 606 (France-Italy Conciliation Commission).

114 *See* UN Convention on Jurisdictional Immunities of States and Their Property, UN Doc A/RES/59/38 (2004), Article 1(b)(ii)–(iii).

115 *See* Article 27(1)–(2) of the European Convention on State Immunity (Basle, 16 May 1972), ETS No 74.

116 Australian Law Reform Commission, *Foreign State Immunity* (ALRC Report No 24, 1984) 28 (para. 49).

117 *See I° Congreso del Partido* [1983] AC 244 (HL), 64 ILR 307, 323 (Lord Wilberforce, dissenting).

118 *Cf.* Mobil Cerro Negro Ltd v. Petroleos de Venezuela [2008] EWHC 532, para. 61.

119 See the Arrangement between the U.S. and Egypt relating to Salvage or Removal of Navigational Hazards from the Suez Canal (Cairo, June 11, 1974), UNTS No 13796, Articles 2–3.

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The *Jan de Nul* tribunal seems to have been following the *Impregilo v. Pakistan* tribunal, which did say that "the threshold for treaty claims [is] activity beyond that of an ordinary contracting party ('*puissance publique*')."[120] But there was a salient difference between *Impregilo* and *Jan de Nul*. In *Impregilo*, the tribunal declined jurisdiction in respect of contractual claims arising from a contract that had been concluded with a State-owned entity, on the basis that the rules of attribution did not operate to join the State as a party to the contract.[121] Whatever claims might remain in respect of conduct by that State-owned entity would have to be shown to be attributable on the basis of ILC Article 5. The contract claims having been excluded on a separate basis, any exercise of governmental authority *in the circumstances* of the case would have to involve conduct that was outside the contractual relationship.[122] *Impregilo* does not stand for a general proposition that conduct in the course of the performance of a contract can by definition never amount to exercise of *puissance publique*. Indeed, the *Bayindir v. Pakistan* tribunal in similar circumstances rightly said that[123]:

> [T]he very fact that . . . questions are governed by specific contractual provisions does not necessarily mean that they have no relevance in the framework of a treaty claim. One cannot seriously dispute that a State can discriminate against an investor by the manner in which it concludes an investment contract and/or exercises the rights thereunder.

Subsequently, the *Biwater* tribunal used the term "*puissance publique*" as shorthand for acts of Tanzania "which exceed the normal course of conduct of a State shareholder of a State-owned company."[124] Such acts included the withdrawal of a tax exemption, the occupation of company facilities with assistance by the police, and the "usurpation of management control."[125] But they also included a ministerial press conference and address to the staff of the company, both of which were politically motivated.[126] The repudiation by the State-owned company of the contract with the foreign investor would also have amounted to an act of *puissance publique*, had it been "procured" by the government on political motives.[127] In *Biwater*, the term *puissance publique* is used to describe conduct which finds no reasonable foundation in private-law rights and therefore can be seen as motivated by other, governmental or political reasons. The *Jan de Nul* tribunal seems to have approached the "governmental authority" test in a similar way. Yet the question whether or not the conduct of the Suez Canal Authority involved no more than a good-faith exercise (or breach) of contractual rights is a matter for the merits, or at most the admissibility of a claim.[128] It is difficult to see how it can stop a claim at the level of attribution.

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120 *Impregilo v. Pakistan* (note 66 above) para. 266(b).

121 See further section IV below.

122 And "not decisions taken in the implementation or performance of the contracts": *Impregilo v. Pakistan* (note 66 above) para. 281.

123 Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Pakistan (Jurisdiction) (2005) para. 215.

124 Biwater Gauff Ltd v. Tanzania (2008) para. 460.

125 *Ibid.*, paras. 501–03.

126 *Ibid.*, paras. 696, 698.

127 *Ibid.*, para. 492.

128 See below, text to notes 165 *et seq*.

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Jan de Nul aside, the position seems to be as follows. The renegotiation of an oil contract may be an act in exercise of governmental authority where authority to do so vests exclusively in a State-owned oil company[129]; so may the termination of a construction agreement on the basis of a general public-law entitlement to do so[130]; so, finally, may be a decision to prefer one type of project financing over another.[131] All those acts could in isolation be seen as instances of garden variety transactional conduct; but what matters is the specific grant of authority to the national entity to take those acts as part of its "empowerment" and functions[132]. On that basis, it appears to be right to attribute to Egypt acts of a private law corporation formed by the State to handle the privatization of hotels, insofar as those acts—including private law leases and the grading of hotels—are acts which that corporation was exclusively authorized to undertake as part of the privatization regime.[133]

It would also be right to attribute to Romania acts of the State Ownership Fund relating to the privatization of a State-owned company as part of its statutory function. The *Noble Ventures* tribunal, which so held,[134] proceeded on the basis (which appears to be wrong, for reasons discussed earlier in this chapter) that the separate personality of the Fund meant that it could not be regarded as an organ, and its acts could be attributed to Romania only on the basis of ILC Article 5.[135] The tribunal had no difficulty holding that the statutory function of carrying out privatizations was an empowerment to exercise governmental authority. On an analysis of Romanian law, "no relevant legal distinction is to be drawn between [the Fund], on the one hand, and a government ministry, on the other hand, when the one or the other acted as the empowered public institution under the Privatization Law."[136] A major component of the claim was that the Fund had failed to exert "due diligence" to secure the rescheduling of debts to various government bodies and that this had led to the bankruptcy of the company. This undertaking Romania characterized as commercial in nature. In consequence, Romania argued, the Fund's failure to abide by it did not constitute an exercise of governmental authority. The tribunal disagreed[137]:

> With regard to the argument of the Respondent that a distinction has to be drawn between attribution of governmental and commercial conduct, the latter not being

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129 See *EnCana* (note 112 above).

130 See *LESI* (note 63 above) paras. 113–14.

131 *Ibid.*, para. 115.

132 *Cf.* TOTO Costruzioni Generali S.p.A. v. Lebanon (Jurisdiction) (2009) para. 59.

133 That seems to be the basis for the holding that "EGOTH [the Egyptian General Company for Tourism and Hotels] was an active operator in the privatisation of the tourism industry on behalf of the Egyptian Government . . . . Even if EGOTH had not been officially empowered by law to exercise elements of the governmental authority, its actions within the privatisation process are attributable to the Egyptian State": *Helnan v. Egypt (Jurisdiction)* (note 90 above) para. 93 (but contrast the decision on the merits: Helnan International Hotels A/S v. Egypt (Merits) (2008) para. 152). The one-sentence holding to opposite effect in Wena Hotels Ltd v. Egypt (Annulment) (2002) 41 ILM 933, para. 35 seems to be wrong (and indeed beyond the original tribunal's findings).

134 *See* Noble Ventures Inc v. Romania (2005).

135 *Ibid.*, paras. 69–70.

136 *Ibid.*, para. 79.

137 *Ibid.*, para. 82.

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> attributable, the following has to be said. The distinction plays an important role in the field of sovereign immunity when one comes to the question of whether a State can claim immunity before the courts of another State. However, in the context of responsibility, it is difficult to see why commercial acts, so called *acta iure gestionis*, should by definition not be attributable while governmental acts, so called *acta iure imperii*, should be attributable. The ILC-Draft does not maintain or support such a distinction. Apart from the fact that there is no reason why one should not regard commercial acts as being in principle also attributable, it is difficult to define whether a particular act is governmental. There is a widespread consensus in international law, as in particular expressed in the discussions in the ILC regarding attribution, that there is no common understanding in international law of what constitutes a governmental or public act. Otherwise there would not be a need for specified rules such as those enunciated by the ILC in its Draft Articles, according to which, in principle, a certain factual link between the State and the actor is required in order to attribute to the State acts of that actor.

This reasoning illustrates that, though commercial acts in principle are not taken in exercise of governmental authority (but, rather, in pursuance of the entity's own, non-governmental goals), when the performance of such acts is part of the entity's special grant of authority and statutory function, they may be attributable to the State. Thus, if an entity organized as a private law corporation has been tasked with the administration of fisheries quotas secured under international treaties, contracts for the commercial exploitation of those quotas by subcontractors will fall within the scope of Article 5; but contracts for the lease of office space will not. In a similar way, the Iran-U.S. Claims tribunal has held that the foreclosure on a mortgage by a State-owned bank was not attributable to Iran, not because of its nature as a commercial act but because the bank had done so under the common law relating to mortgages, rather than a specific entitlement granted as part of special functions.[138]

INEXISTENCE OF "NON-JUSTICIABLE" ACTS OF STATE ORGANS

Attribution seeks only to determine whether a given act is one for which the State may be held to account: "[t]o show that conduct is attributable to the State says nothing, as such, about the legality or otherwise of that conduct . . .".[139] Despite occasional assertions to the contrary,[140] the nature of the conduct is immaterial for purposes of attribution when the conduct concerned is that of a State organ and therefore the principle of plenitude of attribution applies. "[T]here is no basis for the idea that a State could evade international responsibility for one of its own acts by arguing, not that the act was committed by a private party, but that it *could* have been so committed."[141]

138 *See* International Technical Products Corp v. Iran et al. (1985-II) 9 IUSCTR 206, 238–39.

139 ILC Second Reading Commentary, introductory para. (4) to Chapter II of Part One of the ILC Articles.

140 For example, Professor Reuter believed that "legal acts of a commercial nature, such as acts of exchange or sale were never attributable to the State, even if carried out by a State body": ILC 1253rd mtg, [1974-I] YBILC 16, paras. 25–26.

141 Crawford First Report (note 33 above) para. 176.

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To illustrate, if a Minister has refused to permit a foreign investor to acquire a stake in a company, for purposes of attribution it matters not whether the Minister was representing the State as a shareholder in the company, rather than acting in exercise of regulatory powers.[142] It is a wholly separate question—one of substantive law—whether international law places any limitations on a State from taking action as a shareholder to prevent a foreign investor from buying shares in a company.

Thus, the law of attribution cannot be used to erect a barrier of "non-justiciable" acts that may never be attributable to organs. The ILC put it as follows[143]:

> It is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as "commercial" or "*acta iure gestionis*". Of course the breach by a State of a contract does not as such entail a breach of international law . . . . But the entry into or breach of a contract is nonetheless an act of the State . . ., and it might in certain circumstances amount to an internationally wrongful act.

The General Assembly Sixth Committee, which the ILC had earlier specifically asked to consider the matter,[144] emphatically rejected any distinction between *iure gestionis* and *iure imperii* acts, on the grounds that it was not reflected in "practice and jurisprudence," was "extremely difficult" to operate and was wrong as a matter of principle.[145]

Thus, conduct by State organs that has been attributed to States includes several examples of acts which did not involve the exercise of any governmental prerogative, such as:

- The organization of a campaign to promote domestic products in preference to imports from other European Community States.[146]
- The failure to ensure freedom of association for State employees in collective labor contracts or through the statutes of the relevant organizations.[147]

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142 On the former hypothesis, see the Luxembourg government's negative reaction to the hostile takeover of a Luxembourg company, in which the government held a shareholding, by a Dutch entity controlled by Indian shareholders, on grounds of protecting the workforce from future redundancies: *The International Herald Tribune*, February 1 and 2, 2006. (A few days later, draft legislation was tabled before Parliament to make the proposed takeover prohibitively expensive; *see ibid.*, 7 February 2006.) On the latter hypothesis, see Dubai Ports' proposed acquisition of terminals at six U.S. ports, discussed by Malkawi, (2006) 7(3) JWIT 443. In *Lalanne & Ledour* (1903), 10 RIAA 17 (France-Mexico Commission), the wrongful act was the prevention of export of goods. The Commission held that there was "an abuse of authority . . . by the president of the [federated] State of Guyana by refusing, in his capacity as an associate of [the private company that had an exclusive right to export by boat], and that this abuse was arbitrarily sustained by the chief of the customs . . .".

143 ILC Second Reading Commentary, para. (6) to Article 4 (citations omitted).

144 *See* [1998-II(1)] YBILC 17, para. 35.

145 See UN Doc A/CN.4/496 (1999) para. 117.

146 *See Commission v. Ireland* (note 63 above) para. 27 (practice amounted to potential quantitative restriction on imports, "comparable to that resulting from government measures of a binding nature").

147 See the *Swedish Engine Drivers' Union* case, Series A, No 20 (1976) para. 37; and Schmidt & Dahlstrom v. Sweden, Series A, No 21 (1976) para. 33. (Although in the latter case, the Commission, Series B, No 19 (1974) at 34, took the view that the state's responsibility could

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- As a litigant in domestic court proceedings, the failure to act expeditiously in order "to ensure that the dispute is speedily concluded,"[148] or the failure to file memoranda in court proceedings between third parties to point out to the courts how to ensure compliance with the State's international obligations.[149]
- Taking purely material steps as part of exercising control over the operations of a company.[150]
- As a litigant in international proceedings, taking any act that could aggravate or exacerbate the dispute,[151] providing administrative guidance[152] or recommendations,[153] or making adverse public statements[154] (in an official capacity).

There is a substantive-law foundation for this position: "there is no *a priori* limit to the subject matters on which States may assume international obligations . . .".[155] States often undertake international obligations whose performance does not involve the exercise of any special governmental power. Dissemination of information,[156] or entering into a private law transaction[157] (such as a sale or a lease of property[158] or an agreement with a foreign investor governed by international law) are examples.[159]

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rest on its failure to take legislative measures to ensure freedom of association, the Court made no such finding, stating curtly that the relevant obligation was "binding upon 'the State as an employer,' whether the latter's relations are governed by public or private law".) See further Dipla, *La Responsabilité de l'État pour Violation des Droits de l'Homme: Problèmes d'Imputation* (1994) 40 *et seq*.

148 *See* X v. France, Series A, No 234-C (1992) paras. 41-44.

149 *See Concessions des Phares de l'Empire Ottoman* (1956), 12 RIAA 155, 233 (France v. Greece); Iran v. U.S. (Case No A27), (1998) 34 IUSCTR 39, para. 67.

150 *See, e.g.*, Tippetts et al. v. TAMS-AFFA & Iran et al. (1984-II) 6 IUSCTR 219, 22–226.

151 Amco Asia Corp v. Indonesia (Interim Measures) (1983), 1 ICSID Reports 410.

152 *See* ILC Second Reading Commentary, para. (6) to Article 4 and the references at note 115.

153 *See* Case 30/77 Regina v. Bouchereau [1977] ECR 1999, paras. 21–23 (executive recommendation was in the circumstances a necessary part of the process for the issuance of a deportation order).

154 *See, e.g., Wena (Merits)* (note 2 above) para. 64 (ministerial "defamatory" statements to the media); Mondev v. U.S. (2002), 6 ICSID Reports 192, para. 64; and Case C-470/03 AGM-COS.MET Srl v. Suomen valtio [2007] ECR-I-2749 (public statements as "obstacles to free movement of goods").

155 ILC Second Reading Commentary, para. (9) to Article 12.

156 *See, e.g.*, UN Human Rights Committee, CCPR General Comment No 3, Implementation at the National Level (Article 2), July 29, 1981, para. 2; *id.*, CCPR General Comment No 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) para. 7 ("educative" measures "to raise levels of awareness about the Covenant").

157 *See, e.g.*, the Implementation Agreement between the UK and the Russian Federation (London, July 7, 2005 and Moscow, July 12, 2005), TS No 38 (2005) Cm 6684, Article 9: "ECGD [the Export Credits Guarantee Department] commits not to enter . . . into any market transaction that may affect in any way its economic or credit risk exposure to its Paris Club debt towards the Russian Federation."

158 *See, e.g.*, the U.S.-Canada Agreement regarding the continued use of land adjacent to certain leased bases (Ottawa, June 15, 1966), UNTS No 8595.

159 *See generally* Mann, (1957) 32 BYIL 20, *reprinted in id.*, Studies in International Law 140 (1973).

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Conversely, a private-law right may afford a defence to a charge of breach of international law. To illustrate, the termination of a contract with a foreign investor may be a legitimate exercise of contract rights on the part of the State (and so not an expropriatory act)[160]; and the temporary assumption of management rights over a foreign-owned enterprise may be due to a force majeure situation or a mandate from the foreign investor (rather than an intention to deprive the foreign investor of management of the enterprise).[161]

It follows that it would be unduly restrictive to limit putative breaches of international law to cases of exercise of governmental powers. By definition, governmental powers presuppose the existence of a public-law predicate for taking the relevant action. Yet international law is not concerned only with actions that are actually or putatively lawful in domestic law.[162] A foreign investor which is prevented from accessing and managing (say) an industrial plant may have a complaint under international law, whether the plant has been requisitioned by judicial or executive action[163] or simply taken over by workers at the behest or with the tolerance of the official authorities.[164]

There should therefore be no confusion between the question of attribution and a defence that the conduct fails to disclose a colorable claim. The latter may be on the basis that the relevant conduct has no legal significance in international law (e.g., it was no more than a contract breach, rather than an expropriation)[165]; is causally or objectively unable to constitute the wrong complained of[166]; or did not constitute a

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160 *See International Fisheries* (1931), 4 RIAA 631, 691 (U.S.-Mexico General Claims Commission); Azinian v. Mexico (1998), 5 ICSID Reports 269, paras. 97–100; SGS v. Pakistan (Jurisdiction) (2003), 8 ICSID Reports 406, para. 161; and the case law regarding terminable-at-will contracts cited by Weston et al., International Claims: Their Settlement by Lump Sum Agreements, 1975–1995 (1999) 63 (note 101).

161 *Cf.* Bulgaria's defense in Compagnie d'Électricité de Sofia et de Bulgarie v. Bulgaria (1923) 3 MAT 308, 315–18 (Belgo-German MAT), *reprinted in Electricity Company of Sofia and Bulgaria, Pleadings*, PCIJ, Series C, No 88 (1939) 60; and Sedco, Inc v. NIOC & Iran (1987-II) 15 IUSCTR 23, paras. 27–28 (allegation that possession of oil rigs was taken after the exercise of a purchase option under a preexisting contract).

162 *Cf.* the *Fair American* case, Moore, International Arbitrations vol. iv (1898) 3369 (U.S. v. Mexico, 1841) (execution of confiscatory regulations adopted in breach of domestic law); Briegel v. Germany (1923) 3 MAT 358, 360–61 (Anglo-German MAT) (sequestrations unauthorized by law); and France's pleadings in *"Électricité de Beyrouth" Company*, ICJ Pleadings, 56 (charging Lebanon with breaches of concession by way of government's failing to pay bills due, encouraging embargo on payment by other consumers, etc).

163 *See Elettronica Sicula Spa (ELSI)*, ICJ Reports 1989, 15.

164 *Cf.* Sohn & Baxter, (1961) 55 AJIL 545, 559 ("The alien may simply be forbidden to employ a certain portion of a building which he occupies, either on a wholly arbitrary basis or on the authority of some asserted requirement of the local law."); Aucoven v. Venezuela (2003), 10 ICSID Reports 314, paras. 125–28 (where in the circumstances no final finding was made in that regard).

165 *See, e.g.*, Waste Management Inc v. United Mexican States (II) (2004), 11 ICSID Reports 362, paras. 115 and 174; Joy Mining Machinery Ltd v. Egypt (2004) 19 ICSID Rev–FILJ 486, para. 78; *EnCana* (note 112 above) para. 194; and *Jan de Nul (Merits)* (note 62 above) paras. 169–70.

166 *See, e.g.*, Kalogeropoulou v. Greece and Germany App No 59021/00, ECHR 2002-X, 13–14 (as a litigant in the Greek courts, Germany was not exercising "jurisdiction" in the sense of

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"measure" in the sense of the relevant treaty.[167] That kind of defence goes to the merits or, on a prima facie test, to the admissibility of a claim.[168] That seems in fact to have been Poland's position in the *Eureko* case, where it was argued that the relevant contracts between the claimant and the Polish Treasury "constituted civil law agreements . . . which fall within the sphere of the exercise of civil law rights and which are not at all connected with the exercise by the State Treasury of governmental powers."[169] The argument appears to have been that the relevant conduct could not be characterized as a breach of the applicable treaty (as contended by the claimant), not because it could not be attributed to Poland,[170] but rather because it was in the nature of a contractual breach to be addressed with private law remedies. Yet curiously the tribunal addressed Poland's submission purely in terms of attribution and rejected it.[171]

ATTRIBUTION OF REPRESENTATIONS

The rules of attribution relate to international responsibility for wrongful conduct, i.e., a breach of an international obligation.[172] "Attaching to the State a manifestation of will which is valid, for example, in order to establish its participation in a treaty is . . . in no way identifiable with the operation which consists of attributing to the State particular conduct for the purpose of imputing to it an internationally wrongful act entailing international responsibility."[173] Thus, special rules govern the conclusion of treaty relations[174] and issuance of unilateral statements that are binding on the

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Article I of the ECHR); *Waste Management (II)* (note 165 above) para. 131 (a litigant cannot commit a denial of justice "unless its improper actions are endorsed or acted upon by the court, or unless the law gives it some extraordinary privilege which leads to lack of due process"); Saipem SpA v. Bangladesh (Merits) (2009) para. 131 (court interference with arbitration proceedings at request of state-owned company; conduct of that company "cannot amount to expropriation" as it is not in the nature of a governmental act).

167 Though the value of such an argument is at best debatable; *see Waste Management (II)* (note 165 above) para. 174; Ethyl Corp v. Canada (Jurisdiction) (1999) 38 ILM 708, para. 66 (official announcement of forthcoming law limiting imports); *Fisheries Jurisdiction*, ICJ Reports 1998, 12, para. 66 ("in its ordinary sense the word ['measure'] is wide enough to cover any act, step or proceeding"); and *United States–Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R (WTO Appellate Body, 2003) paras. 81–82 (prospective statements of policy can affect "the security and predictability needed to conduct future trade").

168 *See e.g.*, Salini & Italstrade v. Jordan (Jurisdiction) (2001), 6 ICSID Reports 400, para. 163.

169 Eureko BV v. Poland (Partial Award) (2005), 12 ICSID Reports 335, para. 124.

170 *Ibid.*, para. 123, note 8.

171 See *Eureko* (note 169 above) paras. 125–34. See the critique by Douglas, (2006) 22 Arb. Int. 27, 37–45.

172 See ILC Article 2, quoted at note 25 above.

173 ILC First Reading Commentary, [1973-II] YBILC 189, introductory para. (5) to Chapter II of Part One.

174 *See* Vienna Convention on the Law of Treaties (Vienna, May 23, 1969), 1155 UNTS 331, Articles 7–8.

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formulating State.[175] Liability for injurious consequences of lawful acts may similarly follow special rules.[176] The practical significance of that point arises especially in two situations, which merit discussion separately.

Representations Frustrated by Later Conduct

The first situation is where there is a representation that is not in itself wrongful but nonetheless part of the predicate of the wrongful act—for example, a representation on which reliance is placed by an investor as generating legitimate expectations of future conduct, which expectations are later frustrated by inconsistent conduct. The question is whether the rules of attribution apply not only to the subsequent inconsistent conduct, which is the allegedly wrongful conduct, but also to the initial representation.

In part, the issue has arisen with respect to representations which are alleged by the State to have been *ultra vires* under its law and purported to have been retracted on that basis.[177] The rule of attribution that comes closest to being apposite to such situations is that set out in ILC Article 7, which provides that:

> The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

On its face, this rule is concerned with attribution of conduct that itself constitutes a breach of a State's international obligations (e.g., unauthorized brutality by the police).

In other cases, the initial representation is indisputably lawful under the law of the host State, but the inquiry is about the extent of the legitimate expectation or other entitlement that it is said to have generated. The legitimate expectation is then relevant in determining whether the later, allegedly wrongful, act is expropriatory, unfair and inequitable, or delictual on some other ground.

In respect of both types of cases, there is no great difficulty with applying the rules of attribution to conduct that is not in itself wrongful. This may rest on the basis that the non-wrongful conduct is a necessary part of the wrong complained of: the wrongfulness lies in the frustration of a prior representation. This approach finds some support in the view of the ILC that "the entry into or breach of a contract by a State organ is . . . an act of the State for the purposes of [attribution], and it might in certain circumstances amount to an internationally wrongful act."[178]

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175 See the ILC Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, UN Doc A/CN.4/L.703 (2006), Principle 4.

176 See ILC 1257th mtg, [1974-I] YBILC 29, para. 25 (Quentin-Baxter); Quentin-Baxter, Preliminary Report on International Liability for Injurious Consequences arising out of Acts not Prohibited by International Law, UN Doc A/CN.4/334 and Add.1 & Corr.1 and Add.2, [1980-II(1)] YBILC 247, para. 19.

177 *See* Meron, (1957) 6 ICLQ 273.

178 ILC Second Reading Commentary, para. (6) to Article 4 (citations omitted).

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Admittedly, in the cases discussed here, attribution may be only the beginning of the inquiry. Whether the representation so attributed entitles its recipient reasonably to expect a certain course of conduct is a matter of the merits. In other words, by operation of the rules of attribution one may answer only the question whether the representation has been issued by a State organ or other person or entity whose acts may engage the responsibility of the State. Attribution says nothing about the legal significance of the representation, that is, whether and to what extent it may be relied upon by its recipient or, conversely, varied or revoked by the State. To illustrate, that a technical department of government may issue a paper identifying the precise location of a hypothetical boundary line does not amount to an acceptance of that line as an international boundary.[179] In the same way, one can see that a representation about the availability of a tax exemption could be relied upon if made by the Prime Minister's office or the Ministry of Economy but not if made by the Ministry of Education.

This analysis appears to be tenable in the light of investment treaty case law. Thus, the tribunal in *ADF v. U.S.* referred to "representations made by authorized officials"[180]; and the tribunal in *SPP v. Egypt* said that the acts on which the investor had relied and was held legitimately to have relied were "cloaked with the mantle of government authority and communicated as such."[181] In both cases, the investor's ability to rely on the relevant representation (and therefore the legitimacy of the putative expectation itself) rested, not on bare rules of attribution but rather on the position of the officials involved and the content and nature of the particular representation.[182] Indeed, in a recent case, the principle was put as follows: "It is difficult for an organ or official who manifestly lacks competence to be able to induce reasonable reliance in a third party, such as the foreign investor . . . . In the end, everything depends on the particular circumstances surrounding the actions or statements at the heart of the estoppel allegations."[183]

That the rules of attribution are necessary but not sufficient in the analysis of such situations appears to have been accepted in respect of two cognate issues: whether discussions with municipal authorities or State-owned companies can satisfy the requirement of negotiations as a necessary prior step to arbitration[184] and whether endorsement of an investment by government officials can meet the requirement of

179 *See Gulf of Maine*, ICJ Reports 1984, 246, paras. 131–39.

180 ADF Group Inc v. United States (2003), 6 ICSID Reports 470, para. 189.

181 See Southern Pacific Properties (Middle East) Ltd v. Egypt (Merits) (1992), 3 ICSID Reports 189, paras. 81–85, in particular para. 83. The tribunal referred to "expectations protected by established principles of international law," referring in all likelihood to principles of estoppel.

182 *See also Aboilard* (1905), 11 RIAA 71 (France v. Haiti) (refusal to perform agreement with foreigner concluded by three ministers acting in the name of the government, and authorized so to act, constitutes a "frustration of legitimate expectations").

183 Duke Energy Int'l Peru Investments No 1, Ltd v. Peru (Merits) (2008) paras. 249-251; and see *ibid.*, paras. 320 *et seq.* (whether representations made by State agencies in the context of a privatization process were binding on tax authorities).

184 *See Tokios* Tokelės v. Ukraine (Jurisdiction) (2004), 11 ICSID Reports 313, para. 102; *Salini v. Morocco (Jurisdiction)* (note 57 above), 6 ICSID Reports 400, para. 18.

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obtaining a certificate approving the investment, as necessary for the investment to be protected by the treaty.[185]

On this analysis, the *MTD* case appears at first blush to be an outlier. There, the representation consisted in acts by Chile's Foreign Investment Commission. The Commission's statutory function was to approve the "inflow of foreign capital . . . and to stipulate the terms and conditions of the corresponding contracts." In that case, the Commission had approved the making of an investment by MTD, and an "investment contract" was concluded between MTD and the Commission providing that MTD would develop "a real estate project on 600 hectares of Fundo El Principal de Pirque."[186] The Ministry of Housing and Urban Development later refused to assent to the rezoning that was necessary in the circumstances, and this was the basis of MTD's claim. Chile argued that the Commission's function did not go beyond approval of importation of funds, and the contract was therefore incapable of giving rise to a legitimate expectation that rezoning would be forthcoming. Urban planning was a separate function which belonged to the Ministry alone.

The tribunal disagreed, holding that "approval of an investment by the FIC for a project that is against the urban policy of the Government is a breach of the obligation to treat an investor fairly and equitably."[187] The stated basis for that finding was that the Ministry and the Commission "for purposes of the obligations of Chile under the BIT . . . represented Chile as a unit, as a monolith."[188] Although the reference to the concept of the unity of the State is redolent of the rules of attribution, the tribunal's decision appears to rest on a view that, as a matter of substantive law, co-ordination was required among the Commission and the Ministry and that the investor was entitled to expect that such coordination would have taken place. (How that view accords with the separation of competences typical among government departments was not explained.)

Contractual Breaches Actionable Under Umbrella Clauses

Where the wrong alleged is the breach of a contractual obligation actionable under an umbrella or "specific undertakings" clause, the question may be asked in the first place whether the contract is one that the host State is required to perform as a party to it. For example, where the relevant treaty provides that "Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party,"[189] it is sometimes necessary to determine

185 *See* Desert Line Projects LLC v. Yemen (2008) paras. 118–21.

186 MTD v. Chile (Merits) (2004), 12 ICSID Reports 6, para. 54.

187 *Ibid.*, para. 166.

188 *Ibid.*

189 Article 2(2) of the UK Prototype Bilateral Investment Treaty (1991), 3 UNCTAD, International Investment Instruments: A Compendium 185 (1996); and Article 2(2) of the 2005 UK prototype text, *reprinted in* Dolzer & Schreuer (note 3 above) 376.

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whether the entity that is signatory to the obligation "entered into" is "it," the State, for the purposes of the clause.

The answer will be straightforward in the cases where the contract has been concluded by (say) "the Government" or "the Republic," stated to be acting through an authorized entity (typically, a Ministry or a specialized agency). In those cases, a public-law delegation of authority or private law agency relationship under domestic law will be extant on any view.[190] The matter is more complex when there is no delegation or agency, and the signatory entity has separate personality in domestic law and is able to undertake obligations in its own name and for its own account and perform them by its own means and through its own property. In essence, the question here may be stated as whether by operation of international law a State can become a Party to a contract that in the domestic law sphere binds only its signatory, being a separate entity. If so, contractual breaches could potentially engage the international responsibility of the State in an action under an umbrella clause. The policy implications are substantial.

There is authority for the proposition that contractual obligations of entities separate from, or subordinate to, the "central government" in principle do not bind the State on the international plane.[191] This would be a rule of substantive law, recently expressed by the *ad hoc* Committee in the *Vivendi* case as follows: "the State of Argentina is not liable for the performance of contracts entered into by [the federated province of] Tucumán, which possesses separate legal personality under its own law and is responsible for the performance of its own contracts."[192] Thus, the question that arises is whether umbrella clauses may be read as requiring of the State observance of contractual obligations which under their proper (domestic) law bind only their signatory, being a body with separate legal personality. In answer, the view has been expressed that an umbrella clause does not "transform the obligation which is relied on into something else,"[193] i.e., into a substantive obligation of international law. On that view,

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190 Though in *Texaco v. Libya* (note 40 above) the binding effect on the state of Libya of a contract signed by the Ministry of Oil and Gas was established on the basis of the rule of the unity of the state, which relates to attribution. The cases analysed by Böckstiegel, *Arbitration and State Enterprises* (1984) 43–46, under the headings of actual or apparent authority, functional identity with the state, and abuse of rights by misuse of corporate personality, would also fall within the broad category where the state's participation in the contract may be established on agency theories. In *Petrobart Ltd v. Kyrgyz Republic* (2005), 13 ICSID Reports 387, it was argued that a state-owned company had acted as an agent for the state ("for and on behalf of the Kyrgyz Republic"), but the tribunal did not enter the issue.

191 See the Harvard Law School Draft Convention on Responsibility of States for Damages Caused in their Territory to the Person or Property of Foreigners, (1929) 23 AJIL Spec Supp 132, Articles 3 and 8(b), and the commentary at pp. 145 and 168; and the revised 1961 text (Sohn & Baxter, note 165 above), Article 12 and the commentary.

192 Compañia de Aguas del Aconquija SA and Vivendi Universal v. Argentina (Annulment) (2002), 6 ICSID Reports 340, para. 96; quoted with approval in Generation Ukraine Inc v. Ukraine (2003), 10 ICSID Reports 240, paras. 10.5–10.6.

193 Crawford, (2008) 24 Arb. Int. 351, 362, and 369; and CMS Gas Transmission Company v. Argentina (Annulment) (2003) 42 ILM 788, para. 95(c). Accord Nouvel in Leben (ed), *Le Contentieux Arbitral Transnational relatif à l'Investissement* (2006) 25, 46–51.

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the content and proper law of, and the parties to, the obligation remain unaffected by the umbrella clause: these are matters governed by their proper law under ordinary conflicts rules; and the rules of attribution do not apply at all.

There are several difficulties with that thesis, which appears to assume what must be demonstrated. First, on its face an umbrella clause of the kind discussed here[194] does seem to set forth "a rule of international law imposing upon a State the duty to ensure the observance of a particular contract."[195] On any view, breach of an umbrella clause is not a breach of the underlying obligation whose observance the clause calls for; it is a breach of the umbrella clause itself. The only thing that umbrella clauses do not expressly say is that rules of attribution are to apply; but vanishingly few treaties say anything about attribution at all. Second, for the purposes of an umbrella clause, the relevant obligation must be referable to a "contracting State," which is a notion of international law. As a rule, terms in international treaties are not dependent on domestic law for their interpretation. Third, in domestic systems where there is no unitary legal person called "the State,"[196] the umbrella clause would have no significance at all, which could hardly have been the intention of the parties to the treaty. Fourth, one may doubt the wisdom or practicality of applying to umbrella clause claims rules different from those that apply where a contractual representation is pleaded as a predicate for the breach but not in itself the breach (as discussed before.)[197] Finally, it seems difficult to accept that the unilateral (say, legislative) annulment of (say) a tax holiday accorded in an investment contract signed by the Tax Administration Agency does not give rise to an umbrella clause claim on the theory that the Agency has separate legal personality. Historically, the umbrella clause was designed to counter precisely such conduct, that is, conduct that is not *per se* actionable as a breach under the proper law of the contract.[198] (Indeed, on one view, ordinary contractual breaches of "ordinary commercial contract" terms are never caught by an umbrella clause.[199])

In the light of those considerations, determination of whether the State has "entered into" the relevant obligation would call for an analysis under international law, not domestic law. Here, too, the rules of attribution may well be relevant. It is true that the implications of applying rules of attribution are considerable. But it is also true that, as

194 Text to note 189 above.

195 Observations by the Chairman of the Drafting Committee (Hambro), [1974-I] YBILC 152, para. 10. *See also* First Reading Commentary, [1974-II(1)] YBILC 277, para. (13) to Article 7 ("[I]t has been often affirmed as a principle that the state cannot be held internationally responsible for the breach of contracts entered into by the organs of a territorial government entity . . .. [I]t is necessary to determine whether or not, in the specific case in point, the State is under an international obligation, for example in virtue of a treaty, requiring that State . . . to honour certain contractual obligations under internal law . . . .").

196 Crawford (note 193 above) 355 gives the example of Poland.

197 Nouvel (note 193 above) 42 distinguishes between a contract that may be attributable to the state as a fact ("*fait étatique*") from a contract that binds a state contractually ("*engagement étatique*"), but that is a classification proposed by that author and not a statement of positive law.

198 *See generally* Sinclair, (2004) 20 Arb. Int. 411.

199 *See, e.g.*, Pan American Energy LLC v. Argentina (Preliminary Objections) (2006) para. 109; and Wälde, (2004) 1 TDM 31.

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noted, the scope of obligations imported by umbrella clauses is not settled, and a clarification of that scope seems to be a more appropriate way to deal with the implications that arise.

The case law relevant here comprises decisions on umbrella clause claims but also decisions on related questions of a jurisdictional nature under the terms of particular treaties. One strand of cases is to the effect that rules of attribution apply to determine whether the State was an obligor under a contract signed by an entity with its own personality in domestic law. The most straightforward case appears to have been *Eureko*, where the relevant contract had been concluded by the Treasury, a government Ministry. The Treasury had separate personality in Polish law. This was held to be immaterial to Poland's international responsibility.[200] The conclusion appears justified on any view of the matter (i.e., under an international law or under a domestic law analysis), given that, for the purposes of sovereign immunity, it is Poland's own position that the Treasury "does not hold property separately from the State," and that its "core function—to hold and administer property of the Polish State—is indisputably governmental."[201]

The *SwemBalt* tribunal also applied principles of attribution in respect of some acts that appear to have been taken by (*inter alios*) municipal authorities or a specialized agency in a contractual setting. The explanation given was that[202]:

> [T]he subdivisions of the state and the way in which each state chooses to divide the work between such subdivisions is without relevance. If the state delegates certain work to lower levels of government, be they federal, regional or municipal, it must be an obligation of the state under international law to ensure that its obligations under international law . . . are fulfilled by such subdivisions.

Several other tribunals have followed the same approach, without much elaboration, both in respect of specialized agencies[203] and State-owned companies.[204]

Another strand of cases, by contrast, appears to follow the approach adopted in *Generation Ukraine*, to the effect that:

> [T]he acts of [a municipal authority] may be imputable to Ukraine as a sovereign state for the purpose of the international law of responsibility . . . . But such rules do not operate to join the central government of Ukraine to contractual relationships entered into by municipal authorities.[205]

200 *See Eureko* (note 169 above) paras. 115–34.

201 *See* Garb et al. v. Republic of Poland, 207 F. Supp. 2d 16, 35 (E.D.N.Y. 2002).

202 SwemBalt AB v. Latvia (2000), [2004:2] SAR 97, para. 36.

203 *See Noble Ventures* (note 134 above) paras. 68 *et seq*; *LESI* (note 63 above) para. 19; and SGS v. Pakistan (Jurisdiction) (note 160 above) para. 166 (Water and Power Development Authority of Pakistan).

204 *See Nykomb* (note 99 above) Section 4.2 (electricity company).

205 *Generation Ukraine* (note 192 above) para. 8.12. This holding related to the jurisdictional question whether on the basis of its agreement with the municipal authority the claimant had a claim under "(a) an investment agreement between [a Contracting] Party and [a] national or company [of the other Contracting Party]" in terms of the applicable treaty.

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Thus, the tribunal in *Salini v. Jordan* held that "each State Party to the BIT between Italy and Jordan remains bound by its contractual obligations,"[206] which obligations it distinguished from contractual obligations of an entity with separate legal personality. The tribunal accepted that the Jordan Valley Authority was an "autonomous corporate body" under the Jordanian government's "strict control,"[207] which body, given its public functions,[208] was to be considered as an "entity of a Contracting Party" for jurisdictional purposes under the applicable treaty.[209] The result of that analysis was that disputes under an investment agreement with the Authority were excluded from the tribunal's jurisdiction.[210] Nevertheless, the tribunal went on to discuss—*obiter*—whether the contract with the Authority could be said to bind the State of Jordan as a party. It answered that question in the negative, on the basis that "the contract at issue was entered into between the claimants and the Jordan Valley Authority, which *under the laws of Jordan governing the contract*, has a legal personality distinct from that of the Jordanian State,"[211] citing in support the jurisdictional decisions in *Salini v. Morocco*[212] and *RFCC v. Morocco*.[213]

The jurisdictional decision in *Salini v. Jordan* is rightly cited for the proposition that domestic law determines the identity of the obligor of a contractual obligation.[214] Yet the tribunal's award on the merits of the case casts doubt on that conclusion. It was alleged that the Authority's breaches of the contract constituted also (*inter alia*) unjust and inequitable treatment under the applicable treaty. The tribunal held that there was no colorable claim on the facts.[215] For that reason it was unnecessary to take a view on whether the contractual breaches by the Authority, when pleaded as distinct breaches of separate standards in the treaty, ought to be attributed to Jordan in accordance with the rules on attribution. The tribunal said[216]:

> [T]he rules of attribution governing responsibility for the performance of contract obligations may differ from those governing responsibility for the performance of BIT obligations. In this respect, the Tribunal, in the present case, has no intention of taking a position on such a substantive issue at this stage. It will note, however, that under Jordanian law, the legal personality of the JVA [Jordan Valley Authority]

206 *Salini v. Jordan (Jurisdiction)* (note 168 above) para. 127.

207 *Ibid.*, para. 84.

208 *Ibid.*, para. 81.

209 Article 9(2) of the treaty provided that where an "investment agreement" had been concluded between an investor and an "entity of the Contracting Parties, the [dispute-resolution] procedure foreseen in such investment agreement shall apply."

210 *Ibid.*, para. 101: "Article 9(2) of the BIT makes it obligatory to refer such disputes to the dispute settlement mechanisms provided for in the contracts and, where such disputes are concerned, excludes recourse to the procedure set forth in Article 9(3) [of the treaty] for such disputes" (internal cross-reference omitted).

211 *Ibid.*, para. 100 (emphasis added; internal cross-reference omitted).

212 *See Salini v. Morocco (Jurisdiction)* (note 57 above) paras. 35, 60–62.

213 *See* Consortium RFCC v. Morocco (Jurisdiction) (2001) paras. 30, 34, 67–69.

214 Thus Nouvel (note 193 above) 48.

215 *See* Salini v. Jordan (Merits) (2006) para. 163.

216 *Ibid.*, para. 157 (citing a passage from *Vivendi (Annulment)* quoted in the text to note 192 above).

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> is distinct from that of the Jordanian State; accordingly, it cannot be ruled out that Jordan might not be held responsible for JVA's breaches of contract. Nevertheless, in public international law, a State may be held responsible for the acts of local public authorities or public institutions under its authority and it cannot be ruled out that the Jordanian State may be held responsible for the acts of the JVA.

Whatever import *Salini v. Jordan* may have, the *Impregilo v. Pakistan*, *Nagel v. Czech Republic* and *Amto v. Ukraine* tribunals curtly dismissed the proposition that contracts entered into by entities with separate legal personality could bind the State, whether such entities might be public corporations or agencies or State-owned private law companies.[217217]

In sum, the jurisprudence presents a fragmented picture which will, on occasion, exasperate investors and their advisers. The task of future tribunals will be to contribute to a systematic and comprehensive analysis of the issues of principle involved.

CONCLUSION

The following legal propositions are supported by authority and the analysis in this chapter:

(1) An organ of the state is any person or entity charged with functions, of whatever nature, that are overwhelmingly for the benefit and account of the State, as opposed to the benefit and account of the person or entity concerned. That is not a mechanical test, but the indications to be taken into account fall within recognizable categories. Their assessment in every case is to be made by application of international law, but the relevant data can only be found in the internal law of the State concerned. While a classification of a person or entity as an "organ" in internal law may in practice often lead to the same conclusion under international law, this will not always be the case: "organ" is not a classification that all domestic legal systems have; and where it exists, it may serve internal-law purposes unrelated to those of international law.

(2) Existence of separate legal personality and liability in internal law is never dispositive of the status of the entity as an organ in international law. State-owned corporations with a commercial purpose would not in principle be regarded as State organs, but that presumption could be overturned on a showing that, in fact or law, the relevant entity (a) overwhelmingly serves a different, governmental purpose, (b) has no decision-making organs of its own, (c) is tasked merely with implementing decisions taken by the State, or (d) is subject to pervasive control or direction by the State.

(3) Where the conduct in question is not that of an organ of the State but that of a person or entity said to be entitled to exercise, and to have in fact exercised,

217 *See Impregilo v. Pakistan* (note 66 above) paras. 212–13; Nagel v. Czech Republic (2003), 13 ICSID Reports 33, 162–63 (where jurisdiction was held to be lacking on other grounds); and *Amto* (note 74 above) para. 110.

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"elements of the governmental authority," there are four salient points. First, while regulatory, adjudicatory, or executive functions (i.e., core State functions) are always to be regarded as "governmental" in nature, it is possible that in the light of the conceptions prevailing in the State concerned other functions may also be regarded as governmental. Second, there is no reason of principle to say that lawful coercion is a necessary component of governmental authority. Third, an exercise of governmental authority involves the taking of an act that the entity in question is specifically authorized to take as part of the functions assigned to it (or to entities of similar kind); an act taken on a legal basis that would be available to any private person is not predicated on any grant of governmental authority. It is irrelevant whether the act so taken is generically of a kind that in some circumstances a private person could take: the question is, rather, whether the act was in fact taken on a legal basis available specifically to the entity concerned, as a complement of its governmental functions.

(4) The rule of plenitude of attribution, which applies to conduct of State organs, suffers no exceptions. Conduct that is justiciable in domestic law as "private" conduct (e.g., commercial conduct) is no less attributable as a matter of international law. It is possible that such conduct is properly to be regarded as having no legal significance in the claim as pleaded—i.e., that it is objectively unable to constitute the cause of action pleaded. That kind of defence goes to the merits or (on a *prima facie* test) to the admissibility of the claim. It cannot be assessed under the rules of attribution.

(5) Where the wrongful conduct is the frustration of a prior representation, the rules of attribution may be applied, on the basis that the representation is a necessary predicate of the wrongful act. Nevertheless, the question of the legal significance of the representation is one of the merits, not of attribution.

(6) Where the claim is for a breach of an undertaking under an umbrella clause, the better view is that rules of attribution apply to determine whether the undertaking is attributable to the State and actionable as such in international law. The contrary view is premised on the argument that an umbrella-clause claim is one for a breach of the underlying undertaking, rather than the umbrella clause itself. That argument is difficult to reconcile with the purpose of umbrella clauses and the proper role of domestic law in international treaties generally. The view here proposed as the better view is without prejudice to substantive rules of international law which limit the scope of breaches of undertakings that are actionable under an umbrella clause.

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Chapter 14

Breach of Treaty Claims and Breach of Contract Claims: Is It Still Unknown Territory?

*Stanimir Alexandrov**

INTRODUCTION

Foreign investments are often made by means of a contract between the foreign investor and an entity or instrumentality of the host State. In numerous cases, disputes between investors and host States under investment treaties arise out of breaches of underlying contracts. Claims for breaches of international legal obligations arising out of or relating to underlying contracts are nothing new in international arbitration. Recently, however, the question of how treaty-based tribunals should deal with claims arising out of the contractual relationship was brought into the spotlight because of the decisions on jurisdiction in *SGS v. Pakistan* and *SGS v. Philippines*. These decisions, often perceived as contradictory, both deal with the jurisdiction of treaty-based tribunals over claims for breach of the underlying contract.[1]

Since the two *SGS* decisions, tribunals have carefully examined the issue and created jurisprudence that has provided useful guidance. With the exception of the jurisprudence relating to the umbrella clause, discussed in Chapter 19 of this book, tribunals have generally approached the analysis of their jurisdiction over breach of treaty and breach of contract claims in a consistent manner, each building upon prior decisions to

* Partner at the Washington, DC office of Sidley Austin LLP and Professorial Lecturer of Law at The George Washington University Law School.

1 SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan (ICSID Case No. ARB/01/13), Decision of the Tribunal on Objections to Jurisdiction of August 6, 2003, 18 ICSID Rev.– FILJ 307 (2003); SGS Société Générale de Surveillance S.A. v. Republic of the Philippines (ICSID Case No. ARB/02/6), Decision of the Tribunal on Objections to Jurisdiction of January 29, 2004.

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establish a clearer analytical approach to jurisdiction over claims arising out of the contractual relationship.

The seeming confusion regarding the interplay between treaty claims and contract claims is largely dispelled; how to treat contract claims is no longer unknown territory.

TREATY-BASED TRIBUNALS' JURISDICTION OVER TREATY CLAIMS ARISING OUT OF AN UNDERLYING CONTRACT

Assuming all jurisdictional requirements are met (i.e., a foreign investor submits a legal dispute against a host State arising out of an investment and there is consent to arbitrate under an applicable investment treaty), a treaty-based arbitral tribunal has jurisdiction over claims asserting breach of the treaty. Should a tribunal adopt a different approach to assessing jurisdiction merely because the treaty claims arise out of an underlying contract? There are several reasons why this question should be answered in the negative.

Contract Protection Under Customary International Law

It is well established under international law that the taking of a foreign investor's contractual rights constitutes expropriation or a measure having an equivalent effect. As Brice Clagett has put it:

> Customary international law has long regarded such elementary principles as respect for lawfully acquired property rights and respect for lawfully concluded agreements (*pacta sunt servanda*) as the cornerstones of relations between States and alien investors. It is believed that State liability for breach of these obligations has never been seriously questioned by any twentieth-century arbitral tribunal or other international adjudicatory authority. To the contrary, international tribunals have repeatedly held, in decisions spanning the last hundred years, that under customary international law, when a State takes an alien investor's property, the investor must be compensated.[2]

The Permanent Court of International Justice, in the landmark *Chorzów Factory* case, concluded that Poland's seizure of the factory in Chorzów and its machinery also constituted an expropriation by Poland of the patents and contract rights of the company managing the factory, even though the Polish Government had not purported to expropriate the intangible property.[3]

Early arbitration decisions followed the same reasoning. For example, in *Company General of the Orinoco*, the French-Venezuelan Mixed Claims Commission determined

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2 Brice M. Clagett, *Just Compensation in International Law: The Issues Before the Iran-United States Claims Tribunal*, *in* IV THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 31, 38 (Richard B. Lillich ed., 1987).

3 *See* German Interests in Polish Upper Silesia and the Factory at Chorzów (Ger. v. Pol.), 1926 P.C.I.J. (ser. A) No. 7, at 44 (May 25).

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that the Government of Venezuela owed compensation for its unilateral repudiation of a concession agreement, which was to be "commensurate to the damages caused by the act of the respondent Government [Venezuela] in denying efficacy to the contract."[4] In *Shufeldt*, the Government of Guatemala nullified a concession agreement that it had concluded with a U.S. investor. In considering whether Shufeldt had "acquire[d] any rights of property under the contract" for the purposes of pecuniary indemnification, the tribunal found that "[t]here can not be any doubt that property rights are created under and by virtue of a contract."[5]

ICSID jurisprudence has followed the same reasoning. In *SPP v. Egypt*, an ICSID tribunal found that SPP was entitled to compensation for the Egyptian Government's expropriation of its contractual rights. The tribunal noted that "it has long been recognized that contractual rights may be indirectly expropriated"[6] and that "contract rights are entitled to the protection of international law and that the taking of such rights involves an obligation to make compensation therefor."[7] The Iran-U.S. Claims tribunal has also made numerous pronouncements to that effect. In *Phillips v. Iran*, for example, the tribunal found that "[e]xpropriation . . . of the property of an alien gives rise under international law to liability for compensation, and this is so whether the expropriation is formal or *de facto* and whether the property is tangible, such as real estate or a factory, or intangible, such as the contract rights involved in the present Case."[8]

Contract Protection Under Investment Treaties

The overwhelming majority of the modern investment treaties define protected investments broadly and explicitly include contractual rights in that definition.

Expropriation. The fact that contractual rights are a protected form of investment under most treaties reinforces the conclusion that a taking of such rights is an expropriation under the relevant treaty. As the tribunal in *Consortium RFCC v. Kingdom of Morocco* noted, "any type of asset can be *a priori* subject to expropriation and thus

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4 Company General of the Orinoco (Fr. v. Venez.), Opinion of the Umpire of July 31, 1905, REPORT OF FRENCH-VENEZUELAN MIXED CLAIMS COMMISSION OF 1902, 322, at 362 (1906).

5 Shufeldt Claim (U.S. v. Guat.), II R.I.A.A. 1081, 1097 (1930).

6 Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt (ICSID Case No. ARB/84/3), Award on the Merits of May 20, 1992, 3 ICSID REPORTS 189 (1995), at para. 165.

7 *Id.* at para. 164.

8 Phillips Petroleum Company Iran v. The Islamic Republic of Iran, Award 425-39-2 of June 29, 1989, at para. 76. *See also* SeaCo, Inc. v. The Islamic Republic of Iran, Award 531-260-2 of June 25, 1992, at para. 45 ("To prevail upon its contention that the Government of Iran expropriated contract rights . . . SeaCo must show that its contract rights were breached and that the breach resulted from 'orders, directives, recommendations or instructions' of the Government of Iran.") (citing Flexi-Van Leasing, Inc. v. The Government of the Islamic Republic of Iran, Award No. 259-36-1 of October 13, 1986, at 20); Starrett Housing Corporation v. The Government of the Islamic Republic of Iran, ITL Award 32-24-1 of December 19, 1983, at section IV(b).

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protected by the provisions of the treaty."[9] In *Impregilo v. Pakistan*, the tribunal relied on several cases for the notion that "the taking of contractual rights could, potentially, constitute an expropriation or a measure having an equivalent effect."[10]

Fair and Equitable Treatment. Once contractual rights are covered by the definition of investment, they also fall within the scope of the other substantive protections of an investment treaty. Thus, not surprisingly, investor-State jurisprudence has recognized that a State's failure to observe its contractual commitments to a foreign investor may constitute a violation of the international law standard of fair and equitable treatment. According to the European Communities' Investment Protection Principles, the requirement of fair and equitable treatment is an "overriding concept" that encompasses various investment protection principles, including the observance of undertakings.[11] The United Nations Conference on Trade and Development also concluded that the fair and equitable treatment standard includes the legal rules of *pacta sunt servanda* and respect for contractual obligations.[12] In several recent cases tribunals have concluded that State actions repudiating contractual obligations, while not amounting to an expropriation, breached the fair and equitable treatment standard under the relevant investment treaty.[13]

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9 Author's translation. The original quote in French says: "[T]out type d'actif peut être a priori l'objet d'une expropriation et donc protégé par les dispositions du traité." Consortium RFCC v. Kingdom of Morocco (ICSID Case No. ARB/00/6), Award of December 22, 2003, at para. 62. *See also* Eureko v. Poland, Award of August 19, 2005, at para. 240 (describing contractual rights as "assets").

10 Impregilo SpA v. Islamic Republic of Pakistan (ICSID Case No. ARB/03/3), Decision on Jurisdiction of April 22, 2005, at para. 274. In drawing this conclusion, the *Impregilo* tribunal relied on Norwegian Shipowner's Claims (Nor. v. U.S.), I R.I.A.A. 307 (1922); Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt (ICSID Case No. ARB/84/3), Award on the Merits of May 20, 1992, 3 ICSID Reports 189 (1995), at paras. 42–46; Consortium RFCC v. Kingdom of Morocco (ICSID Case No. ARB/00/6), Award of December 22, 2003; Phillips Petroleum Company Iran v. The Islamic Republic of Iran, Award 425-39-2 of June 29, 1989, at para. 76; SeaCo, Inc. v. The Islamic Republic of Iran, Award 531-260-2 of June 25, 1992, at para. 45.

11 *See, e.g.*, *News from ICSID*, Vol. 11, No.1 (Winter 1994), at 5 (referring to the Investment Protection Principles adopted in 1992 by the Council of the European Communities to provide details for the application of the investment promotion and protection principles contained in the Fourth Lomé Convention on cooperation between the group of Asian, Caribbean, and Pacific countries and the EC and its Member States).

12 *See* UNCTAD, Fair and Equitable Treatment 34–37 (UNCTAD Series on Issues in International Investment Agreements, 1999); *see also* World Bank, *Guidelines on the Treatment of Foreign Direct Investment*, 7 ICSID Rev.–FILJ 297, 300 (Fall 1992) (Article III(2) states that "[e]ach State will extend to investments established in its territory by nationals of any other State fair and equitable treatment according to the standards recommended in these Guidelines," which include protections regarding expropriation, currency transfers, licenses, etc.).

13 *See* CMS Gas Transmission Company v. Argentine Republic (ICSID Case No. ARB/01/8), Award of May 12, 2005, at paras. 264, 281; Azurix Corp. v. Argentine Republic (ICSID Case No. ARB/01/12), Award of July 14, 2006, at paras. 322, 374; Enron Corp. v. Argentine Republic (ICSID Case No. ARB/01/3), Award of May 22, 2007, at paras. 246, 268; LG&E Energy Corp. v. Argentine Republic (ICSID Case No. ARB/02/1), Award of October 3, 2006, at paras. 132, 200. Tribunals that found no breach of the fair and equitable treatment requirement in light of the circumstances of the specific case have also recognized that violations of

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In other recent cases, tribunals have found that destruction of contractual rights amounted to both denial of fair and equitable treatment and expropriation.[14]

Other Treaty Protections. Further, there is no reason why State actions in violation of contractual obligations could not breach treaty protections other than expropriation and fair and equitable treatment. In several cases tribunals have held that repudiating contractual rights also amounted to a breach of the treaty requirement to accord to investments full protection and security[15] or a breach of the prohibition on impairing the value of an investment through arbitrary or discriminatory measures.[16] The tribunal in *Noble Ventures*, for example, held that the fair and equitable treatment standard includes the obligation to abide by contracts, along with the obligation to provide full protection and security, and the prohibition of arbitrary and discriminatory treatment. It stated:

> [O]ne can consider this [the fair and equitable treatment standard] to be a more general standard which finds its specific application in *inter alia* the duty to provide full protection and security, the prohibition of arbitrary and discriminatory measures and the obligation to observe contractual obligations towards the investor.[17]

Investment Treaty Claims Arising out of Contracts

Assuming all other jurisdictional requirements are met, there should therefore be little doubt that treaty-based tribunals have jurisdiction to decide claims for breach of the treaty, whether or not those claims arise out of or relate to an underlying contractual relationship. As the tribunal in *Eureko* stated, it was required to "consider whether the acts of which Eureko complains, whether or not also breaches of [contract], constitute breaches of the Treaty."[18] It further held that "[t]here is an amplitude of authority for the proposition that when a State deprives the investor of the benefit of its contractual rights, directly or indirectly, it may be tantamount to a deprivation in violation" of an investment treaty.[19]

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contractual rights may amount to unfair and inequitable treatment. *See, e.g.*, Consortium RFCC v. Kingdom of Morocco (ICSID Case No. ARB/00/6), Award of December 22, 2003, at para. 51.

14 Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (ICSID Case No. ARB/97/3) (*Vivendi II*), Award of August 20, 2007, at sections 7.4, 7.5; Eureko v. Poland, Award of August 19, 2005, at paras. 234, 243; Siemens A.G. v. Argentine Republic (ICSID Case No. ARB/02/8), Award of February 6, 2007, at paras. 273, 309.

15 *See* Azurix Corp. v. Argentine Republic (ICSID Case No. ARB/01/12), Award of July 14, 2006, at para. 408; *Vivendi II*, *supra* note 14, at paras. 7.4.13–7.4.17.

16 *See* Azurix Corp. v. Argentine Republic (ICSID Case No. ARB/01/12), Award of July 14, 2006, at para. 393.

17 Noble Ventures v. Romania (ICSID Case No. ARB/01/11), Award of October 12, 2005, at para. 182.

18 Eureko v. Poland, Award of August 19, 2005, at para. 112.

19 *Id.* at para. 241.

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In fact, while the *SGS v. Pakistan* and *SGS v. Philippines* decisions are generally perceived as inconsistent, it is often overlooked that both tribunals asserted jurisdiction over treaty claims without hesitation, regardless of the fact that those claims arose directly out of the underlying contracts. Both *SGS* tribunals, in line with ICSID jurisprudence, acknowledged the existence of independent treaty claims, even though the treaty claims were based upon the same sets of facts as the contract claims. They found jurisdiction over the treaty claims and only then addressed the separate issue of jurisdiction over the contract claims.

The *SGS v. Pakistan* tribunal stated that if Article 9 of the Switzerland-Pakistan bilateral investment treaty (the dispute settlement provision) "relates to any dispute at all between an investor and a Contracting Party, it must comprehend disputes constituted by claimed violations of BIT provisions establishing substantive standards."[20] In other words, if the BIT dispute settlement mechanism is to have any meaning, which it obviously must, it must cover disputes where treaty breaches are alleged. The tribunal concluded: "Any other view would tend to erode significantly those substantive treaty standards of treatment."[21] It is hardly possible to disagree with this conclusion. The *SGS v. Philippines* tribunal followed the same logic. It noted that a treaty-based tribunal should assert jurisdiction where the claims presented involve "allegations which, if proved, [are] capable of amounting to breaches" of the relevant BIT.[22] Surely, then, the fact that treaty claims arise out of an underlying contract should not (and, in most cases, does not) alter a tribunal's approach to determining jurisdiction over claims alleging breach of the treaty.[23]

TREATY-BASED TRIBUNALS' JURISDICTION OVER "PURELY" CONTRACTUAL CLAIMS

Given the consensus that the jurisdiction of treaty-based tribunals over treaty claims is not in any way undermined by the fact that such treaty claims arise out of an underlying contract, the next question, logically, is whether treaty-based tribunals also have jurisdiction to decide claims asserted by investors not as treaty claims but rather as contractual claims.

According to one view, every breach by the State of a contract with an alien invokes the State's international responsibility. As Brownlie notes, "[t]here is a school of

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20 SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan (ICSID Case No.ARB/01/13), Decision of the Tribunal on Objections to Jurisdiction of August 6, 2003, 18 ICSID Rev –FILJ 307 (2003), at para. 150.

21 *Id.*

22 SGS Société Générale de Surveillance S.A. v. Republic of the Philippines (ICSID Case No. ARB/02/6), Decision of the Tribunal on Objections to Jurisdiction of January 29, 2004, at para. 158.

23 One possible exception may be where a tribunal has interpreted a forum selection clause in an underlying contract as an explicit waiver of treaty-based jurisdiction and declined jurisdiction over a claim arising "essentially" out of the contract, even though characterized as a treaty claim. *See* discussion below, text accompanying notes 90–95.

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thought which supports the view that the breach of a state contract by the contracting government of itself creates international responsibility."[24]

Whether or not a contract breach falls within the jurisdiction of a treaty-based tribunal is, however, a question of the interpretation of the relevant treaty. Treaty-based tribunals have looked for specific guidance in the text of the relevant treaty to determine whether the treaty requires them to exercise jurisdiction over "pure" contract claims. There is no doubt that a treaty can provide a basis for consent to arbitrate "purely" contractual claims. One needs to look no further than the Iran-U.S. Claims tribunal; under the Claims Settlement Declaration, which is part of the Algiers Accords of 1981, private claimants brought numerous contractual claims against Iran[25] (resulting in awards enforceable under the New York Convention). Likewise, several provisions in investment treaties have been invoked as a basis for jurisdiction over claims asserted only as contract claims.

Umbrella Clause Provisions as a Basis for Jurisdiction over Contract Claims

One such provision is the so-called "umbrella clause," a provision requiring that states observe obligations or undertakings they have entered into with respect to foreign investors or investments. The question that a number of tribunals have confronted is whether the umbrella clause "elevates" contractual breaches to the level of treaty breaches and, therefore, confers upon treaty-based tribunals jurisdiction to decide contractual—"elevated to the level of treaty"—claims. This question is discussed elsewhere in this book.

Provisions Granting Jurisdiction over "Any Disputes"

Many investment treaties include a narrow jurisdictional clause that provides only for the settlement of disputes relating to obligations under the treaty—in other words, disputes based on claims for breach of the treaty.[26] Some, however, contain a clause

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24 Ian Brownlie, Principles of Public International Law 523 (6th ed., 2003). For authorities supporting this "maximalist approach," *see* Brownlie, *id.* at note 136; *see also* Prosper Weil, *Problèmes relatifs aux contrats passés entre un Etat et un particulier*, 128 Recueil des Cours 95, 134–37 (1969).

25 *See* Charles N. Brower & Jason D. Brueschke, The Iran-United States Claims Tribunal 60–72 (The Hague, 1998); David D. Caron and John R. Crook eds., The Iran-United States Claims Tribunal and the Process of International Claims Resolution: A Study by the Panel on State Responsibility of the American Society of International Law 10–11 (New York 2000).

26 *See, e.g.*, Agreement between the Government of Canada and the Government of the Republic of Costa Rica for the Promotion and Protection of Investments, Can.-Costa Rica, Mar. 18, 1998, 1999 Can. T.S. No. 43 (Article XII(1) provides for the settlement of "[a]ny dispute between one Contracting Party and an investor of the other Contracting Party, relating to a claim by the investor that a measure taken or not taken by the former Contracting Party is in breach of this Agreement . . . .")

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providing for the settlement of "*[a]ny disputes* arising between a Contracting Party and the investors of the other" Contracting Party.[27] An interpretation of such a clause "in accordance with the ordinary meaning to be given to [its] terms," as required by Article 31(1) of the Vienna Convention on the Law of Treaties,[28] seems to suggest that disputes arising from contract breaches fall within its purview. After all, the clause refers to "any disputes" and makes no distinction between disputes arising from breaches of contract and disputes arising from breaches of the treaty. As Professor Christoph Schreuer has observed, "where a BIT provides for investor/State arbitration in respect of all investment disputes rather than disputes concerning violations of the BIT, the tribunal is competent even for pure contract claims."[29]

The two *SGS* tribunals interpreted provisions similar to the "any dispute" provision discussed earlier and came to opposite conclusions, even though the two relevant treaties contained identically worded jurisdictional clauses.[30] The tribunal in *SGS v. Pakistan* found that it did not have jurisdiction over SGS's direct claims for breach of contract, while the tribunal in *SGS v. Philippines* held that it did. The *SGS v. Pakistan* tribunal first appeared to accept the ordinary meaning of the jurisdictional clause found in Article 9 of the Switzerland-Pakistan BIT. The tribunal recognized "that disputes arising from claims grounded on alleged violation of the BIT, and disputes arising from claims based wholly on supposed violations of the [contract at issue in the case], can both be described as 'disputes with respect to investments,' the phrase used in Article 9 of the [Switzerland-Pakistan] BIT."[31] The tribunal, however, concluded that, despite the ordinary meaning, "we do not see anything in Article 9 or in any other provision of the BIT that can be read as vesting this tribunal with jurisdiction over claims resting *ex hypothesi* exclusively on contract," and, therefore, "without more, we believe that no implication necessarily arises that both BIT and purely contract claims are intended to be covered by the Contracting Parties in Article 9."[32] Based on this

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27 *See, e.g.*, Agreement between the Government of the Italian Republic and the Government of the Islamic Republic of Pakistan on the Promotion and Protection of Investments, Italy-Pak., July 19, 1997, at Article 9(1) (emphasis added).

28 Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (1980), at Article 31(1).

29 Christoph Schreuer, *Investment Treaty Arbitration and the Jurisdiction over Contract Claims–The Vivendi Case Considered*, *in* International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law 296 (Todd Weiler ed., 2005).

30 The jurisdictional clauses in the Switzerland-Pakistan BIT and the Switzerland-Philippines BIT provide for the settlement of "disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party." Agreement between the Swiss Confederation and the Islamic Republic of Pakistan on the Promotion and Reciprocal Protection of Investments, Switz.-Pak., July 11, 1995, at Article 9(1); Agreement between the Swiss Confederation and the Republic of the Philippines on the Promotion and Reciprocal Protection of Investments, Switz.-Phil., Mar. 31, 1997, at Article VIII(1).

31 SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan (ICSID Case No. ARB/01/13), Decision of the Tribunal on Objections to Jurisdiction of August 6, 2003, 18 ICSID Rev.–FILJ 307 (2003), at para. 161.

32 *Id.*

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reasoning, the *SGS v. Pakistan* tribunal declined to assert jurisdiction over SGS's claims for breach of contract.

By contrast, the ordinary meaning of the phrase "disputes with respect to investments" was accepted and given effect by the tribunal in *SGS v. Philippines*, which held that it had jurisdiction over SGS's contract claims. Interpreting the jurisdictional clause in the Switzerland-Philippines BIT, the tribunal concluded:

> *Prima facie*, Article VIII is an entirely general provision, allowing for submission of all investment disputes by the investor against the host State. The term "disputes with respect to investments" . . . is not limited by reference to the legal classification of the claim that is made. A dispute about an alleged expropriation contrary to Article VI of the BIT would be a "dispute with respect to investments"; so too would a dispute arising from an investment contract such as the [contract at issue in the case].[33]

The *SGS v. Philippines* tribunal listed several factors that supported its interpretation of the jurisdictional clause in Article VIII. The tribunal found that the three fora available to resolve disputes under Article VIII—the host State's domestic courts, ICSID panels, and *ad hoc* UNCITRAL tribunals—were all competent "to apply the law of the host State, including its law of contract."[34] Moreover, according to the tribunal, a foreign investor's ability to choose where to have its contract claims addressed was entirely consistent with a BIT's general purpose of promoting and protecting foreign investment.[35] Further, the tribunal recognized that "investments are characteristically entered into by means of contracts or other agreements with the host State and the local investment partner"; therefore, "the phrase 'disputes with respect to investments' naturally includes contractual disputes."[36] Finally, the tribunal noted that the State parties to the Switzerland-Philippines BIT could have limited the jurisdictional clause only to "claims concerning breaches of the substantive standards contained in the BIT," as they did elsewhere in the BIT with respect to the settlement of disputes between the State parties,[37] or that the State parties could have limited the clause to "claims brought for breach of international standards," as was the case with NAFTA,[38] but that in each instance, the State parties did not impose any such limits.

The reasoning of the *SGS v. Philippines* tribunal is persuasive. There is no reason to decline jurisdiction in contravention of the clear language of a treaty simply because the grant of jurisdiction appears particularly broad and open-ended. Broad and open-ended consent is by no means unheard of. For example, consent to arbitrate disputes with foreign investors can also be found in a State's domestic legislation, where States extend a general offer, or a standing invitation, to all foreign investors to submit to

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33 SGS Société Générale de Surveillance S.A. v. Republic of the Philippines (ICSID Case No. ARB/02/6), Decision of the Tribunal on Objections to Jurisdiction of January 29, 2004, at para. 131 (internal citation omitted).

34 *Id.* at para. 132(a).

35 *Id.* at para. 132(c).

36 *Id.* at para. 132(d).

37 *Id.* at para. 132(b).

38 *Id.* at para. 132(e).

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international arbitration (including to ICSID tribunals) any disputes relating to their investments. In one such example, the ICSID tribunal in *SPP v. Egypt* assumed jurisdiction over SPP's claims based on consent to ICSID arbitration given by Egypt in its domestic legislation.[39] Egyptian law provided that all investment disputes in respect of the implementation of the provisions of the Egyptian statute relating to foreign investment could be submitted by the investor to arbitration under the ICSID Convention.[40] Kazakhstan's 1994 Law on Foreign Investments provided an even broader scope of consent: the investor was entitled to submit to ICSID any "[d]isputes and disagreements arising in connection with foreign investments or activity connected therewith."[41] The scope of jurisdictional grants like those under Egyptian and Kazakh domestic law is even broader than the consent to arbitrate "any disputes" in an investment treaty, as those domestic grants of jurisdiction cover disputes with any foreign investors, not just the foreign investors from the treaty partner. Therefore, that a State would consent to arbitrate "any disputes" with foreign investors from one specific country before an international arbitral tribunal should not be surprising.

Possible Limitation of Jurisdiction over Pure Contract Claims to Contracts with the State Itself. Nevertheless, several tribunals have applied the logic of the *SGS v. Philippines* tribunal more narrowly. They have concluded that in case of "purely" contractual disputes, the "any disputes" provision covers only disputes with the State itself, i.e., when the State is a direct party to the contract and that the provision does not extend to situations where the contractual relationship is between the investor and a State entity other than the State itself.[42] This interpretation of the "any disputes" provision limits significantly the scope of its application: as a practical matter, the State itself, rather than its organs or other State entities, would rarely enter directly into a contract with a foreign investor. Not surprisingly, on the basis of this interpretation, tribunals have declined jurisdiction over "purely" contractual claims when such jurisdiction has been sought pursuant to the "any disputes" provision.

By contrast, the *SGS v. Philippines* decision, when giving effect to the ordinary meaning of the "any disputes" provision and finding jurisdiction over the contract claims at issue, did not discuss the distinction between contracts entered into directly

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39 *See* Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt (ICSID Case No. ARB/84/3), Decision on Jurisdiction of November 27, 1985, 3 ICSID Reports 112 (1995), at paras. 64–87.

40 *Id.* at para. 70.

41 Law of the Republic of Kazakhstan on Foreign Investments (December 27, 1994), at Article 27(1)-(2). *See also* Article 16.2 of the 1996 Investment Law of the Republic of Georgia, providing that "disputes between a foreign investor and a government body, if the order of resolution is not agreed between them, shall be settled at the Court of Georgia or at the International Centre for the Resolution [sic] of Investment Disputes." Both the Law of the Republic of Kazakhstan on Foreign Investments and the 1996 Investment Law of the Republic of Georgia have served as a basis for asserting jurisdiction by international arbitration tribunals.

42 *See, e.g.*, Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco (ICSID Case No. ARB/00/4), Decision on Jurisdiction of July 23, 2001, 42 ILM 609 (2003), at paras. 59–64; Consortium RFCC v. Kingdom of Morocco (ICSID Case No. ARB/00/6), Decision on Jurisdiction of July 16, 2001, at paras. 67–69.

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by the State and contracts entered into by other State entities. The most logical conclusion to be drawn from the absence of such discussion is that the tribunal did not believe the distinction was relevant to its analysis. Given the fact that the contract at issue was approved by the president of the Philippines,[43] it could also be argued that the tribunal considered it to be a contract entered into directly by the State. If that were the case, however, one might expect that the tribunal would have mentioned this point in its analysis.

Principle of Attribution Distinguished. It is important here to clarify the relationship between the principle of attribution on the one hand, and the jurisdiction of treaty-based tribunals to decide contractual disputes only when the contractual obligation is undertaken directly by the State, on the other.

Attribution requires that the conduct of a number of categories of domestic entities be treated as the conduct of the State for the purposes of responsibility under international law.[44] In many situations, for example with respect to the conduct of State organs as defined in Article 4 of the International Law Commission's Articles on State Responsibility, the conduct of such domestic entities is attributable to the State whether or not it is characterized as *iure imperii* or *iure gestionis*. The International Law Commission's Commentary to Article 4 states: "It is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as 'commercial' or '*acta iure gestionis*' . . . the breach by a State of a contract does not as such entail a breach of international law . . . But the entry into or breach of a contract by a State organ is nonetheless an act of the State for the purposes of article 4, and it might . . . amount to an internationally wrongful act."[45] Thus, attribution operates when the question posed is whether a State is responsible for a breach of an international obligation, such as an obligation in an investment treaty.

By contrast, the question posed in cases where tribunals considered whether they could assert jurisdiction over "pure" contractual claims is a question of interpretation of the scope of consent, i.e., the scope of the agreement to arbitrate.[46] Where tribunals required that the contract be entered into directly by the State, they did not consider that ruling as involving a question of attribution; rather, they reasoned that the scope of consent to arbitrate under the relevant treaty extended only to disputes under such contracts and did not cover disputes under contracts with other entities. The *Consortium RFCC* tribunal, for example, put it this way: "That limitation of the jurisdiction of the arbitral tribunal, however, is only applicable to claims which rest solely on the violation of the contract. By contrast, the arbitral tribunal has jurisdiction over contract

43 *See* SGS Société Générale de Surveillance S.A. v. Republic of the Philippines (ICSID Case No. ARB/02/6), Decision of the Tribunal on Objections to Jurisdiction of January 29, 2004, at para. 13.

44 *See* James Crawford, *Treaty and Contract in Investment Arbitration*, 24 Arb. Int'l 351, 356 (2008).

45 International Law Commission, Commentary to Article 4, para. (6), *in* James Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries 96 (Cambridge University Press 2002) (internal citations omitted).

46 *See generally* Crawford, *supra* note 44, at 363.

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violations which would also constitute violations of the bilateral treaty that are attributable to the State."[47]

Provisions Granting Jurisdiction over Disputes Relating to "Investment Agreements"

A third type of provision in investment treaties that has been invoked as a basis for jurisdiction over claims asserted only as contract claims is a provision specifically defining covered investment disputes as, *inter alia*, disputes relating to an "investment agreement."[48] When dealing with such provisions, tribunals face the task of determining whether a contract, the breach of which is asserted, qualifies as an investment agreement. At least one tribunal, in *Generation Ukraine*, held that an investment agreement is only a contract with the State itself and that a contract with a municipal authority does not qualify, even though the actions of the municipal authorities are attributable to the State for the purposes of international responsibility. The tribunal stated:

> In relation to category (a), an "investment agreement" must be an agreement between the investor and one of the two State Parties to the BIT. The Claimant has never contracted directly with Ukraine as a "Party" to the BIT. In the present case, the parties to the Lease Agreements and the Foundation Agreement are the Claimant and a municipal authority of Ukraine, the Kyiv City State Administration. True enough, the acts of the Kyiv City State Administration may be imputable to Ukraine as a sovereign state for the purposes of the international law of state responsibility.

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47 Author's translation. The original quote in French says: "Mais cette restriction à la compétence du Tribunal arbitral ne s'applique qu'aux demandes qui reposent sur la seule violation du contrat. En revanche, le Tribunal arbitral demeure compétent pour les violations du contrat qui constitueraient en même temps, à la charge de l'Etat, une violation de l'Accord bilatéral." Consortium RFCC v. Kingdom of Morocco (ICSID Case No. ARB/00/6), Decision on Jurisdiction, at para. 69. *See also* Impregilo SpA v. Islamic Republic of Pakistan (ICSID Case No. ARB/03/3), Decision on Jurisdiction of April 22, 2005, at para. 210.

48 This provision is typical of bilateral investment treaties of the United States. *See, e.g.*, The Treaty Between the United States of America and the Government of the Republic of Albania Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Alb., Jan. 11, 1995, at Article IX (Settlement of Disputes Between One Party and a National or Company of the Other Party) ("Article IX procedures apply to an 'investment dispute,' which covers any dispute arising out of or relating to an investment authorization, an investment agreement, or an alleged breach of rights granted or recognized by the Treaty with respect to a covered investment."); Treaty Between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., Nov. 14, 1991, at Article VII(1) ("For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company . . ."); Treaty Between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Ukr., Mar. 4, 1994, at Article VI (State-Investor Dispute Resolution) ("Article VI procedures apply to an 'investment dispute,' a term which covers any dispute arising out of or relating to an investment authorization, an agreement between the investor and host government, or to rights granted by the Treaty with respect to an investment.").

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> For this reason, the Claimant is entitled to bring a cause of action based on alleged expropriation of its investment by acts performed by Ukrainian municipal authorities. It is an international claim and international rules of attribution apply. But such rules do not operate to join the central government of Ukraine to contractual relationships entered into by municipal authorities.[49]

Thus, the *Generation Ukraine* tribunal made the same distinction that tribunals have made in the context of the "any disputes" provision: if the claims are only contractual, the contractual relationship must be between the investor and the State itself. On the other hand, if the claims are for violations of the treaty, then the actions of political subdivisions, local authorities, organs, officials, etc., are attributable to the State for the purposes of liability under the treaty.

The significance of this precedent may be limited, however. The 2004 United States Model BIT (and, consequently, subsequent U.S. BITs and chapters on investment in U.S. free trade agreements) includes a definition of the term "investment agreement." Under this definition, an investment agreement is an agreement in writing with a "national authority," which, for the United States, includes "an authority at the central level of government."[50] In other words, while the definition excludes the states of the United States and local governments, it does include agreements entered into by federal government agencies and entities (rather than only agreements with the State itself). At the same time, the definition in the Model BIT narrows the scope of an "investment agreement" with respect to subject matter: it covers only certain sectors (natural resources, supply of services to the public, such as power, water, or telecommunications, and infrastructure projects). It remains to be seen how tribunals will interpret this definition.

DISTINGUISHING BETWEEN BREACH OF TREATY CLAIMS AND BREACH OF CONTRACT CLAIMS

Given the different treatment of treaty claims and contract claims by treaty-based tribunals, the distinction between these two categories of claims acquires critical importance. As discussed earlier, there is no doubt that treaty-based tribunals have

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49 Generation Ukraine, Inc. v. Ukraine (ICSID Case No. ARB/00/9), Award of September 16, 2003, at para. 8.12.

50 2004 Model BIT at Article 1. This use of the defined term "national authority" in the definition of "investment agreement" can be found in such agreements as the U.S.-Singapore Free Trade Agreement (defining "national authority" as "(1) for Singapore, a ministry or other government body that is constituted by an Act of Parliament; and (2) for the United States, an authority at the central level of government"), the U.S.-Chile Free Trade Agreement (defining "national authority" as "(a) for the United States, an authority at the central level of government; and (b) for Chile, an authority at the ministerial level of government" and noting that "'[n]ational authority' does not include state enterprises"), the U.S.-CAFTA-DR Free Trade Agreement (defining "national authority" for both States as "an authority at the central level of government"), and the U.S.-Uruguay BIT (defining "national authority" for both States as "an authority at the central level of government").

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jurisdiction to decide claims for breach of the treaty, whether or not those claims arise out of or relate to an underlying contractual relationship. The question of the nature of the distinction between treaty claims and contract claims, however, does arise when the investor asserts treaty claims relating to an underlying contract. In many such cases, the State will argue that the investor's claims are in fact contractual claims rather than treaty claims and should therefore be treated as such. If a tribunal were to accept this argument, it would then face the task of distinguishing between "genuine treaty claims" arising out of an underlying contract, and claims that, even though presented as such, are in fact contractual claims "disguised" as claims for breach of the treaty. But does a tribunal have to deal with this question and, if it has to, should it do so at the jurisdictional phase?

The difficulty arises from the fact that a breach of contract by a State may well be, and often is, also a breach of an investment treaty obligation. States incur international responsibility when they violate a contract in a manner that constitutes a "clear and discriminatory departure" from the governing law of the contract or an "unreasonable departure from the principles recognized by the principal legal systems of the world."[51] States are internationally responsible when they terminate a contract in an untimely manner[52] and when a termination is effected "by the exercise of sovereign power instead of claimed contractual right."[53] States are also responsible under international law for contractual breaches when they have frustrated the contractual dispute settlement mechanism, leaving the foreign investor with no recourse to contractual remedies to redress a contractual wrong. For example, both *SGS* tribunals agreed that there would be a viable treaty claim if the investor were prevented from submitting disputes to the contractual dispute settlement mechanism.[54] Likewise, the *Waste Management* tribunal stated that the availability and the viability of a contractual dispute settlement mechanism were critical to determining whether certain acts violated substantive provisions of the treaty.[55] Thus, some (perhaps many) types of contractual breaches by

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51 Louis B. Sohn & R.R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT'L L. 545, at Article 12(1) (1961). *See also* III MARJORIE M. WHITEMAN, DAMAGES IN INTERNATIONAL LAW 1558 (1943); K. Lipstein, *The Place of the Calvo Clause in International Law*, 22 BRIT. Y.B. INT'L L. 130, 134 (1945); F.A. Mann, *The Proper Law of Contracts Concluded by International Persons*, 35 BRIT. Y.B. INT'L L. 34, 41 (1959).

52 *See, e.g.*, In the Matter of an Arbitration between the Government of the State of Kuwait and the American Independent Oil Co. (AMINOIL), Final Award of March 24, 1982, 21 ILM 976, 1051 (1982) (dissenting opinion of Sir G. Fitzmaurice).

53 Kenneth S. Carlston, *Concession Agreements and Nationalization*, 52 AM. J. INT'L L. 260, 261 (1958).

54 *See* SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan (ICSID Case No. ARB/01/13), Decision of the Tribunal on Objections to Jurisdiction of August 6, 2003, 18 ICSID REV.–FILJ 307 (2003), at para. 172; SGS Société Générale de Surveillance S.A. v. Republic of the Philippines (ICSID Case No. ARB/02/6), Decision of the Tribunal on Objections to Jurisdiction of January 29, 2004, at paras. 154, 155, 170.

55 Waste Management, Inc. v. United Mexican States (ICSID Case No. ARB(AF)/00/3), Award of April 30, 2004. The *Waste Management* tribunal found that a contractual claim was not a violation of Article 1105 of the NAFTA, "provided that it does not amount to an outright and unjustified repudiation of the transaction and *provided that some remedy is open to the creditor*

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the State could trigger the State's responsibility under customary international law and amount to a breach of an investment treaty.

Obviously, in many cases where the claims for treaty breach arise out of an underlying contract, the same acts or omissions that result in breach of contract may also result in a breach of the relevant treaty. How should tribunals deal with such acts or omissions—as breaches of contract or as breaches of the treaty? Should they seek to draw a line between contractual breaches that do not rise to the level of treaty violations and those that do?

The best answer to this question was given by the *Vivendi I* annulment committee, which stated

> [W]hether there has been a breach of the BIT and whether there has been a breach of contract are different questions. *Each of these claims will be determined by reference to its own proper or applicable law*—in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract . . .[56]

The *Vivendi I* annulment committee explained that "[a] state may breach a treaty without breaching a contract, and *vice versa*,"[57] and that "whether particular conduct involves a breach of a treaty is not determined by asking whether the conduct purportedly involves an exercise of contractual rights."[58]

In other words, the fact that certain acts or omissions may have given rise to breach of contract claims does not mean that the same acts or omissions could not also give rise to treaty claims. The *SGS v. Pakistan* tribunal, for example, following the logic of the *Vivendi I* annulment committee and quoting extensively from its decision, did not see why it should decline jurisdiction over the treaty claims simply because they arose out of the same set of facts as the breach of contract claims. The *SGS v. Pakistan* tribunal observed that "[a]s a matter of general principle, the same set of facts can give rise to different claims grounded on differing legal orders: the municipal and the international legal orders."[59] The tribunal in *Impregilo v. Pakistan* articulated the same approach even more categorically, when it stated: "[C]ontrary to Pakistan's approach in this case, the fact that a breach may give rise to a contract claim does not mean that it cannot also—and separately—give rise to a treaty claim. Even if the two perfectly

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to address the problem." *Id*. at para. 115 (emphasis added). It also found that the contractual claim was not a violation of Article 1110 of the NAFTA because such a violation required a showing of "an effective repudiation of the [contractual] right, *unredressed by any remedies available to the Claimant*, which has the effect of preventing its exercise entirely or to a substantial extent." *Id*. at para. 175 (emphasis added).

56 Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (ICSID Case No. ARB/97/3), Decision on Annulment of July 3, 2002 (*Vivendi I Decision on Annulment*), 41 ILM 1135 (2002), at para. 96 (emphasis added).

57 *Id.* at para. 95.

58 *Id.* at para. 110.

59 SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan (ICSID Case No. ARB/01/13), Decision of the Tribunal on Objections to Jurisdiction of August 6, 2003, 18 ICSID Rev. – FILJ 307 (2003), at para. 147.

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coincide, they remain analytically distinct, and necessarily require different enquiries."[60]

It follows, then, that when tribunals have to deal with claims for treaty breaches arising out of an underlying contract, they must engage in an inquiry into whether the alleged conduct constitutes a violation of a treaty obligation—and they must conduct this inquiry regardless of whether the conduct might also constitute a breach of contract. The treatment of contract claims and treaty claims as legally and analytically distinct is the only logical and correct approach. This approach gives rise, however, to several important questions.

The Power of Treaty-based Tribunals to Interpret Contracts

The first question is whether treaty-based tribunals have the power to interpret the contract, if necessary to determine whether the State's conduct breached the treaty. It may well be that a treaty-based tribunal called upon to decide on claims for treaty breaches arising out of a contractual relationship will first have to determine whether or not the conduct—either of the investor or of the State or both—was consistent with the underlying contract. This may require the tribunal to engage in a detailed and elaborate review of the contract and the rights and obligations arising from it. Can a treaty-based tribunal engage in such a review?

The *Vivendi I* annulment committee once again provided an unambiguous answer: if necessary, the tribunal not only can but must do so. As the committee noted, if the tribunal is called upon to decide on treaty claims arising out of contractual breaches, the tribunal cannot abdicate its responsibility and refuse to rule simply because detailed contractual analysis may be required. In the words of the committee, "under . . . the BIT the tribunal had jurisdiction to base its decision upon the Concession Contract, at least so far as necessary in order to determine whether there had been a breach of the substantive standards of the BIT."[61] The committee noted that a detailed contractual analysis and interpretation is different from exercising contractual jurisdiction: "[I]t is one thing to exercise contractual jurisdiction . . . and another to take into account the terms of a contract in determining whether there has been a breach of a distinct standard of international law."[62] The annulment committee annulled the relevant portion of the *Vivendi I* award because "the tribunal declined to decide key aspects of the Claimants' BIT claims on the ground that they involved issues of contractual performance or non-performance."[63] The annulment committee's conclusion is consistent with the long-established practice of international tribunals of interpreting contracts

60 Impregilo SpA v. Islamic Republic of Pakistan (ICSID Case No. ARB/03/3), Decision on Jurisdiction of April 22, 2005, at para. 258. *See also* Bayındır Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan (ICSID Case No. ARB/03/29), Decision on Jurisdiction of November 14, 2005, at para. 160, where the tribunal found "not surprising" that the treaty claims and the contract claims arose out of the same set of facts.

61 *Vivendi I Decision on Annulment*, *supra* note 56, at para. 110.

62 *Id.* at para. 105.

63 *Id.* at para. 108.

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and national law when necessary to determine whether there has been a breach of international law.[64]

This did not deter Argentina from advancing similar arguments at the merits phase of the second, resubmitted *Vivendi* case. Argentina asserted that because of the forum selection clause in the concession contract, the *Vivendi II* tribunal could not decide on the meaning of the contract, interpret, or apply the contract when considering the merits of the treaty claims.[65] The *Vivendi II* tribunal, invoking the conclusions of the *Vivendi I* annulment committee, held that it was open to the tribunal, if necessary for its analysis of treaty breaches, to interpret the contract and "come to a view as to whether either of the parties failed to live up to its terms."[66] By doing so, the tribunal held, it would not be deciding a contractual issue or granting relief under the contract; it would be "taking the contractual background into account in determining whether or not a breach of the treaty has occurred."[67] The tribunal concluded: "[I]t is permissible for the tribunal to consider such alleged contractual breaches, not for the purpose of determining whether a party has incurred liability under domestic law, but to the extent necessary to analyze and determine whether there has been a breach of the Treaty."[68]

The Difficulty (and Irrelevance) of Attempting to Identify Contract Claims "Dressed" as Treaty Claims

The second question arises in situations where a respondent State argues that claimants have "dressed" their contractual claims as treaty claims only to gain jurisdiction. Should tribunals seek to distinguish between "genuine" treaty claims and contract claims "dressed" as treaty claims for the purposes of finding jurisdiction? At the

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64 For example, even though Article 38(1) of the Statute of the International Court of Justice explicitly states that the Court's function is to decide in accordance with international law, the Court has concluded that it must address questions of domestic law and contract interpretation when necessary to resolve a question of international law. *See, e.g.*, German Settlers in Poland, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 6, at 6 (Sept. 10); The Mavrommatis Jerusalem Concessions (Greece v. U.K.), 1925 P.C.I.J. (ser. A) No. 5, at 6 (Mar. 26); German Interests in Polish Upper Silesia and the Factory at Chorzów (Ger. v. Pol.), 1926 P.C.I.J. (ser. A) No. 7, at 4 (May 25); Serbian Loans Case (Fr. v. Serb.), 1929 P.C.I.J. (ser. A.) Nos. 21–22, at 5 (July 12); Payment in Gold of Brazilian Federal Loans Issued in France (Fr. v. Braz.), 1929 P.C.I.J. (ser. A) Nos. 21–22, at 93 (July 12); Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, Advisory Opinion, 1935 P.C.I.J. (ser. A/B) No. 65, at 41 (Dec. 4); The Panevezys-Saldutiskis Railway Case (Est. v. Lith.), 1939 P.C.I.J. (ser. A/B) No. 76, at 4 (Feb. 28). *See also* C. Wilfred Jenks, The Prospects of International Adjudication 572–73 (1964) (discussing international claims where contracts under domestic law were at issue).

65 *See* Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (ICSID Case No. ARB/97/3) (*Vivendi II*), Award of August 20, 2007, at paras. 7.3.1.–7.3.4.

66 *See id.* at para. 7.3.9.

67 *Id.* at para. 7.3.9.

68 *Id.* at para. 7.3.10.

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jurisdictional stage, this may be an impossible task. The difficulty was emphasized by the *Joy Mining* tribunal in the following terms:

> To the extent that a dispute might involve the same parties, object and cause of action it might be considered to be a dispute where it is virtually impossible to separate the contract issues from the treaty issues and to draw any jurisdictional conclusions from a distinction between them.[69]

Tribunals have attempted to make that distinction using various criteria. One test, often used by tribunals, has been to determine whether, in allegedly acting in breach of contract, the State actor has used sovereign powers (*puissance publique*) or instead has engaged in conduct as a purely commercial actor. This test has been applied in various contexts: to determine jurisdiction over contractual claims when an umbrella clause or an "any dispute" clause has been invoked, to determine whether the asserted treaty claims are in fact contractual claims "dressed" as treaty claims, or to determine the merits of such claims.[70] The problem of applying this test for jurisdictional purposes, however, is twofold. First, it requires that the tribunal inquire into the nature, or even into the motive or intent, of the alleged breach—an inquiry that requires a review of the merits. Second, when the claim is presented as a treaty claim, the inquiry is irrelevant because every violation of an international obligation by a State is itself a sovereign act. As the tribunal in *Bayındır* stated:

> In the Tribunal's view, the test of '*puissance publique*' would be relevant only if Bayındır was relying upon a contractual breach . . . in order to assert a breach of the BIT. In the present case, Bayındır has abandoned the Contract Claims and pursues

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69 Joy Mining Machinery Limited v. Arab Republic of Egypt (ICSID Case No. ARB/03/11), Award of August 6, 2004, at para. 75 (internal citation omitted).

70 *See id.* at para. 72 ("[A] basic general distinction can be made between commercial aspects of a dispute and other aspects involving the existence of some forms of State interference with the operation of the contract involved."); Azurix Corp. v. Argentine Republic (ICSID Case No. ARB/01/12), Award of July 14, 2006, at para. 315 ("Whether one or series of such [contractual] breaches can be considered to be measures tantamount to expropriation will depend on whether the State or its instrumentality has breached the contract in the exercise of its sovereign authority, or as a party to a contract."); Impregilo SpA v. Islamic Republic of Pakistan (ICSID Case No. ARB/03/3), Decision on Jurisdiction of April 22, 2005, at para. 278 ("[A] Host State acting as a contracting party does not "interfere" with a contract; it "performs" it. If it performs the contract badly, this will not result in a breach of the provisions of the Treaty relating to expropriation or nationalisation, unless it be proved that the State or its emanation has gone beyond its role as a mere party to the contract, and has exercised the specific functions of a sovereign authority."); Consortium RFCC v. Kingdom of Morocco (ICSID Case No. ARB/00/6), Award of December 22, 2003, at para. 51 ("[Q]uand l'investissement a pour origine la conclusion d'un contrat, il est possible pour l'Etat d'accueil de faire usage, dans sa relation contractuelle avec l'investisseur, de pouvoirs que lui seul détient en vertu de sa qualité de puissance publique. Seul l'usage de tels pouvoirs sera examiné par le Tribunal qui y trouvera ou non une violation de l'obligation de traitement juste et équitable . . .") and at para. 87 ("Un manquement à l'exécution d'un contrat, de nature à léser les intérêts du cocontractant, ne peut s'analyser en une mesure d'expropriation. Une chose est de priver un investisseur de ses droits contractuels reconnus par la seule force de l'autorité étatique, autre chose est de contester la réalité ou l'étendue de ces droits par application du contrat.").

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exclusively Treaty Claims. When an investor invokes a breach of a BIT by the host State (not itself a party to the investment contract), the alleged treaty violation is by definition an act of '*puissance publique*'. The question whether the actions alleged in this case actually amount to sovereign acts of this kind by the State is however a question to be resolved on the merits.[71]

The real question that tribunals need to resolve in the context of a jurisdictional inquiry is whether the facts alleged, if proven, may amount to an act or omission that is in violation of a treaty obligation. As the annulment committee in *Vivendi I* pointed out, the critical issue was that "the conduct alleged by Claimants, if established, *could* have breached the BIT."[72] This test was applied by the tribunal in *Impregilo*, which "considered whether the facts as alleged by the Claimant in this case, *if* established, are capable of coming within those provisions of the BIT which have been invoked,"[73] as well as by a number of other tribunals.[74] The tribunal in *Azurix* elaborated on this test in the following terms:

According to the Respondent, the dispute is of a contractual nature and related to the interpretation of and performance under the Concession Agreement. However, for purposes of determining its jurisdiction, the Tribunal should consider whether the dispute, as it has been presented by the Claimant, is *prima facie* a dispute arising under the BIT. The investment dispute which the Claimant has put before this Tribunal invokes obligations owed by the Respondent to Claimant under the BIT and it is based on a different cause of action from a claim under the Contract Documents. Even if the dispute as presented by the Claimant may involve the interpretation or analysis of facts related to performance under the Concession

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71 Bayındır Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan (ICSID Case No. ARB/03/29), Decision on Jurisdiction of November 14, 2005, at para. 183.

72 Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (ICSID Case No. ARB/97/3), Decision on Annulment of July 3, 2002 (*Vivendi I Decision on Annulment*), 41 ILM 1135 (2002), at para. 112.

73 Impregilo SpA v. Islamic Republic of Pakistan (ICSID Case No. ARB/03/3), Decision on Jurisdiction of April 22, 2005, at para. 254.

74 *See, e.g.*, Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco (ICSID Case No. ARB/00/4), Decision on Jurisdiction of July 23, 2001, 42 ILM 609 (2003), at paras. 59–64; United Parcel Service of America, Inc. v. Government of Canada, Award on Jurisdiction of November 22, 2002, at para. 37 ("Accordingly, the Tribunal's task is to discover the meaning and particularly the scope of the provisions which UPS invokes as conferring jurisdiction. Do the facts alleged by UPS fall within those provisions; are the facts capable, once proved, of constituting breaches of the obligations they state?"); Wena Hotels Ltd v. Arab Republic of Egypt (ICSID Case No. ARB/98/4), Decision on Jurisdiction of June 29, 1999, 49 ILM 881, at 891 ("Wena has raised allegations against Egypt . . . which, if proven, clearly satisfy the requirement of a 'legal dispute' under Article 25(1) of the ICSID Convention."); Consortium RFCC v. Kingdom of Morocco (ICSID Case No. ARB/00/6), Decision on Jurisdiction, at paras. 70–71 ("Le Consortium a expressément précisé dans ses écritures que « plusieurs violations se sont concrétisées comme violations d'autres provisions générales et spécifiques du Traité ». Il a ultérieurement indiqué que « toutes les demandes qui ont été soumises au Tribunal arbitral par RFCC se situent dans le domaine des violations du Traité bilateral . . . ». . .Les demandes, ainsi formulées, entrent dans la compétence du Tribunal arbitral. Il appartiendra à la partie demanderesse d'en démontrer le bien fondé dans la suite de la procédure arbitrale.").

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> Agreement, the Tribunal considers that, to the extent that such issues are relevant to a breach of the obligations of the Respondent under the BIT, they cannot *per se* transform the dispute under the BIT into a contractual dispute.[75]

Therefore, the investor is free to state its claims as claims for breach of treaty. Thus stated, such claims need only pass a prima facie test: whether the claims as stated are capable of coming within the purview of the substantive protections of a treaty. Such claims will pass the test if they are capable of giving rise to treaty breaches. The investor cannot "dress up" any claim as a treaty claim if the facts, as stated, cannot—even if established—constitute conduct in breach of the treaty. Other than this inquiry, however, the tribunal's scrutiny of the claims for jurisdictional purposes should be fairly limited. The tribunal in *SGS v. Pakistan* articulated that conclusion as follows:

> At this stage of the proceedings, the Tribunal has, as a practical matter, a limited ability to scrutinize the claims as formulated by the Claimant. Some cases suggest that the Tribunal need not uncritically accept those claims at face value, but we consider that if the facts asserted by the Claimant are capable of being regarded as alleged breaches of the BIT, consistently with the practice of ICSID tribunals, the Claimant should be able to have them considered on their merits. We conclude that, at this jurisdiction phase, it is for the Claimant to characterize the claims as it sees fit.[76]

As the *Bayındır* tribunal noted, "when the investor has a right under both the contract and the treaty, it has a self-standing right to pursue the remedy accorded by the treaty."[77]

The Impact of Contractual Forum Selection Clauses on the Jurisdiction of Treaty-based Tribunals

Tribunals have often been confronted with a situation where the treaty dispute arises out of an underlying contractual relationship, and the contract contains a forum selection clause in favor of local courts or another domestic forum. The distinction between contract claims and treaty claims has served as the foundation on which tribunals have built their analysis in such cases.

Jurisdiction over Treaty Claims. When investors have asserted treaty claims, tribunals have found that a contractual forum selection clause does not preclude jurisdiction under the treaty to resolve such claims. The first case in which a tribunal specifically addressed this situation was *Lanco v. Argentina*. In that case, the treaty claims arose, *inter alia*, out of conduct that was allegedly in breach of a concession contract, which

75 Azurix Corp. v. Argentine Republic (ICSID Case No. ARB/01/12), Decision on Jurisdiction of December 8, 2003, para. 76.

76 SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan (ICSID Case No. ARB/01/13), Decision of the Tribunal on Objections to Jurisdiction of August 6, 2003, 18 ICSID Rev –FILJ 307 (2003), at para. 145 (internal citations omitted).

77 Bayındır Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan (ICSID Case No. ARB/03/29), Decision on Jurisdiction of November 14, 2005, at para. 167.

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directed that all disputes under the contract must be submitted to Argentina's courts. Argentina argued that the treaty-based tribunal lacked jurisdiction because the parties had agreed to resolve their disputes in a different forum. The tribunal demonstrated no hesitation in finding jurisdiction. It concluded that the parties had consented to submit to a treaty-based tribunal (in particular, to an ICSID tribunal) claims for breach of treaty, and that a contractual forum selection clause could not negate or override such consent. The tribunal reasoned that in order for an ICSID tribunal not to have jurisdiction, the forum selection clause must operate as a stipulation requiring exhaustion of local remedies under Article 26 of the ICSID Convention but concluded that was certainly not the case.[78]

The analysis and conclusions of the *Lanco* tribunal were endorsed and further developed by the *Vivendi I* tribunal. One of Argentina's principal defenses in the *Vivendi I* case was that the underlying concession contract contained an exclusive forum selection clause in favor of the local courts and that this clause precluded ICSID jurisdiction over the dispute. The *Vivendi I* tribunal rejected that argument and determined that it had jurisdiction over the dispute, notwithstanding the exclusive forum selection clause in the concession contract. It held that the forum selection clause "does not divest this tribunal of jurisdiction to hear this case because that provision did not and could not constitute a waiver by [Vivendi] of its rights under Article 8 of the BIT to file the pending claims against the Argentine Republic."[79] The tribunal reasoned that Vivendi was claiming treaty violations rather than claims of breach of the contract containing the forum selection clause. It found that, while disputes relating to breaches of contract might belong in the local courts, claims for breaches of the treaty were properly before the ICSID tribunal. In reaching that conclusion, the *Vivendi I* tribunal relied directly on the *Lanco* decision.[80]

The *Vivendi I* annulment committee ratified the tribunal's jurisdictional analysis, agreeing with the *Lanco* ruling that treaty-based arbitration is unaffected by a contractual forum selection clause, thus rejecting Argentina's challenge to the tribunal's jurisdictional holding. The committee endorsed the *Vivendi I* tribunal's holding that the tribunal had jurisdiction over Vivendi's treaty claims and that the forum selection clause in the contract referring contractual disputes to local courts "did not affect the jurisdiction of the tribunal with respect to a claim based on the provisions of the BIT."[81]

Notwithstanding the *Vivendi I* tribunal's finding of jurisdiction, however, it stopped short of deciding the merits of Vivendi's core treaty claims precisely because of the presence of the forum selection clause in the contract. According to the *Vivendi I* tribunal, Argentina could not be held liable under the treaty unless it had first been

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78 Lanco International Inc. v. Argentine Republic (ICSID Case No. ARB/97/6), Preliminary Decision on Jurisdiction of December 8, 1998, 40 ILM 457 (2001), at para. 38.

79 Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (ICSID Case No. ARB/97/3), Award of November 21, 2000 (*Vivendi I Award*), at para. 53.

80 *See id.* at para. 53.

81 Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (ICSID Case No. ARB/97/3), Decision on Annulment of July 3, 2002 (*Vivendi I Decision on Annulment*), 41 ILM 1135 (2002), at para. 76.

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established that the concession contract had been breached. To make such a determination, however, the tribunal "would have to undertake a detailed interpretation" of the concession contract.[82] This, the tribunal decided, it could not do, because the forum selection clause divested it of authority to rule on breaches of contract: this task was, according to the tribunal, within the exclusive jurisdiction of the local courts.[83] As a result, the *Vivendi I* tribunal declined to decide the treaty claims.

As noted earlier, the *Vivendi I* annulment committee annulled this portion of the tribunal's award. The committee concluded that the tribunal's obligation to decide Vivendi's treaty claims was in no way negated by the contractual forum selection clause. According to the committee, the treaty sets out an independent international law standard by which Argentina's actions must be judged and "where 'the fundamental basis of the claim' is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state . . . cannot operate as a bar to the application of the treaty standard."[84] The key paragraph of the committee's holding reads as follows:

> In the Committee's view, it is not open to an ICSID tribunal having jurisdiction under a BIT in respect of a claim based upon a substantive provision of that BIT, to dismiss the claim on the ground that it could or should have been dealt with by a national court. In such a case, the inquiry which the ICSID tribunal is required to undertake is one governed by the ICSID Convention, by the BIT and by applicable international law. Such an inquiry is neither in principle determined, nor precluded, by any issue of municipal law, including any municipal law agreement of the parties.[85]

"At most," the committee noted, the contractual forum selection clause "might be relevant—as municipal law will often be relevant—in assessing whether there has been a breach of the treaty."[86]

The *Vivendi I* annulment committee concluded that if there were a breach of the treaty in the case, the existence of a forum selection clause in the contract could not prevent its characterization as a treaty breach because "[a] state cannot rely on an exclusive jurisdiction clause in a contract to avoid the characterisation of its conduct as internationally unlawful under a treaty."[87] Subsequent tribunals have followed this reasoning of the *Lanco* tribunal and the *Vivendi I* tribunal and annulment committee and have uniformly declined to entertain objections to jurisdiction over treaty claims based on forum selection clauses contained in underlying contracts.[88] As the tribunal in *Jan de Nul N.V. v. Egypt* observed, "the fact that the dispute involves contract rights

82 *Vivendi I Award*, *supra* note 79, at para. 79.
83 *See id.* at paras. 79 and 81.
84 *Vivendi I Decision on Annulment*, *supra* note 81, at para. 101.
85 *Id.* at para. 102.
86 *Id.* at para. 101.
87 *Id.* at para. 103.
88 *See, e.g.*, Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco (ICSID Case No. ARB/00/4), Decision on Jurisdiction of July 23, 2001, 42 ILM 609 (2003), at para. 27; Eureko v. Poland, Award of August 19, 2005, at paras. 94–97, 112–13.

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and contract remedies does not in and of itself mean that it cannot also involve Treaty breaches and Treaty claims."[89]

The only possible exception to this consistent refusal to abrogate treaty jurisdiction in the face of a contractual forum selection clause is where such a clause constitutes an explicit waiver by the investor of its rights to an international treaty-based arbitration. In *Aguas del Tunari*, the tribunal reasoned that whether a contractual forum selection clause constitutes a waiver of the treaty-based right to arbitration depends on the intent of the parties.[90] The tribunal observed that if "the parties to an ICSID arbitration could jointly agree to a different mechanism for the resolution of their disputes other than that of ICSID, it would appear that an investor could also waive its rights to invoke the jurisdiction of ICSID."[91] However, the tribunal required an explicit waiver or other "specific indications" of the common intention of the parties.[92] It held that the mere fact that the forum selection clause confers upon the domestic forum exclusive jurisdiction to resolve contractual claims is not sufficient to affect a treaty-based tribunal's jurisdiction.[93]

The *Aguas del Tunari* approach was endorsed by the tribunal in *Occidental Petroleum v. Ecuador*. That tribunal concluded: "Based on elementary principles of contract interpretation, any exception to the availability of ICSID arbitration for the resolution of disputes arising under [the relevant contract] requires clear language to this effect."[94] In reaching this conclusion, the *Occidental* tribunal quoted extensively from the *Aguas del Tunari* decision and stated its agreement with it. The *Occidental* tribunal noted further that the parties could have excluded certain disputes from ICSID jurisdiction but did not do so, and, therefore, the tribunal could not imply such an exclusion.[95]

Jurisprudence on this point is scarce and the significance of the *Aguas del Tunari* approach may be limited: it is unlikely that many investors will agree to include in an investment contract a provision by virtue of which they explicitly waive their rights to submit any disputes arising out of or relating to the contract, including claims for breaches of an investment treaty, to international treaty-based arbitration.

Jurisdiction over Contract Claims. While a contractual forum selection clause will not deprive a treaty-based tribunal of jurisdiction over a treaty claim, the effect of a contractual forum selection clause may be different when the question is whether a treaty-based tribunal has jurisdiction over contract claims. The question then is whether a treaty-based tribunal, which may otherwise have jurisdiction over "purely" contractual

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89 Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt (ICSID Case No. ARB/04/13), Decision on Jurisdiction of June 16, 2006, at para. 80.

90 Aguas del Tunari v. Bolivia (ICSID Case No. ARB/02/3), Decision on Jurisdiction of October 21, 2005, at para. 115.

91 *Id.* at para. 118.

92 *Id.* at para. 119.

93 *Id.* at para. 122.

94 Occidental Petroleum Corp. and Occidental Exploration and Production Company v. Republic of Ecuador (ICSID Case No. ARB/06/11), Decision on Jurisdiction of September 9, 2008, at para. 71.

95 *See id.* at para. 73.

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claims (whether by virtue of an umbrella clause, or an "any dispute" clause, or a grant of jurisdiction in a treaty over investment agreements), should take jurisdiction in the presence of an exclusive contractual forum selection clause. Most tribunals have answered that question in the negative and have held that an exclusive contractual forum selection clause deprives a treaty-based tribunal of jurisdiction over contract claims.[96]

Further, some tribunals have treated contractual forum selection clauses as precluding a treaty-based tribunal's consideration not only of "purely" contractual claims but also of claims where "the basis of the claim" is a contract, or the "essential basis" for the claim is a breach of contract. For example, the *SGS v. Philippines* tribunal stated:

> The question is whether a party should be allowed to rely on a contract as the basis of its claim when the contract itself refers that claim exclusively to another forum. In the Tribunal's view the answer is that it should not be allowed to do so, unless there are good reasons, such as *force majeure*, preventing the claimant from complying with its contract.[97]

This approach was also articulated by the *Vivendi I* annulment committee, which held that "[i]n a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract."[98] The *Vivendi I* annulment committee relied, *inter alia*, on the *Woodruff* case, where it was stated:

> [T]he judge, having to deal with a claim fundamentally based on a contract, has to consider the rights and duties arising from that contract, and may not construe a contract that the parties themselves did not make, and he would be doing so if he gave a decision in this case and thus absolved from the pledged duty of first recurring for rights to the Venezuelan courts, thus giving a right, which by this same contract was renounced, and absolve claimant from a duty that he took upon himself by his own voluntary action . . . [A]s the claimant by his own voluntary waiver has disabled himself from invoking the jurisdiction of this Commission, the claim has to be dismissed without prejudice on its merits, when presented to the proper judges.[99]

It is, however, not entirely clear what the difference is between a "pure" contract claim and "a claim fundamentally based on a contract." Another pre-treaty arbitration case, *North American Dredging Company of Texas*, suggests that "pure" contract claims and "claims fundamentally based on a contract" may be coextensive and, therefore, the

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96 *See, e.g.*, Joy Mining Machinery Limited v. Arab Republic of Egypt (ICSID Case No. ARB/03/11), Award of August 6, 2004, at para. 89 *et seq.*

97 SGS Société Générale de Surveillance S.A. v. Republic of the Philippines (ICSID Case No. ARB/02/6), Decision of the Tribunal on Objections to Jurisdiction of January 29, 2004, at para. 154.

98 Compañía de Aguas del Aconquija, S.A. and Vivendi Universal S.A. v. Argentine Republic (ICSID Case No. ARB/97/3), Decision on Annulment of July 3, 2002, at para. 98.

99 Woodruff Case, IX R.I.A.A. 213, Venez. Mixed Claims Commission, at 222–23 (1903).

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Woodruff case rule applies to “pure” contract claims rather than treaty claims, whether fundamentally based on a contract or not:

> [E]ach case involving the application of a valid clause partaking of the nature of the Calvo Clause will be considered and decided on its merits. Where a claim is based on an alleged violation of any rule or principle of international law, the Commission will take jurisdiction notwithstanding the existence of such a clause in a contract subscribed by such claimant. But where a claimant has expressly agreed in writing, attested by his signature, that in all matters pertaining to the execution, fulfillment, and interpretation of the contract he will have resort to local tribunals, remedies, and authorities, and then wilfully ignores them by applying in such matters to his government, he will be held bound by his contract and the Commission will not take jurisdiction of such claim.[100]

The *Woodruff/Vivendi I* approach, however, could be interpreted to apply, beyond “pure” contract claims, to claims presented as treaty claims but where the basis of the claim is a contract. This approach would then allow a treaty-based tribunal to decline jurisdiction not only over a “pure” contract claim but also over a treaty claim if the “essential basis” of the treaty claim is a breach of contract. In such a case, there is a risk that tribunals may seek to establish, at the jurisdictional stage, what is the real (essential or fundamental) basis of the claim and thus substitute an inquiry into the merits for a jurisdictional test.

The Role and Significance of “Fork-in-the-Road” Provisions

The distinction between treaty claims and contract claims is not only relevant to the jurisdiction of treaty-based tribunals in the presence of contractual forum selection clauses but also raises the question of the relationship between domestic court proceedings and international arbitration.

Older investment treaties often require the exhaustion of local remedies before international arbitration may be invoked. Some modern investment treaties require that efforts be made first to resolve the dispute in domestic court for a certain period of time. If no satisfactory resolution is found, the dispute can then be submitted to international arbitration.

Most modern investment treaties, however, require that the investor must choose between litigation in the host State’s domestic courts and international arbitration. This provision has generally been referred to as the “fork in the road,” because the choice of the investor is final and binding—on the State and on the investor itself. In other words, it is the point of no return: once the investor submits a dispute to local courts, it cannot submit that dispute to international arbitration.

Still other investment treaties (of which Chapter Eleven of the NAFTA is a prominent example) require that the investor waive its right to initiate or continue proceedings in

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100 North American Dredging Company of Texas v. United Mexican States, 20 Am. J. Int’l L. 800, 808, at para. 23 (1926).

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local courts in order to submit the same dispute to international arbitration. This means that the investor does not forfeit its access to international arbitration by initiating local court proceedings, but if the investor resorts to local courts and then turns to international arbitration, it must discontinue the local court proceedings.

When considered in the context of fork-in-the-road provisions, the distinction between contract claims and treaty claims raises the specter of significant implications. Will the investor lose access to international arbitration if it submits contractual claims to local courts? The answer is, of course, "it depends."

The first logical step in the analysis is clear: a tribunal cannot decline jurisdiction under a fork-in-the-road provision if the investor has not submitted the dispute to local courts. In *Lanco*, Argentina argued that Lanco was precluded from submitting the dispute to arbitration under the U.S.-Argentina BIT because of a forum selection clause in the underlying concession agreement. The tribunal's logic in this case (dealing with treaty claims alone) was compelling. The tribunal held that the fork-in-the-road provision could not be a bar to its jurisdiction in this case. It noted that the investor had not chosen, simply by agreeing to a forum selection clause, to submit the dispute to the procedure agreed to in the concession agreement; instead the investor chose to submit the dispute to arbitration under the treaty.[101] In other words, in the view of the *Lanco* tribunal, the mere existence of a contractual forum selection clause did not constitute the choice by the investor, required by the fork-in-the-road provision, to submit the dispute to the contractual forum. Only the actual submission of the dispute to local courts would have constituted such a choice and triggered the fork-in-the-road provision, thus barring the tribunal's jurisdiction.

The *Vivendi I* tribunal took a further analytical step by making a distinction between treaty claims and contract claims. The tribunal held that it had before it treaty claims, which were not subject to the jurisdiction of local courts under the contractual forum selection clause "if only because, *ex hypothesi*, those claims are not based on the Concession Contract but allege a cause of action under the BIT."[102] On that basis, the tribunal concluded that "a suit by Claimants [in local courts] for violation of the terms of the Concession Contract would not have foreclosed Claimants from subsequently seeking a remedy against the Argentine Republic as provided in the BIT and ICSID Convention" because such a suit would not have been "the kind of choice by Claimants of legal action in national jurisdictions (i.e., courts) against the Argentine Republic that constitutes the 'fork in the road' under Article 8 of the BIT, thereby foreclosing future claims under the ICSID Convention."[103] In the subsequent annulment proceeding, the *Vivendi I* annulment committee agreed with the tribunal's analysis and declined to annul the jurisdictional part of the award.[104]

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101 *See* Lanco International Inc. v. Argentine Republic (ICSID Case No. ARB/97/6), Preliminary Decision on Jurisdiction of December 8, 1998, 40 ILM 457 (2001), at paras. 28–30.

102 Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (ICSID Case No. ARB/97/3), Award of November 21, 2000 (*Vivendi I Award*), at para. 53.

103 *Id.* at para. 55.

104 *See* Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (ICSID Case No. ARB/97/3), Decision on Annulment of July 3, 2002 (*Vivendi I Decision on Annulment*), 41 ILM 1135 (2002), at paras. 38–39.

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Numerous tribunals have performed the same analytical exercise when approaching fork-in-the-road provisions.[105] As the *CMS Gas* tribunal noted, "[d]ecisions of several ICSID tribunals have held that as contractual claims are different from treaty claims[;] even if there had been or there currently was a recourse to the local courts for breach of contract, this would not have prevented submission of the treaty claims to arbitration."[106] The *Enron* tribunal echoed that conclusion: "It has . . . been held that even if there was recourse to local courts for breach of contract this would not prevent resorting to ICSID arbitration for violation of treaty rights."[107]

A fork-in-the-road provision, therefore, would be triggered (and the investor would lose access to international arbitration) only if the same dispute between the same parties has been submitted to local courts prior to its submission to international arbitration. The investor's submission of contractual claims to local courts does not preclude its access to treaty-based arbitration for the resolution of treaty claims. For the fork-in-the-road provision to be triggered, then, the parties to the local court proceeding and the international arbitration must be identical *and* the causes of action in the two proceedings must be identical.[108]

As a result, the fork-in-the-road provision would act as a bar to jurisdiction in only two situations. First, it would apply where an investor has submitted breach of treaty claims against the State to local courts and then seeks to submit the same claims to international arbitration. This situation is highly unlikely for obvious reasons. Second, the fork-in-the-road provision would apply if the investor has submitted claims for breach of contract to local courts and then seeks to submit the same contract claims (most likely together with treaty claims) to treaty-based arbitration. In this second case, a tribunal—even assuming it otherwise had jurisdiction over breach of contract claims—would decline to exercise its jurisdiction over the contract claims because, by submitting the contract claims to local courts, the investor has taken the fork in the road with respect to those claims. This, however, would not affect the tribunal's jurisdiction over any treaty claims submitted by the investor.

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105 *See, e.g.*, Lauder v. Czech Republic (UNCITRAL), Award of September 3, 2001, at paras. 162–63; Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt (ICSID Case No. ARB/99/6), Award of April 12, 2002, at para. 71; Wena Hotels Ltd. v. Arab Republic of Egypt (ICSID Case No. ARB/98/4), Decision on Application for Annulment of February 5, 2002, 41 ILM 933 (2002), at para. 36; Azurix Corp. v. Argentine Republic (ICSID Case No. ARB/01/12), Decision on Jurisdiction of December 8, 2003, at paras. 88–92.

106 CMS Gas Transmission Company v. Argentine Republic (ICSID Case No. ARB/01/8), Decision on Jurisdiction of July 17, 2003, 42 ILM 788 (2003), at para. 80 (citing *Vivendi I Award*, *supra* note 79; Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Estonia (ICSID Case No. ARB/99/2), Award of June 25, 2001; and Eudoro Olguín v. Paraguay (ICSID Case No. ARB/98/5), Decision on Jurisdiction of August 8, 2000).

107 Enron Corp. v. Argentine Republic (ICSID Case No. ARB/01/3), Decision on Jurisdiction of January 14, 2004, at para. 97.

108 *See* Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Estonia (ICSID Case No. ARB/99/2), Award of June 25, 2001, at paras. 331–33, and Professor Schreuer's analysis in Christoph Schreuer, *Travelling the BIT Route—Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 J.W.I.T. 2, April 2004, at 231, 244–45 and 247–48.

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CONCLUSION

The approach of treaty-based tribunals to analyzing jurisdiction over breach of treaty and breach of contract claims has been undergoing significant clarification and refinement. Tribunals continue to build upon prior decisions on the subject. The result is a clearly emerging jurisprudence that establishes a framework for future tribunals to approach the jurisdictional analysis of treaty and contract claims in a consistent and analytically sound manner.

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Chapter 15

The MFN Clause: What are its Limits?

*Abby Cohen Smutny and Lee A. Steven**

INTRODUCTION

The obligation to accord most-favored-nation (MFN) treatment arises when "a State (the granting State) undertakes the obligation towards another State (the beneficiary state) to accord to it or to persons or things in a determined relationship with it most-favoured-nation treatment in an agreed sphere of relations."[1] To be accorded MFN treatment means that the beneficiary will enjoy treatment in the agreed sphere of relations no less favorable than the granting State accords to third parties in that same sphere of relations.[2]

MFN clauses originated in early international trade practice and have continued to be incorporated in modern trade and investment treaties, both bilateral and multilateral. Their intended purpose is to lessen discrimination and encourage the growth of trade and foreign investment by ensuring that certain defined benefits accorded to one set of States (or their nationals, investments, goods, etc.) are extended to other States (or their nationals, investments, goods, etc.). The trade and investment benefits that fall within the scope of an MFN clause may be either substantive (e.g., lower tariffs on certain goods, the promise to accord investments fair and equitable treatment) or procedural (e.g., the right to invoke certain dispute settlement procedures). In the investment treaty context, some commentators have observed that the right to a favorable dispute settlement mechanism is the primary concern of foreign investors[3] and

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* Abby Cohen Smutny is a partner and Lee A. Steven is a counsel of White & Case LLP. Both resident in Washington, DC.

1 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 468 (1997).

2 *Ibid.*

3 *See* Francisco Orrego Vicuña, *Bilateral Investment Treaties and the Most-Favored-Nation Clause: Implications for Arbitration in the Light of a Recent ICSID Case*, *in* INVESTMENT

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investors often invoke MFN clauses to secure procedural rights that might otherwise be denied them. The extent to which MFN clauses may be used to secure procedural rights, however, remains somewhat controversial, as the cases that will be discussed demonstrate.

This chapter discusses MFN clauses from early references in trade agreements to contemporary references in investor-state arbitrations.

HISTORICAL BACKGROUND

Origins

The obligation to accord MFN treatment is created and governed by conventional, rather than customary, international law. Historically, MFN clauses were used within a limited sphere of trading relations in State-to-State (or even city-to-city) agreements in order to reduce discrimination and provide greater access to a State's trading partners.[4] The primary aim of the parties was to reduce tariffs and other barriers to the flow of goods across borders and to expand trading benefits to a larger number of beneficiaries.

MFN provisions were in use as early as the Middle Ages,[5] although at least one scholar has traced the use of the MFN obligation as far back as the beginning of the Holy Roman Empire for favors granted "by whatsoever town."[6] England and Continental Europe first used MFN clauses in commercial treaties in the twelfth century, and by the close of the fifteenth century, England's use of MFN clauses without listing specific nations paved the way for its contemporary usage, as "privilege[s] granted to the beneficiary were are no longer necessarily defined with reference to one or several named countries, the most favoured nations in the original meaning of the term."[7] The use of the phrase "most favored nation" became commonplace in treaties of friendship, commerce, and navigation dating from the 1700s[8] and continues to be found in both trade and investment treaties in use today.

As MFN clauses arose in the context of international trade, they naturally have been included in the tariff and trade agreements negotiated through the General Agreement on Tariffs and Trade (GATT), which ultimately led to the creation of the World Trade Organization. The MFN clause in the 1947 GATT, for example, provides that:

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of

TREATIES AND ARBITRATION 138 (Gabrielle Kaufmann-Kohler & Blaise Stucki eds., 2002): "Under most [bilateral investment treaties] . . . the key of the protection of the investor lies not so much in the substantive provisions of the treatment accorded . . . but in the arrangements allowing for the submission of disputes to arbitration."

4 *See* 1 OPPENHEIM'S INTERNATIONAL LAW 1327 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992).

5 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 469 (1997).

6 GEORG SCHWARZENBERGER, INTERNATIONAL LAW AND ORDER 130 (1971).

7 *Ibid*.

8 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 469 (1997).

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> payments for imports or exports . . . any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.[9]

With the advent of bilateral and multilateral investment treaties in the latter half of the twentieth century, MFN clauses became common in the foreign investment field. As an example, Article 1103 of the North American Free Trade Agreement states:

> Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of another Party or a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.[10]

The purpose of an MFN clause in the investment treaty context is to ensure "that investments or investors of contracting parties to [an investment treaty] receive the best treatment that each of them has granted to the investments or investors of any other third country. Thus the MFN standard establishes, at least in principle, a level playing field between all foreign investors protected by [an investment treaty]."[11]

Work of the International Law Commission

As part of its program of work for the United Nations, the International Law Commission (ILC) began examining the MFN obligation in the context of its work on the law of treaties in the 1960s. It ultimately separated MFN and the law of treaties into two distinct areas of study and, in 1967, appointed Endre Ustor as Special Rapporteur on MFN clauses.[12] The goal of this program of study was to "clarify the scope and effect of the [MFN] clause as a legal institution in the context of all aspects of its practical application."[13] The ILC specifically instructed Ustor not to confine his analysis of MFN clauses to international trade but to explore other applications of the MFN clause as well.[14]

From 1969 through 1976, Ustor presented seven reports to the ILC on the MFN standard and in 1976 presented a set of draft articles on the subject.[15] Nikolai A. Ushakov succeeded Ustor as Special Rapporteur in 1977 and presented a revised set of draft

9 General Agreement on Tariffs and Trade Art. 1(1) (1947).

10 North American Free Trade Agreement Art. 1103(1), 1994. Article 1103(2) repeats the same formulation, except that it applies it to "investments of investors."

11 UNCTAD, Bilateral Investment Treaties: 1995–2006: Trends in Investment Rulemaking 38 (2007).

12 *See Yearbook of the International Law Commission* 1967, vol. II, p. 369, para. 48; G.A. Res. 2272 (XXIX) (Dec. 11, 1967).

13 Endre Ustor, *The Most-Favoured-Nation Clause*, *in* 11 Journal of World Trade Law 462, 462 (1977).

14 *Yearbook of the International Law Commission* 1968, vol. II, p. 223, para. 93. *See also* Sir Arthur Watts, The International Law Commission 1949–1998, at 1794 (1999).

15 Watts, *supra* note 14, at 1794, 1796.

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articles after taking into account the comments of the Member States on the first set of draft articles.[16] Based upon this work, the ILC adopted the "Draft Articles on Most-Favoured-Nation Clauses" in 1978 and presented the Draft Articles, together with a commentary,[17] to the General Assembly with a recommendation for the Member States to conclude a convention on the subject.[18] Although the General Assembly never acted upon the ILC's recommendation to use the Draft Articles as the basis for a convention, the Draft Articles and their commentary are a helpful resource in interpreting MFN clauses in use today.

Interpretation. The Draft Articles emphasize that MFN treatment is not a customary law obligation but arises only where a treaty creates it.[19] The scope of the MFN obligation in any particular case therefore will be defined by the specific language of the MFN clause in question, which is "subject to the general rules of treaty interpretation."[20] As such, Articles 31 and 32 of the Vienna Convention on the Law of Treaties serve as the interpretative starting point.

An important tenet of treaty interpretation, confirmed in the Vienna Convention, that has played a key role in the reasoning of the cases to be discussed is that treaty provisions such as MFN clauses are to be interpreted and applied in a manner consistent with the intent of the Contracting Parties to the particular treaty. The Vienna Convention settled earlier differences of approach. It made clear that the general rule for determining party intent is the ordinary meaning of the terms of the treaty, interpreted in their context and in light of their object and purpose; however, recourse may be had to supplementary means of interpretation, such as the documents associated with the treaty's negotiation, conclusion, and ratification, to confirm that interpretation or to determine the meaning when application of the general rule gives an ambiguous, obscure, or manifestly absurd or unreasonable result. This is reflective of the approach previously followed by the International Court of Justice (ICJ).[21]

Definition of MFN Treatment. Draft Article 4 defines an MFN clause as "a treaty provision whereby a State undertakes an obligation towards another State to accord most-favored-nation treatment in an agreed sphere of relations."[22] Draft Article 5 defines the MFN obligation as "treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less

16 *See Yearbook of the International Law Commission* 1978, vol. II, Pt. 1, p. 1.

17 *See* WATTS, *supra* note 14, at 1798–1916 (republishing the Draft Articles and Commentary).

18 *See Yearbook of the International Law Commission* 1978, vol. II, Pt. 2, p. 16; WATTS, *supra* note 14, at 1794.

19 *See* Draft Articles on MFN Clauses Arts. 1, 4, 6–8.

20 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 471 (1997).

21 *See e.g.*, Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.), 1952 ICJ 176, 191–92 (Judgment of August 27) (the intention of the parties in the case "is shown both by the wording of the particular treaties, and by the general treaty pattern which emerges from an examination of the treaties made by Morocco with [various States] over the period from 1631 to 1892.").

22 Draft Articles on MFN Clauses Art. 4.

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favourable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State."[23]

The reference in Article 4 of the Draft Articles to an "agreed sphere of relations" recognizes that, although it is possible for States to accord MFN treatment in all relations between the parties concerned, the more usual practice is to define a more limited area in which to apply the MFN standard, such as in the area of trade in certain goods or in foreign direct investment. This agreed area of application may be defined in the MFN clause itself, by reference to specific terms that are defined elsewhere in the treaty, or by the specific nature of the treaty as a whole. A bilateral investment treaty, for example, constitutes a limited area of State-to-State relations dealing with specifically defined types of investment and applying to a specifically defined class of investors. The investment contemplated by such a treaty thus constitutes the outer bounds of the "agreed sphere of relations" for purpose of an MFN clause contained in such a treaty.

With respect to the meaning in Article 5 of the Draft Articles of the persons or things that are in a "determined relationship" with the beneficiary State, the commentary to the Draft Articles explains that:

> A "determined relationship" in this context means that the relationship between the States concerned and the persons or things concerned is determined by the clause, i.e., by the treaty. The clause embodied in the treaty between the granting and the beneficiary State has to determine the persons or things to whom and to which the most-favored-nation treatment is applicable and this determination has to include, obviously, the link between the beneficiary State and the persons or things concerned.[24]

In the investment treaty context, the treaty's definitions of an investor and an investment define the category of persons and things to which that treaty's MFN clause applies.

Article 5 of the Draft Articles defines the treatment to be accorded the beneficiary State as treatment "not less favorable" than that extended to other States. This formulation or its equivalent is found in most MFN clauses today, and its use reflects the fact that MFN clauses do not require treatment of the beneficiary that is identical or exactly equal to the treatment extended to third parties. That is, treatment may be different as between the beneficiary State and the third State as long as the treatment of the beneficiary State is as favorable as the treatment extended to the third State or, in the investment context, their respective investors and investments.

MFN Clauses May Be Conditioned or Restricted. In extending MFN benefits to another State, the granting State may impose conditions, restrictions, and exceptions to the application of a particular MFN clause. As the commentary to the Draft Articles explains,

> The parties stipulating the clause, i.e. the granting State and the beneficiary State, can . . . restrict in the treaty or agreement itself the extent of the favours that can be claimed by the beneficiary State. . . . If the clause contains a restriction, the

23 Draft Articles on MFN Clauses Art. 5.

24 Commentary 5(4), Draft Articles on MFN Clauses, *reprinted in* Watts, *supra* note 14, at 1811.

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> beneficiary State cannot claim any favours beyond the limits set by the clause, even if this extent does not reach the level of the favours extended by the granting State to a third State. In other words, the treatment granted to the third State by the granting State is applicable only within the framework set by the clause.[25]

An example of a more specific restriction is provided by the bilateral investment treaty between Albania and the United Kingdom,[26] which exempts from MFN treatment the beneficial treatment extended to third States arising from membership in a customs union and from taxation treaties. Article 7 of that treaty provides as follows:

> The provisions of this Agreement relative to the grant of treatment not less favourable than that accorded to the nationals or companies of either Contracting Party or of any third State shall not be construed so as to oblige one Contracting Party to extend to the nationals or companies of the other the benefit of any treatment, preference or privilege resulting from:
>
> (a) any existing or future customs union or similar international agreement to which either of the Contracting Parties is or may become a party, or
>
> (b) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation.

Another example of a restriction would be if the treaty limited the application of the MFN clause to the substantive protections contained in that treaty and excluded any procedural rights and protections, such as the right of an investor to bring an arbitration in a specific forum.

The Ejusdem Generis Principle. In the MFN context, the principle of *ejusdem generis*[27] operates to define the scope of an MFN clause's subject matter. Sir Gerald Fitzmaurice has explained that MFN clauses, following the *ejusem generis* principle, "only attract rights of the same kind or order, or belonging to the same class, as those contemplated by the most-favoured-nation clause concerned. The subject-matter or category of subject-matter must be the same."[28] This concept is embodied in Articles 9 and 10 of the Draft Articles on MFN Clauses as follows:

> ARTICLE 9
>
> 1. Under a most-favoured-nation clause the beneficiary State acquires, for itself or for the benefit of persons or things in a determined relationship with it, only those rights which fall within the limits of the subject-matter of the clause.

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25 Commentary 8(8), Draft Articles on MFN Clauses, *reprinted in* WATTS, *supra* note 14, at 1820. *See also* Draft Articles on MFN Clauses Arts. 11–19; 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 470 (1997).

26 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Albania for the Promotion and Protection of Investments Art. 7, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/uk_albania.pdf.

27 *Ejusdem generis* is a canon of construction to the effect that "when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same type as those listed." BLACK'S LAW DICTIONARY 556 (8th ed. 2004).

28 1 SIR GERALD FITZMAURICE, THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE 324 (1986).

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2. The beneficiary State acquires the rights under paragraph 1 only in respect of persons or things which are specified in the clause or implied from its subject-matter.

ARTICLE 10

1. Under a most-favoured-nation clause the beneficiary State acquires the right to most-favoured-nation treatment only if the granting State extends to a third State treatment within the limits of the subject-matter of the clause.

2. The beneficiary State acquires rights under paragraph 1 in respect of persons or things in a determined relationship with it only if they:

(a) belong to the same category of persons or things as those in a determined relationship with a third State which benefit from the treatment extended to them by the granting State and

(b) have the same relationship with the beneficiary State as the persons and things referred to in subparagraph (a) have with that third State.[29]

The ILC's commentary to the Draft Articles quotes Lord McNair to explain this idea further:

> Suppose that a most-favoured-nation clause in a commercial treaty between State A and State B entitled State A to claim from State B the treatment which State B gives to any other State, that would not entitle State A to claim from State B the extradition of an alleged criminal on the ground that State B has agreed to extradite alleged criminals of the same kind to State C, or voluntarily does so. The reason, which seems to rest on the common intention of the parties, is that the clause can only operate in regard to the subject-matter which the two States had in mind when they inserted the clause in their treaty.[30]

The application of the MFN standard is, as Sir Gerald Fitzmaurice described it, "double" in nature because it depends upon the "interplay of two sets of treaty provisions."[31] The first treaty, called the "basic treaty,"[32] contains the MFN clause and

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29 Draft Articles on MFN Clauses Arts. 9–10. *See also* 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 472 (1997) ("The beneficiary State can only claim rights which belong to the subject-matter of the clause which are within the time-limits and other conditions and restrictions set by the agreement, and which are in respect of persons or things specified in the clause or implied from its subject-matter. The beneficiary State is entitled to the same treatment as extended by the granting State to a third State, as long as that treatment lasts, only in respect of persons and things which belong to the same category and have the same relationship to the beneficiary State as those persons and things related to the third State which enjoy the favoured treatment extended to them by the granting State.").

30 Commentary 10(1), Draft Articles on MFN Clauses (quoting A.D. MCNAIR, THE LAW OF TREATIES 287 (1961)), *reprinted in* WATTS, *supra* note 14, at 1821.

31 1 SIR GERALD FITZMAURICE, THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE 326 (1986). *See also* Draft Articles on MFN Clauses Art. 8.

32 *See* Anglo-Iranian Oil Co. Case (U.K. v. Iran), 1952 I.C.J. 93, 109 (Judgment on Preliminary Objection of 22 July) ("The treaty containing the most-favoured-nation clause is the basic treaty . . . . It is this treaty which establishes the juridical link between the United Kingdom and a third-party treaty and confers upon that State the rights enjoyed by the third party. A third-party

establishes the right to be accorded MFN treatment, whereas a "third-party treaty" determines "the extent of the favours" that the beneficiary of the clause may enjoy.[33] In fact, a third-party treaty itself is not strictly necessary. In principle and depending upon the wording of the basic treaty, MFN treatment may be invoked as long as benefits in the same subject matter are extended to a third party, whether those benefits are "based upon a treaty, another agreement or a unilateral, legislative, or other act, or mere practice."[34] As the commentary to the Draft Articles explains, "[t]he mere fact of favourable treatment is enough to set in motion the operation of the clause."[35]

In most cases, however, the specific benefits to be invoked under an MFN clause are contained in an appropriate third-party treaty. In such a case, both the basic treaty and the third-party treaty must be in force in order for the MFN clause to operate. The beneficiary of the MFN clause, however, does not need to show that the third-party State (or its nationals) have, in fact, invoked the benefits of the third-party treaty. The mere existence of the third-party treaty is sufficient:

> [T]he fact of favourable treatment may consist . . . in the conclusion or existence of an agreement between the granting State and the third State by which the latter is entitled to certain benefits. The beneficiary State, on the strength of the [MFN] clause, may also demand the same benefits as were extended by the agreement in question to the third State. The mere fact that the third State has not availed itself of the benefits which are due to it under the agreement concluded with the granting State cannot absolve the granting State from its obligations under the clause.[36]

In considering the extent to which an MFN clause may be invoked in a particular case, therefore, one must determine whether the basic treaty containing the MFN clause establishes the appropriate juridical link between it and the benefits that are extended to a third party. "[T]he beneficiary State can claim most-favoured-nation treatment in respect of its nationals, ships, products, etc. only to the extent that the granting State confers the same benefits upon the nationals, ships, products, etc., of a third State."[37] In addition, under the *ejusdem generis* principle, the benefits to be invoked under an MFN clause must be limited to the appropriate subject matter. "[T]he grant of most-favoured-nation rights on one subject or order of subjects, cannot confer

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treaty, independent of and isolated from the basic treaty, cannot produce any legal effect as between the United Kingdom and Iran: it is *res inter alios acta*.").

33 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 471 (1997). *See also* FITZMAURICE, *supra* note 31, at 327–28 ("[T]he entire right to receive such treatment derives from and depends on the earlier most-favoured-nation treaty. The role of the [third-party] treaty is so to speak largely indicative. It does not *per se* confer rights on [State] *A*, but (as between [State] *A* and *B*) it indicates *what* particular treatment *B* must grant *A* by reason of the right given to *A* under the earlier most-favoured-nation clause.").

34 Commentary 8(1), Draft Articles on MFN Clauses, *reprinted in* WATTS, *supra* note 14, at 1818.

35 Commentary 5(6), Draft Articles on MFN Clauses, *reprinted in* WATTS, *supra* note 14, at 1812.

36 *Ibid.*, WATTS, *supra* note 14, at 1812–13.

37 WATTS, *supra* note 14, at 1811.

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a right to enjoy the treatment granted to another country in respect of a different subject-matter or category of subject-matter."[38]

Early Jurisprudence

The International Court of Justice and other international tribunals have been confronted with the interpretation and application of MFN clauses on a number of instances, and the resulting decisions have relevance not only to understanding how the above principles have been applied in specific circumstances but also to the contemporary question of the extent to which MFN clauses may be relied on in the investment treaty context to confer benefits not otherwise available to the beneficiary of the MFN clause. The following cases have been discussed and referenced in several recent bilateral investment treaty cases.

Anglo-Iranian Oil Company. Although the *Anglo-Iranian Oil Company* case[39] has often been cited in recent investment treaty cases, it has had little relevance to the issues actually decided. Its chief contribution, if any, has been the Court's dicta concerning the need to determine party intent in interpreting the meaning and scope of an MFN clause.

In the case, the United Kingdom invoked MFN clauses in treaties concluded with Iran in 1857 and 1903 in an attempt to benefit from a 1934 treaty between Iran and Denmark, as well as similar Iranian treaties concluded with Switzerland in 1934 and Turkey in 1937, that guaranteed treatment of persons and property in accordance with international law. Without reaching the merits, the ICJ dismissed the case on the grounds that it did not have jurisdiction.

The basis of the Court's ruling was that Iran's Declaration accepting the ICJ's jurisdiction was not made until 1932, which postdated the two traties containing the MFN clauses invoked by the United Kingdom, and that the Declaration applied only to disputes arising under treaties concluded after the date of the Declaration. In interpreting the wording of the Declaration, the Court sought evidence of Iran's intent in making the Declaration by comparing its contemporaneous treaty practice with other States and the wording of its internal ratification of the Declaration.[40] The Court's conclusion was that Iran had intended to agree to the Court's jurisdiction only with respect to disputes arising under treaties concluded after the date of the Declaration. Accordingly,

> The Court must, therefore, find in regard to the Iranian-Danish Treaty of 1934, that the United Kingdom is not entitled, for the purpose of bringing its present dispute with Iran under the terms of the Iranian Declaration, to invoke its Treaties of 1857 and 1903 with Iran, since those Treaties were concluded before the ratification of

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38 1 Sir Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice 324 (1986).

39 Anglo-Iranian Oil Co. Case (U.K. v. Iran), 1952 I.C.J. 93 (Judgment on Preliminary Objection of 22 July).

40 1952 I.C.J. at 105–07.

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> the Declaration; that the most-favoured-nation clause contained in those Treaties cannot thus be brought into operation; and that, consequently, no treaty concluded by Iran with any third party can be relied upon by the United Kingdom in the present case.[41]

The Court's finding was not that the MFN clauses in the treaties of 1857 and 1903 were, by their nature, incapable of giving rise to jurisdiction or otherwise operating to confer benefits on the United Kingdom, but that because of the specific wording and effect of Iran's Declaration, which was the only possible basis for the ICJ's jurisdiction in the case, those particular treaties could not be invoked on any basis before the Court. The case thus turned on the Court's understanding of Iran's purpose and intent in making its Declaration of acceptance of the Court's jurisdiction.

Rights of U.S. Nationals in Morocco. As already noted, the application of MFN treatment generally depends upon the interplay of two sets of treaties: the basic treaty establishes the right to be accorded MFN treatment and the third-party treaty establishes the content of the treatment. In the *Rights of U.S. Nationals in Morocco* case,[42] the ICJ explained that because the basic treaty relies on the provision of another treaty for the content of the rights to be accorded to the beneficiary of the MFN clause, both treaties must be valid and in force.[43]

The case concerned the question of whether the United States could continue to claim "privileges with regard to consular jurisdiction" that Morocco had granted to Spain and the United Kingdom in other treaties but which privileges Spain and the United Kingdom had since renounced. The United States argued that it was entitled to such consular jurisdiction on the basis of an MFN clause in a treaty concluded with Morocco in 1836, pursuant to which Morocco agreed that "whatever indulgence, in trade or otherwise, shall be granted to any of the Christian Powers, the citizens of the United States shall be equally entitled to them."[44]

The ICJ rejected the United States' contention that MFN provisions are intended to be "a form of drafting by reference . . . [under which] rights or privileges which a country was entitled to invoke by virtue of [an MFN] clause . . . would be incorporated permanently by reference . . . even after the abrogation of the treaty provisions from which they derived."[45] Based on an examination of the treaty at issue and the general treaty pattern of the contracting parties, the Court found that the intent of the parties

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41 1952 I.C.J. at 110.

42 Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.), 1952 I.C.J. 176 (Judgment of August 27).

43 *See also* 1 OPPENHEIM'S INTERNATIONAL LAW 1330 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992) ("A most favoured nation clause will usually relate not only to the level of treatment accorded to third states at the time the treaty was concluded, but also to all subsequent changes in the level of treatment given to third states. However, where the treatment granted to a third state is based on a treaty between it and the granting state, the termination of that treaty will in principle bring to an end the entitlement of the beneficiary state to that treatment.").

44 1952 I.C.J. at 190 (citing Treaty of September 16, 1836, Art. 24).

45 1952 I.C.J. at 191.

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was to treat each other with equality at all times, and therefore the Court held that once Spain and the United Kingdom had renounced the privileges at issue, the basis of those privileges ceased to exist, and the United States accordingly could not invoke the MFN clause to continue to claim them.

Ambatielos. The most widely cited case in the recent investment treaty cases discussed here is the *Ambatielos* case decided by an *ad hoc* Arbitration Commission in 1956.[46] In that case, Greece brought a claim in arbitration against the United Kingdom on behalf of its national, arguing that Mr. Ambatielos had suffered a denial of justice in respect of a dispute brought before the English courts.[47] Greece invoked the right to bring such a claim by relying on the MFN clause in an 1886 Anglo-Greek Treaty of Commerce and Navigation and earlier treaties between the United Kingdom and third States that Greece claimed had obligated the United Kingdom to accord its nationals treatment in accordance with international standards in the administration of justice.[48]

In response, the United Kingdom argued that Greece had not brought a valid claim because the MFN clause at issue only related to commerce and navigation, not to the administration of justice.[49] The Arbitration Commission rejected this interpretation, ultimately holding that "the effects of the most-favoured-nation clause contained in Article X of the said Treaty of 1886 can be extended to the system of the administration of justice in so far as it concerns the protection by the courts of the rights of persons engaged in trade and navigation."[50]

In reaching this conclusion, the Arbitration Commission agreed that the *ejusdem generis* principle applied and that an MFN "clause can only attract matters belonging to the same category of subject as that to which the clause itself relates."[51] The Commission, however, found that the subject matter of the 1886 Anglo-Greek treaty encompassed the administration of justice, at least in respect of the intended beneficiaries under the treaty. As the Commission explained:

> It is true that "the administration of justice", when viewed in isolation, is a subject matter other than "commerce and navigation", but this is not necessarily so when it is viewed in connection with the protection of the rights of traders. Protection of the rights of traders naturally finds a place among the matters dealt with by Treaties of commerce and navigation.
>
> Therefore it cannot be said that the administration of justice, in so far as it is concerned with the protection of these rights, must necessarily be excluded from

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46 The Ambatielos Claim (Gr. v. U.K.), XII R.I.A.A. 91 (Award of March 6, 1956).

47 Jurisdiction to hear the case arose from a Declaration annexed to a 1926 Anglo-Greek Treaty of Commerce and Navigation. *See* Ambatielos (Gr. v. UK), 1953 I.C.J. 10 (Judgment on the Obligation to Arbitrate of 19 May); Ambatielos (Gr. v. UK), 1952 I.C.J. 28 (Judgment on Preliminary Objection of 1 July).

48 *See* XII R.I.A.A at 106; 1953 I.C.J. at 20–21.

49 XII R.I.A.A at 106.

50 XII R.I.A.A at 109.

51 XII R.I.A.A at 107.

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> the field of application of the most-favoured-nation clause, when the latter includes "all matters relating to commerce and navigation". The question can only be determined in accordance with the intention of the Contracting Parties as deduced from a reasonable interpretation of the Treaty.[52]

The ultimate question for the Commission, therefore, was the intent of the parties to the MFN clause. The Commission found that the administration of justice was included within the scope the MFN clause at issue because that clause applied broadly to "all matters relating to commerce and navigation" and because:

> Although the wording of Article X does not provide a clear and decisive indication in this respect, the Commission is of the opinion that it is difficult to reconcile the narrow interpretation submitted by the Government of the United Kingdom with the indications given in the text, in particular in the last part of the sentence "it being their (the Contracting Parties') intention that the trade and navigation of each country shall be placed, *in all respects*, by the other on the footing of the most favoured nation".[53]

The Arbitration Commission ultimately decided against Greece on the merits (that is, it decided that Mr. Ambatielos had not suffered a denial of justice). However, its conclusion regarding the scope of an MFN clause in respect of the "administration of justice" has been cited by claimants and some tribunals as authority for the proposition that foreign investors can rely on an MFN clause in one investment treaty to invoke the benefits of another investment treaty in regard to the terms of submission of disputes to international arbitration. This understanding of the significance of the *Ambatielos* case, however, has not been accepted universally. As will be discussed, several tribunals have ruled that as the reference to the administration of justice in the *Ambatielos* case was in the context of the quality of the substantive treatment afforded by the United Kingdom (albeit through its courts), the case does not provide direct support for the conclusion that the "administration of justice" includes the manner in which the treaty obligations themselves can be enforced against the State.

BILATERAL INVESTMENT TREATY PRACTICE

MFN Clauses and Dispute Settlement

MFN clauses are routinely found in modern investment treaties. Many such treaties pair MFN with National Treatment, thereby requiring the Contracting Parties to treat covered investors and investments no less favorably than they treat their own investors/

52 *Ibid.*
53 XII R.I.A.A at 107 (emphasis in original).

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investments or investors/investments of third-party States. The United Kingdom-Turkey bilateral investment treaty[54] provides an example:

NATIONAL TREATMENT AND MOST-FAVOURED-NATION PROVISIONS

(1) Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State.

(2) Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards the management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State.

In disputes arising under investment treaties, claimants have invoked MFN clauses in an attempt to secure both substantive and procedural benefits. *MTD Equity v. Chile*[55] is an example of the successful use of an MFN clause to secure substantive rights. In that case, the claimant brought expropriation and fair and equitable treatment claims under the Malaysia-Chile BIT (the basic treaty) but also relied on the MFN clause in that treaty to assert claims for breach of investment contract, unreasonable and discriminatory measures, and failure to grant necessary permits, which were based upon the Denmark-Chile BIT and the Croatia-Chile BIT.[56]

In the majority of cases, claimants have sought procedural benefits, arguing that the MFN clause in the basic treaty allows them to look to third State investment treaties to secure a more favorable dispute settlement mechanism. As will be discussed, some efforts to invoke an MFN clause in that manner have been successful, and others have not.

The question of whether an MFN clause may permit a claimant to benefit from the dispute settlement procedures contained in other treaties arises because there can be significant variations among investment treaties as to the right, conditions, and forums available for dispute settlement. Whereas most investment treaties give investors the right to bring claims in arbitration against the host State for alleged breaches of the substantive provisions of the investment treaty in question, a small number of investment treaties contain no provision for the arbitration of investment disputes, and others allow arbitration of only a limited subset of potential investment disputes. There may

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54 Agreement between the Government of the Republic of Turkey and the Government of the United Kingdom of Great Britain and Northern Ireland for the Promotion and Protection of Investments Art. 3, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/uk_turkey.pdf.

55 MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award of May 25, 2004. All arbitral cases cited herein may be accessed through the University of Victoria Faculty of Law's "International Treaty Arbitration" Web site at http://ita.law.uvic.ca/.

56 *See MTD Equity v. Chile*, paras. 100–05.

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be other differences as well, including the applicable arbitral rules/institution, whether arbitration claims are barred if the investor avails itself of local remedies, whether the investor must first bring its claims to the local courts and the amount of time an investor must wait before commencing an arbitration.

As the cases that will be discussed demonstrate, the ultimate question of whether an investor can rely on an MFN clause in one investment treaty to avail itself of a more favorable dispute settlement mechanism found in a third State investment treaty is a question of interpretation and turns on the intent of the Contracting Parties to the basic treaty.

Some treaties make the Parties' intent clear. Article 3 of the BIT between Albania and the United Kingdom, for example, includes the same two clauses found in the UK-Turkey BIT listed earlier. In addition, however, it includes the following provision: "For the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this agreement."[57] Articles 1–11 of the UK-Albania BIT contain the substantive and procedural rights typically extended to investors under such treaties, including, in Article 8, the right of investors to bring claims in arbitration under the treaty. It is thus apparent that the United Kingdom and Albania intended the MFN clause to apply to dispute settlement.

States also sometimes expressly exclude dispute settlement from the application of an MFN clause. This might be done either by an express statement in the treaty,[58] for example, or by a later interpretative note agreed to by the Contracting Parties, as Argentina and Panama apparently have done with respect to their BIT.[59]

In many investment treaties, the Contracting Parties' intent to include or exclude dispute settlement within the scope of the treaty's MFN clause may be a matter of interpretation. As the commentary to the ILC's Draft Articles on MFN Clauses states, "Drafters of a most-favoured-nation clause are always confronted with the dilemma of either drafting the clause in too general terms, risking thereby the loss of its effectiveness through a rigid interpretation of the *esjudem generis* rule, or of drafting it too explicitly, enumerating its specific domains, in which case the risk consists in the possible incompleteness of the enumeration."[60] The result is that it is not always clear what the Contracting Parties intended, and in cases where investors have sought to invoke an investment treaty's MFN clause to benefit from another investment treaty's

57 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Albania for the Promotion and Protection of Investments Art. 3(3), *available at* http://www.unctad.org/sections/dite/iia/docs/bits/uk_albania.pdf.

58 *See* Agreement between Canada and the Republic of Peru for the Protection and Promotion of Investments Annex B.4, *available at* http://www.unctad.org/sections/dite/iia/docs/bits/canada_peru.pdf ("For greater clarity, treatment 'with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments' referred to in paragraphs 1 and 2 of Article 4 [MFN Treatment] does not encompass dispute resolution mechanisms, such as those in Section C, that are provided for in international treaties or trade agreements.").

59 *See* National Grid Plc v. The Argentine Republic, UNCITRAL, Decision on Jurisdiction of June 20, 2006, para. 85.

60 Commentary 10(6), Draft Articles on MFN Clauses, *reprinted in* Watts, *supra* note 14, at 1824.

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dispute settlement mechanisms, arbitral tribunals have been required to discern such intent from the available evidence.

A number of arbitral decisions have dealt with the specific question of whether an MFN clause in one investment treaty may be used to invoke the dispute settlement provisions found in another investment treaty, which is addressed next.

The Cases

Maffezini v. Spain. The first BIT case to address the issue of whether an MFN clause in an investment treaty can be used to invoke the dispute settlement provisions in another investment treaty was *Maffezini v. Spain*,[61] a case brought under the Argentina-Spain BIT. This BIT includes as a precondition to submitting a dispute to international arbitration that the investor submits the dispute to the local courts and defer commencing the arbitration until either the local court has ruled on the dispute or 18 months have passed without a decision.[62] Maffezini, the Argentine claimant, commenced the arbitration without submitting the dispute to the Spanish courts, relying on the BIT's MFN clause and the dispute settlement provisions of the Chile-Spain BIT, which does not require submission to the local courts.[63]

The MFN provision of the Argentina-Spain BIT relied on by Maffezini provides that "[i]n all matters subject to this Agreement, this treatment shall not be less favorable than that extended by each Party to the investments made in its territory by investors of a third country."[64] Spain's principal objection was that, under the *ejusdem generis* principle, an MFN clause can only operate in respect of the same subject matter as the basic treaty and that "the reference in the [MFN] clause of the Argentine-Spain BIT to 'matters' can only be understood to refer to substantive matters or material aspects of the treatment granted to investors and not to procedural or jurisdictional questions."[65]

The *Maffezini* tribunal rejected Spain's argument. The tribunal relied on the *Ambatielos* case, finding that that case held that "the protection of the rights of persons engaged in commerce and navigation by means of dispute settlement provisions embraces the overall treatment of traders covered by the [MFN] clause."[66] The tribunal reasoned further that "today dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce" and that:

> International arbitration [is] essential . . . to the protection of the rights envisaged under the pertinent treaties; they are also closely linked to the material aspects of

61 Maffezini v. Kingdom of Spain, ICSID Case No. Arb/97/7, Decision on Jurisdiction of January 25, 2000.

62 *Ibid.*, para. 19.

63 *Ibid.*, para. 39.

64 *Ibid.*, para. 38.

65 *Ibid.*, para. 41.

66 *Ibid.*, para. 50.

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> the treatment accorded. . . . From the above considerations it can be concluded that if a third party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause as they are fully compatible with the *ejusdem generis* principle.[67]

The *Maffezini* tribunal also looked at the negotiations leading to the Argentina-Spain BIT and the general treaty practices of both Argentina and Spain and found it relevant that Spain usually espoused a policy of allowing investors to commence arbitration without any resort to local remedies.[68] The tribunal concluded that "the requirement for the prior resort to domestic courts spelled out in the Argentine-Spain BIT does not reflect a fundamental question of public policy considered in the context of the treaty, the negotiations relating to it, the other legal arrangements or the subsequent practice of the parties."[69] It accordingly upheld Maffezini's right to rely on the MFN clause in the Argentina-Spain BIT and the dispute settlement provisions of the Chile-Spain BIT to commence the arbitration without first resorting to the Spanish courts.

In reaching its decision, the *Maffezini* tribunal sought to put some limits on the use of an MFN clause to invoke the procedural benefits of other investment treaties, stating that:

> As a matter of principle, the beneficiary of the clause should not be able to override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question, particularly if the beneficiary is a private investor, as will often be the case. The scope of the clause might thus be narrower than it appears at first sight.[70]

The tribunal enumerated four examples of specific dispute settlement requirements that, in its opinion, could not be ignored by relying on an MFN provision[71] and then concluded as follows:

> Other elements of public policy limiting the operation of the clause will no doubt be identified by the parties or tribunals. It is clear, in any event, that a distinction has to be made between the legitimate extension of rights and benefits by means of the operation of the clause, on the one hand, and disruptive treaty-shopping that would play havoc with the policy objectives of underlying specific treaty provisions, on the other hand.[72]

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67 *Ibid.*, paras. 54–56.

68 *Ibid.*, paras. 54–61.

69 *Ibid.*, para. 64.

70 *Ibid.*, para. 62.

71 The four examples were 1) a requirement to exhaust local remedies; 2) a fork-in-the-road-provision, whereby the investor is required to make an irreversible choice either to submit the investment dispute to international arbitration or the local courts; 3) provision of a specific arbitral forum; and 4) provision for a highly institutionalized system of arbitration that incorporates precise rules of procedure, such as is found in NAFTA. *Ibid.*, para. 63.

72 *Ibid.*, para. 63.

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Siemens v. Argentina. One may observe that, in *Maffezini*, the MFN clause at issue related to "all matters subject to this Agreement," arguably therefore including references to international arbitration. In *Siemens v. Argentina*,[73] where the BIT at issue also required prior submission of the investment dispute to the local courts and an 18-month wait, the MFN clause did not include similarly broad language. The respondent Argentina therefore argued that the MFN clause at issue was distinct from the clause at issue in *Maffezini* and that it did not allow the claimant to rely on the dispute settlement provisions of other Argentina BITs to avoid submission of the dispute to the local courts. The tribunal disagreed with Argentina's position and interpreted the MFN clause to allow the claimant to rely on third-party investment treaties.

The MFN clause of the Germany-Argentina BIT at issue provides as follows:

> Article 3(1): None of the Contracting Parties shall accord in its territory to the investments of nationals or companies of the other Contracting Party or to investments in which they hold shares, a less favorable treatment than the treatment granted to the investments of its own nationals or companies or to the investments of nationals or companies of third States.
>
> Article 3(2): None of the Contracting Parties shall accord in its territory to nationals or companies of the other Contracting Party a less favorable treatment of activities related to investments than granted to its own nationals and companies or to the nationals and companies of third States.[74]

In addition, Article 3 of this BIT contains various exceptions and limitations to the application of the MFN clause, exempting the MFN clause from the benefits extended to third States under "customs or economic unions and of free trade areas (Article 3(3)), and to advantages granted in taxation-related agreements (Article 3(4))."[75] The BIT's Protocol further excludes "measures dictated by internal or external security or public order concerns, and the fiscal advantages, exemptions or reductions granted to each Contracting Party's nationals or companies (Ad Article 3 (a) and (b))."[76]

The *Siemens* tribunal acknowledged that the MFN clause at issue did not refer to "all matters subject to this Agreement" and that its formulation was narrower than the MFN clause at issue in *Maffezini*; nevertheless, it found that "the term 'treatment' and the phrase 'activities related to the investments' [in the MFN clause] are sufficiently wide to include settlement of disputes."[77]

The tribunal relied on the *Ambatielos* case to support its view that treatment of investors in the BIT at issue included terms of submission to international arbitration. It explained:

> The Respondent has argued that, in *Ambatielos*, administration of justice refers to substantive procedural rights like just and equitable treatment and not to purely jurisdictional matters. The Tribunal does not find any basis in the reasoning of the

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73 Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, Decision on Jurisdiction of August 3, 2004.

74 *Ibid.*, para. 82.

75 *Ibid.*, para. 83.

76 *Ibid.*, para. 83.

77 *Ibid.*, para. 103.

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> Commission to justify such distinction. On the other hand, the Tribunal finds that the Treaty itself, together with so many other treaties of investment protection, has as a distinctive feature special dispute settlement mechanisms not normally open to investors. Access to these mechanisms is part of the protection offered under the Treaty. It is part of the treatment of foreign investors and investments and of the advantages accessible through a MFN clause.[78]

The tribunal also interpreted the specific wording of the MFN clause to encompass dispute settlement by explaining that "'[t]eatment' in its ordinary meaning refers to behavior in respect of an entity or a person. The term 'treatment' is neither qualified nor described except by the expression 'not less favorable.' The term 'activities' is equally general. The need for exceptions confirms the generality of the meaning of treatment or activities rather than setting limits beyond what is said in the exceptions . . . . Treatment in Article 3 refers to treatment under the Treaty in general and not only under that article."[79]

In reaching its decision, the *Siemens* tribunal repeated the concerns expressed in *Maffezini* concerning the limits of using an MFN clause to avail oneself of more favorable dispute settlement provisions, noting that "The Tribunal concurs with *Maffezini* that the beneficiary of the MFN clause may not override public policy considerations judged by the parties to a treaty essential to their agreement."[80] The tribunal, however, found that Argentina had not consistently required investors to submit disputes to the local courts in its other BITs and that therefore,

> This lack of consistency among the BITs entered into by the Respondent during the same year as the Treaty was signed does not support the argument that the institution of proceedings before the local courts is a "sensitive" issue of economic or foreign policy or that it is an essential part of the consent of the Respondent to arbitration. The Respondent has sought for its own nationals as investors in Chile or the United States similar treatment to that sought by the Claimant in these proceedings.[81]

Accordingly, as in *Maffezini*, the *Siemens* tribunal rejected the respondent's objections and allowed the claimant to invoke the more favorable dispute settlement provisions found in other BITs so as to avoid the precondition of submitting its dispute to the local courts.

Other Cases in the Line of Maffezini and Siemens. Although not without some ambiguity, given their dicta regarding the limits of MFN clauses, the *Maffezini* and *Siemens* cases support the proposition that unless there is evidence of contrary intent by the Contracting Parties, an MFN clause may be relied upon to benefit from the terms of submission to dispute settlement set forth in other investment treaties where the more favorable treatment that the investor seeks is to avoid a requirement first to

78 *Ibid.*, para. 102.
79 *Ibid.*, para. 85.
80 *Ibid.*, para. 109.
81 *Ibid.*, para. 105.

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submit the dispute to the local courts. Several other tribunals reached the same conclusion based on similar reasoning, including *Camuzzi International v. Argentina*,[82] *National Grid v. Argentina*;[83] *Gas Natural v. Argentina*;[84] *Suez v. Argentina*,[85] and the joined cases *Suez v. Argentina/AWG Group v. Argentina.*[86]

The principal rationale for the decisions in the above cases, even if not expressly articulated, is that the dispute settlement rights granted under an investment treaty are of the same category or order as the substantive rights created by that treaty. Thus, application of the *ejusdem generis* principle does not, in principle, exclude such procedural rights from the scope of an MFN clause.

Of the several cases listed, the Decision on Jurisdiction in *Gas Natural v. Argentina* bears mentioning as its reasoning is more elaborated. In that case, which involved the same Argentina-Spain BIT at issue in *Maffezini* (but with a Spanish claimant) and the same attempt by the claimant to bypass prior submission of the investment dispute to the local courts, the tribunal allowed the claimant to forgo submitting the dispute to the Argentine courts on the basis of the dispute settlement provisions in other Argentine BITs that did not impose that requirement.

In reaching its decision, the tribunal relied on *Ambatielos* to conclude that the international arbitration rights provided for in most investment treaties "constitute part of the bundle of protections granted to foreign investors by host states," that the arbitration provisions were "perhaps the most crucial element" of such treaties and that international dispute settlement "provisions are universally regarded—by opponents as well as by proponents—as essential to a regime of protection of foreign direct investment."[87] The tribunal further rejected Argentina's argument that it would be against Argentina's public policy to allow the claimant to bypass the specific procedural requirements of the Argentina-Spain BIT, explaining that the "Tribunal notes further that it does not find the public policy argument raised by Argentina to be persuasive, particularly in view of the many BITs concluded by Argentina (in addition to the United States-Argentina BIT) that do not require resort to national jurisdiction prior to access to international arbitration."[88]

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82 Camuzzi International S.A. v. The Argentine Republic, ICSID Case No. ARB/03/7, Decision on Jurisdiction of June 10, 2005 (in Spanish). For a case description in English, see Dana H. Freyer & David Herlihy, *Most-Favored-Nation Treatment and Dispute Settlement in Investment Arbitration: Just How "Favored" is "Most-Favored"?*, 21 ICSID Rev.–Foreign Inv. L.J. 58, 78–79 (2006).

83 National Grid Plc v. The Argentine Republic, UNCITRAL, Decision on Jurisdiction of June 20, 2006.

84 Gas Natural SDG SA v. The Argentine Republic, ICSID Case No. ARB/03/10, Decision on Jurisdiction of June 17, 2005.

85 Suez and others v. The Argentine Republic, ICSID Case No. ARB/03/17, Decision on Jurisdiction of May 16, 2006.

86 Suez and others v. The Argentine Republic, ICSID Case No. ARB/03/19, and AWG Group Ltd. v. The Argentine Republic, UNCITRAL, Decision on Jurisdiction of August 3, 2006.

87 *Gas Natural v. Argentina*, para. 29.

88 *Ibid.*, para. 30.

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The tribunal therefore held that the MFN clause in the Argentina-Spain BIT was applicable to dispute settlement and summed up its ruling as follows:

> This Tribunal understands that the issue of applying a general most-favored-nation clause to the dispute resolution provisions of bilateral investment treaties is not free from doubt, and that different tribunals faced with different facts and negotiating background may reach different results. The Tribunal is satisfied, however, that the terms of the BIT between Spain and Argentina show that dispute resolution was included within the scope of most-favored-nation treatment, and that our analysis set out in paragraphs 28–30 above is consistent with the current thinking as expressed in other recent arbitral awards. We remain persuaded that assurance of independent international arbitration is an important—perhaps the most important—element in investor protection. *Unless it appears clearly that the state parties to a BIT or the parties to a particular investment agreement settled on a different method for resolution of disputes that may arise, most-favored-nation provisions in BITs should be understood to be applicable to dispute settlement.*[89]

Under the rationale of this decision, an investment treaty's provision for international arbitration should be understood as "a significant substantive incentive and protection for foreign investors,"[90] and it should be understood that, unless the State can show "clearly" that the Contracting Parties intended for a treaty's specific dispute settlement procedures to apply notwithstanding more favorable dispute settlement procedures in other relevant investment treaties, the MFN clause in that treaty should apply to dispute settlement.

Tecmed v. Mexico. In *Tecmed v. Mexico*,[91] the claimant argued that the MFN clause in the Mexico-Spain BIT entitled it to present claims based upon events that occurred prior to the BIT's entry into force. The claimant argued further that the MFN clause entitled it to bypass the BIT's provisions requiring it to submit claims within three years from the date such claims arose. The tribunal rejected the claimant's position on both counts.

The MFN clause at issue provided as follows:

> Each Contracting Party shall guarantee fair and equitable treatment in its territory pursuant to international law for investments made by investors from another Contracting Party [. . .]. Such treatment shall not be less favorable than that afforded in similar circumstances by each Contracting Party to investments made in its territory by investors from a third party state.[92]

In reaching its decision, the tribunal relied on the public policy limitations expressed in *Maffezini* concerning those matters deemed crucial to the Contracting Parties in concluding the treaty. Thus, with respect to the claimant's first submission, the tribunal

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89 *Ibid.*, para. 49 (emphasis added).

90 *Ibid.*, para. 31.

91 Técnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award of May 29, 2003.

92 *Ibid.*, para. 64.

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held that it would not apply the MFN clause to allow a retroactive application of the Mexico-Spain BIT because:

> [The Tribunal] deems that matters relating to the application over time of the Agreement, which involve more the time dimension of application of its substantive provisions rather than matters of procedure or jurisdiction, due to their significance and importance, go to the core of matters that must be deemed to be specifically negotiated by the Contracting Parties. These are determining factors for their acceptance of the Agreement, as they are directly linked to the identification of the substantive protection regime applicable to the foreign investor and, particularly, to the general (national or international) legal context within which such regime operates, as well as to the access of the foreign investor to the substantive provisions of such regime. Their application cannot therefore be impaired by the principle contained in the most favored nation clause.[93]

One may observe that, although not expressly addressed in the tribunal's award, there are treaty interpretation rules supporting the conclusion that the obligation to provide MFN treatment cannot exist prior to the entry into force of the treaty containing the MFN clause.

The tribunal also rejected the claimant's second argument relating to the time period for the admissibility of claims, concluding that the three-year time period for submitting claims concerned:

> the substantive admissibility of claims by the foreign investor, i.e. its access to the substantive protection regime contemplated under the Agreement. Consequently, such requirements are necessarily a part of the essential core of negotiations of the Contracting Parties; it should therefore be presumed that they would not have entered into the Agreement in the absence of such provisions. Such provisions, in the opinion of the Arbitral Tribunal, therefore fall outside the scope of the most favored nation clause contained in Article 8(1) of the Agreement.[94]

One might observe as to this conclusion that here the tribunal focused on which claims may be submitted to international arbitration (i.e., claims as to recent events) rather than (as was the issue in the other cases discussed) the procedural steps necessary to submit such claims.

Salini v. Jordan. The tribunal in *Salini v. Jordan*[95] recognized that the Contracting Parties to an investment treaty could intend the treaty's MFN clause to encompass dispute settlement. However, it found that the MFN clause in the Italy-Jordan BIT of 1999 should not be interpreted so as to permit the claimants to override the treaty's specific limitations concerning the types of claims arbitrable under the BIT.

The dispute in that case concerned payments allegedly owed to the claimants under certain construction contracts. The claimants brought claims under both the construction

93 *Ibid.*, para. 69.

94 *Ibid.*, para. 74.

95 Salini Costruttori & Italstrade v. Hashemite Kingdom of Jordan, ICSID Case No. ARB/02/13, Decision on Jurisdiction of November 9, 2004.

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contracts and the Italy-Jordan BIT, and Jordan objected to jurisdiction by, among other things, invoking Article 9(2) of the BIT, which provides that "[i]n case the investor and an entity of the Contracting Parties have stipulated an investment Agreement, the procedure foreseen in such investment agreement shall apply."[96] Because the construction contracts provided for dispute settlement in domestic courts and did not provide for ICSID arbitration, Jordan argued that the ICSID tribunal did not have jurisdiction over the contract-based claims.

Citing *Maffezini*, the claimants argued that they had the right to submit their contract disputes to ICSID notwithstanding Article 9(2) because of the BIT's MFN clause, which provides in part:

> Both Contracting Parties, within the bounds of their own territory, shall grant investments effected by, and the income accruing to, investors of the Contracting Party no less favourable treatment than that accorded to investments effected by, and income accruing to, its own nationals or investors of Third States.[97]

Claimants sought to benefit from investment treaties that Jordan had concluded with the United States and the United Kingdom, which do not have the provision found in Article 9(2) of the Italy-Jordan BIT and which claimants argued allow submission of contract disputes.[98]

In rejecting the claimant's position, the *Salini* tribunal reviewed previous ICJ jurisprudence and found it inapposite. In particular, the tribunal distinguished *Ambatielos* by finding that Greece had invoked the MFN clause in that case to secure substantive rights, not the right to commence international arbitration:

> The Tribunal will observe that in [*Ambatielos*], Greece *invoked* the most-favored-nation clause with a view to securing, for one of its nationals, not the application of a dispute settlement clause, but the application of substantive provisions in treaties between the United Kingdom and several other countries under which their nationals were to be treated "in accordance with "justice", "right" and "equity". The solution adopted by the Arbitration Commission cannot therefore be directly transposed in this specific instance.[99]

The tribunal also expressed doubt about the appropriateness of the *Maffezini* decision, citing that tribunal's qualification that the beneficiary of an MFN clause "should not be able to override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement" and explaining that the "fear is that the precautions taken by authors of the [*Maffezini*] award may in practice prove difficult to apply, thereby adding more uncertainties to the risk of 'treaty shopping.'"[100]

The *Salini* tribunal did note that different investment treaties contain different variations of MFN clauses and that tribunals therefore must examine the common intent of

96 *Ibid.*, para. 70.
97 *Ibid.*, para. 104.
98 *Ibid.*, para. 102.
99 *Ibid.*, para. 112 (emphasis in original).
100 *Ibid.*, paras. 114–15.

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the Contracting Parties to the treaty to determine the proper scope of the particular MFN clause at issue. With respect to the MFN clause at issue in the case before it, the tribunal held:

> Article 3 of the BIT between Italy and Jordan does not include any provision extending its scope of application to dispute settlement. It does not envisage "all rights or all matters covered by the agreement." Furthermore, the Claimants have submitted nothing from which it *might* be established that the common intention of the Parties was to have the most-favored-nation clause apply to dispute settlement. Quite on the contrary, the intention as expressed in Article 9(2) of the BIT was to exclude from ICSID jurisdiction contractual disputes between an investor and an entity of a State Party in order that such disputes might be settled in accordance with the procedures set forth in the investment agreements. Lastly, the Claimants have not cited any practice in Jordan or Italy in support of their claim. From this, the Tribunal concludes that Article 3 of the BIT does not apply insofar as dispute settlement clauses are concerned.[101]

Plama v. Bulgaria. In *Plama v. Bulgaria*,[102] the claimant sought to rely on the MFN clause in the 1987 Bulgaria-Cyprus BIT to avoid the limitation in that treaty that only allowed for a limited form of *ad hoc* arbitration of claims concerning the amount of compensation due an investor in the event of an expropriation. Relying on third-party treaties, the claimant argued that the MFN clause allowed it to submit the dispute to ICSID arbitration. The *Plama* tribunal rejected the claimant's arguments and held that the MFN clause "cannot be interpreted as providing consent to submit a dispute under the Bulgaria-Cyprus BIT to ICSID arbitration."[103]

Unlike previous cases, where both the basic treaty and the third-party treaty contained the State Parties' consent to submit specific categories of disputes to a certain type of international arbitration (e.g., arbitration pursuant to the ICSID Convention), the Bulgaria-Cyprus BIT's reference to dispute resolution was a *sui generis* form of *ad hoc* arbitration. The issue presented to the *Plama* tribunal, therefore, was whether the MFN clause contained in the Bulgaria-Cyprus BIT could be interpreted as constituting Bulgaria's consent to submit disputes to ICSID arbitration. The MFN clause at issue provided in relevant part:

> Each Contracting Party shall apply to the investments in its territory by investors of the other Contracting Party a treatment which is not less favorable than that accorded to investments by investors of third states.[104]

Regarding the intent of the Parties, the tribunal noted that the Bulgaria-Cyprus BIT stands apart from other BITs in that it was concluded at a time when Bulgaria's

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101 *Ibid.*, paras. 118–19.

102 Plama Consortium Ltd. v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005. Author Abby Cohen Smutny was counsel to the respondent Bulgaria in this case.

103 *Ibid.*, para. 184.

104 *Ibid.*, para. 187.

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communist rulers "favored bilateral investment treaties with limited protections for foreign investors and with very limited dispute settlement provisions."[105] Given that fact, as well as a later (failed) attempt by Bulgaria and Cyprus to renegotiate the BIT's terms, including its dispute settlement provisions, the tribunal concluded that "at the time of conclusion, Bulgaria and Cyprus limited specific investor-state dispute settlement to the provisions set forth in the BIT and had no intention of extending those provisions through the MFN provision."[106]

The *Plama* tribunal also noted that the dispute settlement provisions contained in a particular BIT are a product of specific negotiations and "Contracting States cannot be presumed to have agreed that those provisions can be enlarged by incorporating dispute settlement provisions from other treaties negotiated in an entirely different context."[107] The tribunal observed that this conclusion was further supported by the principle of separability of dispute resolution agreements from the principal agreement to which they relate.[108] Hence, the tribunal observed that "It is one thing to add to the treatment provided in one treaty more favorable treatment provided elsewhere. It is quite another thing to replace a procedure specifically negotiated by parties with an entirely different mechanism."[109]

With respect to the specific wording of the MFN clause at issue, the tribunal held that, although arbitration has become the accepted means of resolving disputes between foreign investors and States, "that phenomenon does not take away the basic prerequisite for arbitration: an agreement of the parties to arbitrate. It is a well-established principle, both in domestic and international law, that such an agreement should be clear and unambiguous."[110] Since the MFN clause at issue did not include an express indication of consent to ICSID arbitration, the tribunal observed that it could only operate to establish such consent if it incorporated by reference dispute settlement procedures, including reference to ICSID arbitration, from other investment treaties. The tribunal concluded that:

> an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.[111]

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105 *Ibid.*, para. 196.

106 *Ibid.*, para. 197.

107 *Ibid.*, para. 207.

108 *Ibid.*, para. 212 ("When concluding a multilateral or bilateral investment treaty with specific dispute resolution provisions, states cannot be expected to leave those provisions to future (partial) replacement by different dispute resolution provisions through the operation of an MFN provision, unless the States have explicitly agreed thereto (as in the case of BITs based on the UK Model BIT). This matter can also be viewed as forming part of the nowadays generally accepted principle of the separability (autonomy) of the arbitration clause. Dispute resolution provisions constitute an agreement on their own, usually with interrelated provisions.").

109 *Ibid.*, para. 209.

110 *Ibid.*, para. 198.

111 *Ibid.*, para. 223 and *also* para. 200 ("[T]he reference must be such that the parties' intention to import the arbitration provision of the other agreement is clear and unambiguous."); *ibid.*,

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Because an arbitration agreement in a BIT context depends upon the wording of the treaty, "doubts as to the parties' clear and unambiguous intention can arise if the agreement to arbitrate is to be reached by incorporation by reference [through an MFN clause]."[112] That doubt was sufficient for the *Plama* tribunal to reject claimant's argument:

> A clause reading *"a treatment which is not less favourable than that accorded to investments by investors of third states"* as appears in Article 3(1) of the Bulgaria-Cyprus BIT, cannot be said to be a typical incorporation by reference clause as appearing in ordinary contracts. It creates doubt whether the reference to the other document (in this case the other BITs concluded by Bulgaria) clearly and unambiguously includes a reference to the dispute settlement provisions contained in those BITs.[113]

The *Plama* tribunal also discussed several other cases involving MFN clauses.[114] With respect to *Ambatielos*, the *Plama* tribunal stated that "that ruling relates to provisions concerning substantive protection in the sense of denial of justice in the domestic courts. It does not relate to the import of dispute settlement provisions of another treaty into the basic treaty."[115] As for *Maffezini*, the *Plama* tribunal rejected its application to the case before it, stating that the *Maffezini* rationale was "inappropriate for the question whether dispute settlement provisions in the basic treaty can be replaced by dispute settlement provisions in another treaty. As explained above, an arbitration clause must be clear and unambiguous and the reference to an arbitration clause must be such as to make the clause part of the contract (treaty)."[116]

Telenor and Berschader. In *Telenor v. Hungary*,[117] the claimant brought claims under the Hungary-Norway BIT, which allows ICSID arbitration only of expropriation claims.[118] Relying on the MFN clause in this BIT, which provides that "[i]nvestments made by Investors of one Contracting Party in the territory of the other Contracting

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para. 204 ("The intention to incorporate dispute settlement provisions must be clearly and unambiguously expressed."). The issue of whether consent to arbitration must be expressed in a "clear and unambiguous" manner has been questioned in other cases. *See e.g.*, Berschader v. Russian Federation, SCC Case No. 080/2004, Award of April 21, 2006, para. 177; Suez and others v. The Argentine Republic, ICSID Case No. ARB/03/17, Decision on Jurisdiction of May 16, 2006, para. 64.

112 *Plama v. Bulgaria*, para. 199.

113 *Ibid.*, para. 200

114 *Ibid.*, paras. 210–26.

115 *Ibid.*, para. 215.

116 *Ibid.*, para. 218 and *also* para. 219 (criticizing *Maffezini* for arguing that applying MFN clauses to dispute settlement will help harmonize investment protections because, "[i]f that were true, a host state which has not specifically agreed thereto can be confronted with a large number of permutations of dispute settlement provisions from the various BITs which it has concluded. Such a chaotic situation—actually counterproductive to harmonization—cannot be the presumed intent of Contracting Parties.").

117 Telenor Mobile Communications A.S. v. Republic of Hungary, ICSID Case No. ARB/05/15, Award of September 13, 2006.

118 *Ibid.*, para. 25.

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Party, as also the returns therefrom, shall be accorded treatment no less favourable than that accorded to investments made by Investors of any third State,"[119] the claimant argued that it could bring claims for breach of the fair and equitable standard as provided by other BITs concluded by Hungary. Thus, the claimant invoked the MFN clause to expand the arbitrable claims available to it.

After briefly reviewing *Maffezini*, *Siemens*, *Plama*, and *Salini*, the *Telenor* tribunal rejected the claimant's argument and declined jurisdiction over the fair and equitable claim on the basis that it "wholeheartedly endorses the analysis and statement of principle furnished by the *Plama* tribunal."[120] By this, the tribunal meant that "an MFN clause . . . should not be construed as extending the jurisdiction of the arbitral tribunal to categories of dispute beyond those set forth in the BIT itself in the absence of clear language that this is the intention of the parties."[121] The tribunal found no such intent in the circumstances of the case and thus rejected the claimant's position.

The tribunal articulated four reasons in support of its conclusion. First, it found that, in the absence of contrary evidence of intent, the "ordinary meaning of 'investments shall be accorded treatment no less favorable than that accorded to investments made by investors of any third State' is that the investor's *substantive* rights in respect of the investments are to be treated no less favorably . . . and there is no warrant for construing the above phrase as importing *procedural* rights as well."[122]

Second, the effect of adopting a wider interpretation of an MFN clause would be to encourage unwarranted treaty shopping, "and even then there would be questions as to whether the investor could select those elements of the wider dispute resolution that were apt for its purpose and discard those that were not."[123]

Third, the effect of adopting a wider interpretation of an MFN clause would generate uncertainty and instability because the BIT's dispute settlement procedures would be operative in some circumstances but not in others.[124] And fourth, because a BIT's specific dispute settlement provisions represent the common intention of the Contracting Parties to that treaty, that intention would be subverted if an investor could invoke the BIT's MFN clause to reach dispute settlement provisions in other BITs.[125]

A similar analysis was adopted by the tribunal in *Berschader v. Russian Federation*.[126] The case involved a fact pattern like *Telenor* in that the basic treaty (the Belgium/Luxembourg-Russia BIT) limited arbitrable disputes to "the amount or mode of compensation to be paid in the event of an expropriatory act,"[127] and the claimants sought to invoke that treaty's MFN clause to allow them to bring a wider set of claims. After a review of the available case law, a majority of the *Berschader* tribunal also adopted

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119 *Ibid.*, para. 84.
120 *Ibid.*, para. 90.
121 *Ibid.*, para. 91.
122 *Ibid.*, para. 92 (emphasis in original).
123 *Ibid.*, para. 93.
124 *Ibid.*, para. 94.
125 *Ibid.*, para. 95.
126 Berschader v. Russian Federation, SCC Case No. 080/2004, Award of April 21, 2006.
127 *Ibid.*, para. 152.

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the reasoning of the *Plama* decision and rejected the claimants' right to bring any claims other than those specifically provided by the basic treaty.

The MFN clause at issue in the case provided that:

> Each Contracting Party guarantees that the most favoured nation clause shall be applied to investors of the other Contracting Party in all matters covered by the present Treaty, and in particular in Articles 4, 5 and 6, with the exception of benefits provided by one Contracting Party to investors of a third country on the basis
>
> —of its participation in a customs union or other international economic organizations, or
> —of an agreement to avoid double taxation and other taxation issues.[128]

The majority opinion in *Berschader* began its analysis of this clause by explaining that the tribunal's fundamental purpose was to discern the intent of the Contracting Parties to the BIT:

> Firstly, the Tribunal must express its firm view that the fundamental issue in determining whether or not an MFN clause encompasses the dispute resolution provisions of other treaties must always be an assessment of the intention of the contracting parties upon the conclusion of each individual treaty. In each case, the question must be asked as to whether the contracting parties to the treaty intended the MFN provision to incorporate by reference the dispute settlement provisions of other treaties. Ultimately, that question can only be answered by a detailed analysis of the text and, where available, the negotiating history of the relevant treaty, as well as other relevant facts.[129]

The majority further stated that it agreed with the *Plama* tribunal that "doubts as to the intentions of the parties may arise" where the "agreement to arbitrate is to be reached by incorporation by reference" in an MFN clause.[130] The majority developed this point further by finding there to be a crucial difference in the application of an MFN clause to substantive rights and to the dispute resolution provisions set forth in the treaty:

> There is a fundamental difference as to how an MFN clause is generally understood to operate in relation to the material benefits afforded by a BIT, on the one hand, and in relation to the dispute resolution clauses, on the other hand. While it is universally agreed that the very essence of an MFN provision in a BIT is to afford to investors all material protection provided by subsequent treaties, it is much more uncertain whether such provisions should be understood to extend to dispute resolution clauses. It is so uncertain, in fact, that the issue has given rise to different outcomes in a number of cases and to extensive jurisprudence on the subject. The issue has caused the drafters of the United Kingdom model BIT to neutralise this ambiguity by confirming in Article 3(3) that, for avoidance of doubt, MFN

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128 *Ibid.*, para. 47. Article 4 of the BIT covers fair and equitable treatment, Article 5 covers expropriation, and Article 6 covers transfers of investment returns.

129 *Ibid.*, para. 175.

130 *Ibid.*, para. 178.

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treatment shall apply to certain specified provisions of the treaty including the dispute settlement provisions.[131]

As a result of this uncertainty over whether an MFN clause should extend to constitute consent to submit to the dispute resolution provisions set forth in third-party treaties, the *Berschader* majority found that it would be more appropriate to presume that that MFN clause only applies to substantive rights unless there is clear evidence to the contrary:

> This general uncertainty about the scope of MFN clauses leaves little room for any general assumption that the contracting parties to a BIT intend an MFN provision to extend to the dispute settlement clause. In the words of the *Plama* tribunal, the interpretation in the *Maffezini* case went beyond what State Parties to BITs generally intended to achieve by an MFN provision.
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> The tribunal in the *Gas Natural* case suggested that as a matter of principle MFN provisions in BITs would be understood to be applicable to dispute settlement provisions unless it appears clearly that the parties intended otherwise. For the reasons developed above, it should be evident that this Tribunal cannot accept that standpoint. *Instead, the present Tribunal will apply the principle that an MFN provision in a BIT will only incorporate by reference an arbitration clause from another BIT where the terms of the original BIT clearly and unambiguously so provide or where it can otherwise be clearly inferred that this was the intention of the contracting parties.*[132]

In that case, the majority held that the MFN clause at issue did not operate to expand the nature of the claims that could be submitted to arbitration in accordance with the dispute settlement provisions of the treaty. The majority considered it significant that at the time the BIT at issue was concluded, the Soviet Union followed a consistent practice of concluding BITs with limited rights to arbitration. "[T]his consistent practice," the majority stated, "strongly suggests that the Soviet Party did not intend the MFN provision in Article 2 of the Treaty to extend to dispute resolution issues."[133] On that basis, the majority found "that the Treaty does not clearly and unambiguously provide for incorporation by reference of arbitration clauses in other BITs."[134]

The *Berschader* award was accompanied by a dissenting opinion to the effect that the MFN clause should have been interpreted to permit the claims at issue to be submitted to the dispute settlement procedures:

> The MFN standard is a tried-and-true expression of the international economic law principle of non-discrimination. Its application, its breadth and depth are limited primarily by restrictive language found in the text of a treaty (such as general exception clauses and reservation schedules) and by the requirement that most favourable treatment be accorded only to those who stand in like circumstances. There is simply no reason to suppose that—absent some specific treaty language—any

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131 *Ibid.*, para. 179.

132 *Ibid.*, paras. 180–81 (emphasis added).

133 *Ibid.*, para. 204.

134 *Ibid.*, para. 208.

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given MFN provision should be more or less narrowly defined. In other words, MFN clauses apply to all aspects of the regulatory environment governed by an investment protection treaty, including availability of all means of dispute settlement.[135]

RosInvestCo v. Russian Federation. A different result was reached in *RosInvestCo v. Russian Federation.*[136] Similar to the *Telenor* and *Berschader* cases described, *RosInvestCo* concerned a treaty that permitted reference to dispute settlement only disputes relating to the amount of compensation due in the event of an expropriation or concerning other matters "consequential upon an act of expropriation"; the provision in question (Article 8 of the UK-Russia BIT) does not permit disputes as to whether an expropriation has occurred, a point the *RosInvestCo* tribunal confirmed.[137] The claimant in the case, a minority shareholder in the Yukos Corporation, alleged that the Russian Federation had expropriated its shares unlawfully. Given the limitation in the BIT's dispute settlement provision, the claimant invoked the MFN clause in Article 3 of the BIT to avail itself of the dispute settlement provision of the Denmark-Russia BIT, which allows, among other things, the arbitration of expropriation disputes, including the question of whether an expropriation has taken place. The MFN clause at issue provides as follows:

> (1) Neither Contracting Party shall in its territory subject investments or returns of investors of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of investors of any third State.
>
> (2) Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to investors of any third State.[138]

The *RosInvestCo* tribunal asked rhetorically, "Can the term *treatment* include the protection by an arbitration clause? The tribunal feels that, for the purposes of this Award, it does not have to answer that question in general, but only regarding the subquestion whether it includes an arbitration clause covering expropriation."[139] Turning then to the specific issue before it, the tribunal concluded that "an expropriation is indeed a 'treatment' of the investment by the Host State," and "the protection by an arbitration clause covering expropriation is a highly relevant aspect of that 'treatment,' if compared with the alternative that the expropriation of an investment can only be challenged before the national courts of the Host State."[140]

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135 *Ibid.*, Separate Opinion of Todd Weiler, para. 20.

136 RosInvestCo UK Ltd. v. Russian Federation, SCC Case No. V079/2005, Award on Jurisdiction of October 5, 2007.

137 *Ibid.*, paras. 105–18.

138 *Ibid.*, para. 126.

139 *Ibid.*, para. 128.

140 *Ibid.*, para. 128.

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The tribunal observed that the benefit afforded by an agreement to submit disputes to arbitration is a right that runs to the investor, as opposed to the investment, and thus the tribunal focused its analysis on the second sub-paragraph of the MFN clause, which grants MFN protection for investors in "their management, maintenance, use, enjoyment or disposal of their investment."[141] Directing its attention to the phrase "use and enjoyment," the tribunal concluded:

> [I]t is difficult to doubt that an expropriation interferes with the investor's use and enjoyment of the investment, and that the submission to arbitration forms a highly relevant part of the corresponding protection for the investor by granting him, in case of interference with his "*use*" and "*enjoyment*", procedural options of obvious and great significance compared to the sole option of challenging such interference before the domestic courts of the host state.[142]

In reliance on this reasoning, the tribunal held that "it has jurisdiction beyond that granted by Article 8 of the UK-Soviet BIT and which extends to the issues whether Respondent's actions have to be considered as expropriations and were valid."[143]

In support of its holding, the tribunal explained further that there was nothing unusual in the fact that the scope of the dispute settlement provision in the UK-Soviet BIT was widened because that was the natural and expected result of the MFN clause:

> While indeed the application of the MFN clause of Article 3 widens the scope of Article 8 and thus is in conflict to its limitation, this is a normal result of the application of MFN clauses, the very character and intention of which is that protection not accepted in one treaty is widened by transferring the protection accorded in another treaty.
>
> If this effect is generally accepted in the context of substantive protection, the Tribunal sees no reason not to accept it in the context of procedural clauses such as arbitration clauses. Quite the contrary, it could be argued that, if it applies to substantive protection, then it should apply even more to "only" procedural protection. However, the Tribunal feels that this latter argument cannot be considered as decisive, but that rather, as argued further above, an arbitration clause, at least in the context of expropriation, is of the same protective value as any substantive protection afforded by applicable provisions such as Article 5 of the BIT.[144]

The tribunal also found comfort for its decision in the fact that Article 7 of the UK-Soviet BIT enumerated certain exceptions to the MFN treatment but that such exceptions did not include dispute settlement. As the tribunal explained:

> In view of the careful drafting of Article 8 and the limiting language therein, it can certainly not be presumed that the Parties "forgot" arbitration when drafting and agreeing on Article 7. Had the Parties intended that the MFN-clauses should also not apply to arbitration, it would indeed have been easy to add a sub-section (c) to

141 *See supra* note 138.
142 *Ibid.*, para. 130.
143 *Ibid.*, para. 133.
144 *Ibid.*, paras. 131–33.

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> that effect in Article 7. The fact that this was not done, in the view of the Tribunal, is further confirmation that the MFN-clauses in Article 3 are also applicable to submissions to arbitration in other Treaties.[145]

CONCLUSION

Despite some competing language regarding the applicable presumptions to be applied in construing MFN clauses, the common touchstone in all of the cases discussed here is the premise that the intent of the Contracting Parties to the treaty containing the MFN clause is paramount in determining whether an investor can rely on the clause to benefit from the dispute settlement provisions of other treaties. There is no standard MFN clause and no standard context; therefore, each such clause requires an independent examination in light of its specific wording, the treaty in which it is found, and the wider context of the relevant treaty practice of the specific Contracting Parties. From this perspective, the divergent results found in the existing case law might be reconciled by an understanding that each individual tribunal reached its decision upon a careful analysis of the available evidence relevant to the intent of the Contracting Parties in each case. In this sense, we might expect divergent results because the evidence of intent in some cases will favor the extension of MFN benefits to dispute settlement, whereas in other cases it will favor the opposite result.

145 *Ibid.*, para. 135.

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PART IV

Practical Guide to the Key Substantive Issues

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Chapter 16

Fair and Equitable Treatment Standard

Katia Yannaca-Small

INTRODUCTION

The fair and equitable treatment standard is still, to some, a mystifying legal concept. Although it has been thoroughly examined, particularly over the last few years, it has not yet been entirely clarified. What is certain is that it is an "absolute," "noncontingent" standard of treatment, i.e., a standard that states the treatment to be accorded in terms which have their own normative content, though the exact meaning has to be determined by reference to specific circumstances of application, as opposed to the "relative" standards embodied in "national treatment" and "most-favored-nation" principles, which define the required treatment by reference to the treatment accorded to other investment in similar circumstances.[1] An absolute standard is not necessarily satisfied by treating the investor as well as the host State treats its own nationals or other foreigners. "Fair and equitable treatment" is a flexible, elastic standard, whose normative content is being expanded to include new elements. Because of this flexibility, it is the most often invoked treaty standard in investor-state arbitration, present in almost every single claim brought by foreign investors against host States.

It has been increasingly used as an alternative and more flexible way to provide protection to investors in cases where the test for indirect expropriation is too difficult to achieve, since the threshold is quite high. It has therefore become a preferred way for tribunals to provide a remedy. As the tribunal in *Sempra v. Argentina* said:

> . . . It would be wrong to believe that fair and equitable treatment is a kind of peripheral requirement. To the contrary, it ensures that even where there is no clear

1 A. A. Fatouros, Government Guarantees to Foreign Investors 35–141, 214–15 (1962); UNCTAD, Bilateral Investment Treaties in the Mid 1990s (1998).

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> justification for making a finding of expropriation, as in the present case, there is still a standard which serves the purpose of justice and can of itself redress damage that is unlawful and that would otherwise pass unattended." ". . . It must also be kept in mind that on occasion the line separating the breach of the fair and equitable treatment standard from an indirect expropriation can be very thin, particularly if the breach of the former standard is massive and long-lasting.[2]

On this point, the tribunal in *Continental Casualty v. Argentina* held that:

> While the requirements of a lawful expropriation focus on the preservation of the value of the investment when the host State precludes its further operation for some public reasons, the fair and equitable standard is aimed at assuring that the normal law-abiding conduct of the business activity by the foreign investor is not hampered without good reasons by the host government and other authorities.[3]

Some even call it "expropriation light." This "invasive" character of fair and equitable treatment sometimes also takes over other investment protection standards such as full protection and security and the obligation for nonarbitrariness and nondiscrimination.

In the governmental context, negotiators of bilateral investment treaties have been inserting this standard in almost every single agreement they have concluded since the 1960s and, before them, FCN negotiators had done the same as well.[4] The first time the concerned governments attempted to clarify the standard was in 1967, when they were negotiating the text of the draft OECD Convention on the Protection of Foreign Property[5]—they then linked it to the minimum standard of customary international law in an official commentary.[6] Later, in 1984, the same governments linked it to the

2 Sempra Energy v. The Argentine Republic, ICSID case No ARB/02/16, September 28, 2007, paras. 300, 301.

3 Continental Casualty Company v. Argentina, ICSID Case No. ARB/03/9, Award, September 5, 2008, para. 254.

4 K. Vandevelde, *The Bilateral Treaty Program of the United States*, 21 Cornell International Law Journal 201–76 (1988); Stephen Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, *in* 70 The British Yearbook of International Law 99–164 (2000).

5 Draft Convention on the Protection of Foreign Property and Resolution of the Council of the OECD on the Draft Convention, OECD, pp.13–15 (1967).

6 "The phrase 'fair and equitable treatment,' customary in relevant bilateral agreements, indicates the standard set by international law for the treatment due by each State with regard to the property of foreign nationals. The standard requires that—subject to essential security interests—protection afforded under the Convention shall be that generally accorded by the Party concerned to its own nationals, but, being set by international law, the standard may be more exacting where rules of national law or national administrative practices fall short of the requirements of international law. The standard required conforms in effect to the 'minimum standard' which forms part of customary international law," Notes and Comments to Article 1.

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general principles of international law without, however, giving further clarifications.[7] Discussions were revived in 2001,[8] in the aftermath of the *Metalclad*[9] award.

This chapter will tackle the fair and equitable treatment standard from two angles: its position in the international law context and the elements identified by arbitral tribunals as forming part of this standard.[10]

DOES THE STANDARD BELONG TO A SPECIFIC LEGAL ORDER, OR IS IT AN AUTONOMOUS STANDARD?

The fair and equitable treatment standard is included in almost all investment agreements and free trade agreements with investment chapters. A standard formulation without any reference to international law is:

> Investors and investments of each contracting party shall at all times be accorded fair and equitable treatment in the territory of the other contracting party.[11]

Sometimes there is reference to international law.[12] In the case of NAFTA,[13] the United States[14] and Canada[15] Model BITs, as well as the FTAs concluded

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7 Intergovernmental Agreements Relating to Investment in Developing Countries, OECD, 1984.

8 The discussions demonstrated that not all "investor-home" governments in their negotiations had entirely grasped the real nature of the standard. Some had rarely given a second thought to its potential breadth, perhaps because they saw themselves as essentially capital exporters and not importers and wished the standard to be as protective as possible. As it was the case with the majority of BIT provisions, second thoughts only begun to arise when arbitral tribunals began to shed light on these provisions.

9 Metalclad Corporation v. United Mexican States, ICSID case No ARB/AF/97/1, Award, August 30, 2000.

10 *See* C. Schreuer, *Fair and Equitable Treatment*, 2(5) TDM (November 2005); also *Fair and Equitable Treatment (FET): Interaction with Other Standards*, 4(5) TDM (September 2007); R. Dolzer & C. Schreuer, Principles of International Investment Law (Oxford University Press 2008); R. S. Schill, *Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law*, International Law and Justice Working Papers, Institute for International Law and Justice (New York University School of Law 2006); R. Dolzer, *Fair and Equitable Treatment: A Key Standard in Investment Treaties*, 39 Int'l Law 87 (2005); Campbell McLachlan et al., International Investment Arbitration—Substantive Principles (Oxford University Press 2007); K. Yannaca-Small, *Fair and Equitable Treatment in International Investment Law*, Chapter 3 *in* International Investment Law: A Changing Landscape (OECD September 2005).

11 Treaties concluded by the Netherlands, Sweden, Switzerland, and Germany. For example, the German model BIT states: "Each Contracting Party . . . shall in any case accord such investments fair and equitable treatment" and the Swiss model BIT states: "Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment . . . ." *See* UNCTAD, *supra* note 1.

12 *See* France Model BIT.

13 Article 1105(1) of NAFTA.

14 U.S. Model BIT (2004).

15 Canada Model FIPA (2004).

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by the three NAFTA countries,[16] the reference is, more specifically, to the minimum standard of customary international law:

> Each party shall accord at all times to covered investments fair and equitable treatment, in accordance with customary international law, including fair and equitable treatment and full protection and security.

Consequently, when tribunals are called upon to interpret the normative content of the fair and equitable standard in treaties which include explicit language linking or, in some cases limiting, fair and equitable treatment to the minimum standard of international customary law,[17] they have more limited options than tribunals which are interpreting the standard found in treaties which either link the standard to international law without specifying custom or lack any reference to international law. The latter have given a broader scope to the standard than the minimum standard of treatment required by customary international law.

In the context of NAFTA, early arbitral tribunals, such as in the cases of *Metalclad v. Mexico*[18] and *S.D. Myers v. Canada,*[19] gave different interpretations of the "fair and equitable" provision of Article 1105(1), establishing a breach of fair and equitable treatment standard based on the transparency[20] and national treatment provisions of the NAFTA, respectively. In order to clarify the interpretation of this provision, the NAFTA Free Trade Commission (FTC) issued a binding interpretation on July 21, 2001, according to which:

> Article 1105 (1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond

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16 U.S.-Chile, U.S.-Australia, U.S. CAFTA-DR, U.S.-Morocco, U.S.–Singapore, U.S.-Peru FTAs; Mexico-Japan FTA (2004).

17 The international minimum standard is a norm of customary international law which governs the treatment of aliens, by providing for a minimum set of principles which States, regardless of their domestic legislation and practices, must respect when dealing with foreign nationals and their property. While the principle of national treatment foresees that aliens can only expect equality of treatment with nationals, the international minimum standard sets a number of basic rights established by international law that States must grant to aliens, independent of the treatment accorded to their own citizens. Violation of this norm engenders the international responsibility of the host State and may open the way for international action on behalf of the injured alien provided that the alien has exhausted local remedies. The classic monograph on the principle is A. H. Roth, The Minimum Standard of International Law Applied to Aliens (Leiden 1949), where it is defined as follows (p. 127): ". . . the international standard is nothing else than a set of rules, correlated to each other and deriving from one particular norm of general international law, namely that the treatment of aliens is regulated by the law of nations." *See* Yannaca-Small, OECD, *supra* note 10.

18 *Metalclad v. Mexico, supra* note 9.

19 S.D. Myers, Inc. v. Canada, UNCITRAL (NAFTA), Award (Merits), November 13, 2000.

20 Mexico, in its defense, supported that,transparency is a conventional law concept which has been developed in international trade law (GATT Article X), not the body of international investment-protection law from which the concept of minimum standard of treatment expressed in Article 1105 has been derived.

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> that which is required by the customary international law minimum standard of treatment of aliens. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105 (1).

Since then, all NAFTA tribunals have accepted this binding interpretation.

However, there has been variations in the way the tribunal have applied this interpretation. Some of them have gone further and stipulated that this acceptance goes with the understanding that the provision on the customary international law minimum standard of treatment refers to an evolving customary international law and not one frozen in time. In *Mondev v. United States,*[21] for instance, the tribunal in its famous holding stated that:

> [. . .] the term 'customary international law' refers to customary international law as it stood no earlier than the time at which NAFTA came into force. It is not limited to the international law of the 19th century or even of the first half of the 20th century, although decisions from that period remain relevant. In holding that Article 1105(1) refers to customary international law, the FTC interpretations incorporate current international law, whose content is shaped by the conclusion of more than two thousand bilateral investment treaties and many treaties of friendship and commerce. Those treaties largely and concordantly provide for 'fair and equitable' treatment of, and for 'full protection and security' for, the foreign investor and his investments.[22]

The tribunal in *ADF v. United States*[23] expressed the view that:

> [. . .] what customary international law projects is not a static photograph of the minimum standard of treatment of aliens as it stood in 1927 when the Award in the *Neer* case[24] was rendered. For both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development.[25]

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21 Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002.

22 *Ibid.*, para. 125.

23 ADF Group Inc. v. United States of America, ICSID Case No ARB(AF)/00/1, Award, January 9, 2003.

24 The decision on the *Neer* claim became the landmark case for the international minimum standard. This claim was presented to the U.S. Mexico Claim Commission by the United States on behalf of the family of Paul Neer, who had been killed in Mexico in obscure circumstances. In what has become a classic *dictum*, the Commission expressed the concept as follows: "the propriety of governmental acts should be put to the test of international standards . . . the treatment of an alien, in order to constitute an international delinquency should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from the deficient execution of a reasonable law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial." Neer v. Mexico, October 15, 1926, 4 UNRIAA 60.

25 *ADF v. U.S.A, supra* note 23, para. 179.

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The *Glamis v. United States* [26]tribunal has taken a different approach. Although it acknowledged that in some bilateral investment treaties, "fair and equitable treatment" is viewed as autonomous treaty language, it found uncontested that the reference in Article 1105 to "fair and equitable treatment" is to be understood not as autonomous treaty language but in terms of customary international law.[27] According to the tribunal, the content of that rule remains unsettled. It went on to emphasize that the task of seeking the meaning of "fair and equitable treatment" by way of treaty interpretation was fundamentally different from the task of ascertaining the content of custom:

> A tribunal confronted with a question of treaty interpretation can, with little input from the parties, provide a legal answer. It has the two necessary elements to do so, namely the language at issue and rules of interpretation. A tribunal confronted with the task of ascertaining custom, on the other hand, has a quite different task because ascertainment of the content of custom involves not only questions of law but also questions of fact, where custom is found in the practice of States regarded as legally required by them. The content of a particular custom may be clear; but where a custom is not clear, or is disputed then it is for the party asserting the custom to establish the content of that custom.[28]

The tribunal found that Glamis failed to establish the evolution in custom it asserted to have occurred. The tribunal concluded that although situations presented to tribunals are more varied and complicated today than in the 1920s, the level of scrutiny required under *Neer* is the same:

> Given the absence of sufficient evidence to establish a change in the custom, the fundamentals of the *Neer* standard thus still apply today: to violate the customary international law minimum standard of treatment codified in Article 1105 of the NAFTA, an act must be sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons—so as to fall below accepted international standards and constitute a breach of Article 1105(1). Such a breach may be exhibited by a 'gross denial of justice or manifest arbitrariness falling below acceptable international standards;' or the creation by the State of objective expectations *in order to induce* investment and the subsequent repudiation of those expectations.[29]

The tribunal emphasized that, although bad faith may often be present in such a determination and its presence will certainly be determinative of a violation, a finding of bad faith is not a requirement for a breach of Article 1105(1). It also found that although the standard for finding a breach of the customary international law minimum standard of treatment therefore remained as stringent as it was under *Neer*; it was entirely possible that, "as an international community, we might be shocked by State actions now that did not offend us previously."[30] The tribunal concluded that the acts of the federal government

26 Glamis Gold Ltd. v. United States, (UNCITRAL) Award, June 8, 2009.
27 *Ibid.*, paras. 606–18.
28 *Ibid.*, para. 20.
29 *Ibid.*, para. 22.
30 *Ibid.*, para. 22.

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and the State of California complained of by Glamis did not, either individually or collectively, violate the Article 1105 obligations of the United States.

Other tribunals, outside NAFTA, faced with investment agreements with no reference to international law, have most often interpreted the relevant provisions of the underlying agreement autonomously, relying on the treaty interpretation rules and international law more broadly. The *Tecmed v. Mexico*[31] tribunal for instance said that:

> [. . .] the scope of the undertaking of fair and equitable treatment under Article 4(1) of the Agreement [. . .] is that resulting from an autonomous interpretation, taking into account the text of Article 4(1) of the Agreement according to its ordinary meaning (Article 31(1) of the Vienna Convention), or from international law and the good faith principle, on the basis of which the scope of the obligation assumed under the Agreement and the actions related to compliance therewith are to be assessed.[32]

In *Siemens v. Argentina*,[33] despite the fact that there was no reference to international law or to a minimum standard in the relevant treaty, the tribunal, in applying the treaty, considered itself:

> [. . .] bound to find the meaning of these terms under international law bearing in mind their ordinary meaning, the evolution of international law and the specific context in which they are used.[34]

The *Enron v. Argentina*[35] tribunal positioned the fair and equitable standard in the evolutionary context of international law:

> [. . .] evolution that has taken place as part of an outcome of a case by case determination by courts and tribunals, partly hinging on the general formulation of 'general principles of law'[36] [. . .] in some circumstances, where the international minimum standard is sufficiently elaborate and clear, fair and equitable treatment might be equated with it. But in other vague circumstances, fair and equitable treatment may be more precise than its customary international law forefathers.[37]

It concluded that, in the specific context, it required a treatment additional to or beyond that of the customary international law.

The second tribunal in *Vivendi v. Argentina,*[38] saw no basis for limiting fair and equitable treatment to the customary international law minimum standard. According to the

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31 Técnicas Medioambientales Tecmed S.A. v. United Mexican States, ARB(AF)/00/2, Award, May 29, 2003.

32 *Ibid.*, para. 155.

33 Siemens A.G. v. The Argentine Republic, ICSID Case No ARB/02/08, Award, February 6, 2007.

34 *Ibid.*, para. 291.

35 Enron and Ponderosa Assets v. The Argentine Republic, ICSID Case No ARB/01/3, Award, May 22, 2007.

36 *Ibid.*, para. 257.

37 *Ibid.*, para. 258.

38 Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No ARB/97/3, Award, August 20, 2007.

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tribunal, the reference to the principles of international law in the France/Argentina BIT supports "a broad reading that invites consideration of a wider range of international law principles." It echoed the *Azurix* tribunal's holding that the requirement of conformity of the fair and equitable treatment standard to the principles of international law sets "a floor, not a ceiling" on this standard,[39] in order to avoid a possible interpretation of the standard below what is required by international law. It also considered that contemporary principles of international law apply and not those of a century ago.[40]

The tribunal in *Sempra v. Argentina* stated:

> It might well be that in some circumstances in which the international minimum standard is sufficiently elaborate and clear, the standard of fair and equitable treatment might be equated with it. But in other cases, it might as well be the opposite, so that the fair and equitable treatment standard will be more precise than its customary international law forefathers. On many occasions, the issue will not even be whether the fair and equitable treatment standard is different or more demanding than the customary standard, but only whether it is more specific, less generic and spelled out in a contemporary fashion so that its application is more appropriate to the case under consideration. This does not exclude the possibility that the fair and equitable treatment standard imposed under a treaty can also eventually require a treatment additional to or beyond that of customary law.[41]

One of few BIT tribunals which retained that the international law mentioned in the treaty is customary international law is the tribunal in *M.C.I. Power Group L.C. v. Ecuador,*[42] which held that:

> [. . .] the international law mentioned in Article II of the BIT refers to customary international law, i.e. the repeated, general, and constant practice of States, which they observe because they are "aware that it is obligatory.[43]

In real terms, what difference does it make if the fair and equitable treatment standard does or does not refer to the minimum standard? Some tribunals have questioned whether substantial differences result from this characterization.

In *Azurix v. Argentina,*[44] for instance, the tribunal did not consider it to be of material significance for its application of the standard of fair and equitable treatment to the facts of the case and held that:

> [. . .] the question whether or not fair and equitable treatment is or is not additional to the minimum treatment requirement under international law is a question about the substantive content of fair and equitable treatment and whichever side of the argument one takes, the answer to the question may in substance be the same.[45]

39 Azurix Corp. v. Argentine Republic, ICSID Case No ARB/01/12, Award, July 14, 2006, para. 361.

40 *Vivendi v. Argentina*, *supra* note 38, para. 7.4.7.

41 *Sempra v. Argentina*, *supra* note 2, para. 302.

42 M.C.I. Power Group v. Ecuador, ICSID Case No ARB/03/6, Award, July 31, 2007.

43 *Ibid.*, para. 369.

44 *Azurix v. Argentina*, *supra* note 39.

45 *Ibid.*, para. 364.

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Similarly, the tribunal in *Saluka v. The Czech Republic,*[46] referring to the controversy between the Claimant and the Respondent over this question, was of the view that:

> [. . .] whatever the merits of the controversy between the parties may be, it appears that the difference between the treaty standard and the customary minimum standard, when applied to the specific facts of the case, may be more apparent than real.[47]

In *Biwater v. Tanzania*[48], the tribunal accepted [. . .] "that the actual content of the treaty standard of fair and equitable treatment is not materially different from the content of the minimum standard of treatment in customary international law." In *Rumeli v. Kazakhstan,*[49] the tribunal was also of the same view and considered this precision to be more theoretical than real.[50] Other tribunals, such as the tribunal in *Duke Energy v. Ecuador,*[51] were also of the same view.[52]

The acceptance of the evolutionary character of the minimum standard to include new elements as shaped by the over 2700 concluded BITs, as indicated by the *Mondev* and other tribunals, may be a path of convergence between the traditional expression of fair and equitable treatment as the minimum standard and new elements brought in a recurrent fashion by arbitral tribunals. Also, as the *Sempra* tribunal stated:

> [. . .] international law is itself not too clear or precise as concerns the treatment due to foreign citizens, traders and investors. This is the case because the pertinent standards have gradually evolved over the centuries. Customary international law, treaties of friendship, commerce and navigation, and more recently bilateral investment treaties, have all contributed to this development.[53]

WHAT IS THE NORMATIVE CONTENT OF THE FAIR AND EQUITABLE TREATMENT STANDARD AS IT HAS BEEN FORMULATED BY ARBITRAL TRIBUNALS?

The vagueness of the term, which some say may be intentional to give tribunals the possibility to articulate the range of principles necessary to achieve the treaty's purpose in particular disputes, had raised some concern among governments that, the less

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46 Saluka Investments BV (The Netherlands) v. The Czech Republic, UNCITRAL, Partial Award, March 17, 2006.

47 *Ibid.*, para. 291.

48 Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, July 24, 2008.

49 Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan, ICSID Case No. ARB/05/16, Award, July 29, 2008.

50 *Ibid.*, para. 611.

51 Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador, ICSID Case No ARB/04/19, Award, August 18, 2008.

52 *Ibid.*, para. 337.

53 *Sempra v. Argentina*, *supra* note 2, para. 296.

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guidance is provided for arbitrators, the more discretion is involved and the more closely the process resembles decisions *ex aequo et bono*, i.e., based on the arbitrators' notions of "fairness" and "equity."[54]

Experience has proven these concerns not to be entirely well founded. Tribunals have refrained from reasoning *ex aequo et bono* and have identified a certain number of recurrent elements which they consider as constituting the normative content of the fair and equitable treatment standard, according to the specific facts of each case. These elements can be analyzed in two categories: (a) due process, including denial of justice; and (b) transparency and stability, including the respect of the investors' reasonable expectations.

In addition to these two elements, tribunals have often had recourse to other elements, usually interlinked with other substantive standards such as vigilance and protection (full protection and security) and lack of arbitrariness and nondiscrimination.

Denial of Justice, Due Process

The only investment agreements which explicitly spell out some of the scope or content of the fair and equitable standard are the 2004 U.S. Model BIT and a number of United States FTAs which stipulate that the obligation to provide fair and equitable treatment "[. . .] includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world [. . .]."[55]

A number of cases arise out of denial of justice[56] in the matter of procedure, some deficiency in the vindication and enforcement of the investor's rights. The principle of "denial of justice" is considered part of customary international law. Most of the cases examined, approach fair and equitable treatment in connection with the improper administration of civil and criminal justice as regards an alien, including denial of access to courts or inadequate and unjust procedures.

The tribunal in *Waste Management v. Mexico*[57] defined a violation of fair and equitable treatment as "[. . .] involving a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency in an administrative process."[58]

In *Loewen v. United States*,[59] the tribunal considered "manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough"[60] to identify a breach of fair and equitable treatment.

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54 Yannaca-Small, OECD, *supra* note 10.

55 *See* Article 5(2)a, US Model BIT (2004), *supra* note 14.

56 For a comprehensive analysis, see J. Paulsson, Denial of Justice in International Law (2005).

57 Waste Management Inc. v. United Mexican States, ARB(AF)/00/3, Award, April 30, 2004.

58 *Ibid.*, para. 98.

59 The Loewen Group, Inc. and Raymond L. Loewen v. United States, ARB(AF)/98/3, Final Award, June 26, 2003.

60 *Ibid.*, para. 132

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In *Genin v. Estonia,*[61] the tribunal took the position that, in order to amount to a violation of the BIT, any procedural irregularity that may have been present would have to amount to bad faith, a willful disregard of due process of law, or an extreme insufficiency of action.[62]

In *Jan de Nul N.V. v. Egypt,*[63] the tribunal viewed acts that would give rise to a breach of the minimum standard of treatment prescribed by NAFTA "and customary international law as those that [. . .] amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards."[64]

In the longest-running claim in the history of ICSID, *Pey Casado v. Republic of Chile*,[65], the tribunal had no doubt that not committing a denial of justice is one of the State's obligations necessary to afford the foreign investment fair and equitable treatment.[66] According to the tribunal, important procedural delays constitute one of the classic forms of denial of justice.[67] It concluded that the absence of a decision by the Chilean authorities during a period of more than seven years on the one hand, and the absence of any response of the Presidency to the claimant's inquiries on the other hand, constituted a denial of justice and therefore a breach of the fair and equitable treatment provision.

The denial of justice in the fair and equitable standard can go beyond procedure. In *Mondev v. USA,* [68] the tribunal posed the question, "whether, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment." As a general matter, the tribunal found that it could, and stated:

> The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal, and on the other hand that Chapter 11 of NAFTA (like other treaties for the protection of investments) is intended to provide a real measure of protection. In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment.

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61 Alex Genin, et al. v. Estonia, ICSID Case No ARB/99/2, Final Award, June 25, 2001.

62 *Ibid.*, para. 371.

63 International Thunderbird Gaming Corporation v. United Mexican States, UNCITRAL (NAFTA), Award, January 26, 2006.

64 *Ibid.*, para. 194.

65 Pey Casado and Président Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2, Award, May 8, 2008.

66 *Ibid.*, para. 656.

67 On this point, it referred to J. Paulsson's relevant comments: "[. . .] delays may be 'even more ruinous' than absolute refusal of access [to justice], because in the latter situation the claimant knows where he stands and take action accordingly, whether by seeking diplomatic intervention or exploring avenues of direct legal action." J. Paulsson, Denial of Justice, *supra* note 56, *ibid.*, para. 660.

68 *Mondev v. U.S.A, supra* note 21.

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> This is admittedly a somewhat open-ended standard, but it may be that in practice no more precise formula can be offered to cover the range of possibilities.[69]

The tribunal in *Jan de Nul N.V. v. Egypt*[70] also had no doubt—and neither did the parties to the dispute—that the fair and equitable treatment standard encompasses the notion of denial of justice. It undertook a thorough analysis of this element taking guidance from the *Loewen* tribunal's definition[71] and applying it in the case at hand. It also found the test formulated by the *Mondev* tribunal useful in this case, i.e., that the denial of justice may occur irrespective of any trace of discrimination or maliciousness, if the judgment at stake shocks a sense of judicial propriety.[72] It examined the fair and equitable treatment standard under the prism of both the procedural and the substantive denial of justice. The procedural aspects included in the particular case were (i) due process before the courts, (ii) duration of the proceedings, and (iii) the conduct of a judicial panel.[73] The tribunal found that none of these elements rose to the level of a denial of justice. The substantive denial of justice involved fraudulent behavior on the part of the Egyptian authorities. The tribunal expressed the view that the threshold for the claimant in proving this fraud was high, because it reflected "the demanding nature of the concept of fraud and of a claim for denial of justice." It concluded that there was "no evidence on record of any discrimination, bias or malicious application of the law [. . ..]"[74]

In *Rumeli v. Kazakhstan*,[75] the tribunal noted that the violations alleged by claimants and allegedly constituting a denial of justice are better qualified and dealt with as issues falling under the fair and equitable treatment standard which also includes in its generality the standard of denial of justice.[76] This tribunal, while stating that denial of justice was procedural only, also considered that the substance of the decision can be relevant:

> The standard is indeed of a procedural nature. In that sense, a court procedure which does not comply with due process is in breach of the duty. On the other hand, as pointed out by Respondent, the substance of a decision may be relevant in the sense that a breach of the standard can also be found when the decision is so patently arbitrary, unjust or idiosyncratic that it demonstrates bad faith.

Transparency, Stability, and Legitimate Expectations

The first reference to the principle of transparency as an element of the fair and equitable treatment was made by the *Metalclad* tribunal, in particular with respect to

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69 *Ibid.*, para. 127.

70 Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Award, November 6, 2008.

71 *Ibid.*, para. 192.

72 *Ibid.*, para. 193.

73 *Ibid.*, para. 196.

74 *Ibid.*, para. 209.

75 *Rumeli v. Kazakhstan*, *supra* note 49.

76 *Ibid.*, para. 654.

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administrative proceedings, while the tribunal in *Tecmed* substantiated this interpretation by putting it in the context of more concrete procedural principles and rights and expanding it to include the investor's legitimate expectations. This set a trend for subsequent tribunals to include the element of the investor's legitimate expectations as one of the main components of fair and equitable treatment. Its application tends to cover the regulatory experience as a whole, where stability and transparency are governmental promises upon which the investor relies for his investment. The principles of transparency, clarity, and stability guide the process of both the definition of the conditions of the "legitimate expectations" principle and its application to the particular facts of a specific situation. Good faith, as the underlying principle, is guiding all of these obligations and, as has been commented, "[. . .] it is relied on as the common guiding beacon that will orient the understanding and interpretation of obligations [. . .]."[77]

Except for the *Genin* tribunal's interpretation,[78] there is a common thread in the recent awards under NAFTA and BITs that bad faith or malicious intention of the recipient State is not required as a necessary element in the failure to treat investment fairly and equitably.

In *Metalclad v. Mexico*,[79] the tribunal defined the concept of "transparency" (stated in NAFTA Article 1802) as the idea that "[. . .] all relevant legal requirements for the purpose of investing should be capable of being readily known to all investors."[80]

In *Tecmed v. Mexico,*[81] the tribunal considered that:

> [. . .] [this] provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparent in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.[82]

The tribunal in *Cargill v. Poland*[83] held Poland liable for discriminating against the U.S. agricultural firm Cargill and for a lack of transparency which the tribunal deemed to be part of the fair and equitable treatment standard.

The stability of the host State's legal order with the existence of predictable and transparent rules and regulations and their consistent application enhance and promote

77 *See* Dolzer, *supra* note 10.
78 *Genin et al. v. Estonia*, *supra* notes 61, 62.
79 *Metalclad v. Mexico*, *supra* note 9.
80 *Ibid.*, para. 76.
81 *Tecmed v. Mexico, supra* note 31.
82 *Ibid.*, para. 154.
83 The arbitration proceeding was initially commenced at ICSID but was subsequently converted into an UNCITRAL proceeding. Therefore, while the award was rendered in March 2008, it has not been published, *Investment Arbitration Reporter*, Vol. 1, No 5, 16 July 2008.

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legal security. This is in conformity with the object and purpose of international investment treaties, as stability, predictability, and consistency are necessary for investors in order to plan their investment according to the legal framework of the host country.

In *Occidental (OEPC) v. Ecuador*,[84] the tribunal referred to the preamble of the U.S.-Ecuador BIT and concluded that "the stability of the legal and business framework is thus an essential element of fair and equitable treatment"[85] and that fair and equitable is an objective requirement that does not depend on whether the Respondent has proceeded in good faith or not."[86]

In *CMS Gas Transmission Company v. Argentina,*[87] the tribunal upheld CMS's claim for violations of fair and equitable treatment under Article II(2) of the US-Argentina BIT, noting that fair and equitable treatment is inseparable from stability and predictability and that there was no need to prove bad faith on the part of Argentina. Rather, an objective assessment of whether the legitimate expectations of the investor were met could be made [88].

In *LG&E v. Argentina*,[89] citing previous awards that have adjudicated on the same fair and equitable standard according to this treaty or identical wording in other treaties, the tribunal acknowledged as well that "the stability of the legal and business framework is an essential element of the standard of what is fair and equitable treatment"[90] and considered this interpretation to be an emerging standard of fair and equitable treatment in international law.

In *Enron v. Argentina*,[91] the tribunal also concluded that a key element of fair and equitable treatment is the requirement of a "stable framework for the investment" and in *Sempra* the tribunal affirmed that "what counts is that in the end the stability of the law and the observance of legal obligations are assured, thereby safeguarding the very object and purpose of the protection sought by the treaty."[92]

Legitimate expectations. Legal rules and regulations are able to create the basis of an environment beneficial to long-term investment when they are applied according to how a reasonable investor would expect them to be applied. The investors' perceptions and their expectations toward the government activity have become an essential element of their perception of the host country's ordering function of law. As mentioned, the legitimate expectation principle became a recurrent, independent basis for a claim under the fair and equitable treatment standard. As Professor Thomas Wälde argued in

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84 Occidental Exploration and Production Company v. Republic of Ecuador, LCIA Case No. UN 3467, Award, July 1, 2004.

85 *Ibid.*, para. 183.

86 *Ibid.*, para. 186.

87 CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, Award, May 12, 2005.

88 *Ibid.*, para. 274.

89 LG&E Energy Corp., LG&E Capital Corp., and LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, October 3, 2006.

90 *Ibid.*, para. 124.

91 *Enron v. Argentina*, *supra* note 35.

92 *Sempra v. Argentina*, *supra* note 2, para. 300.

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his Separate Opinion in the *Thunderbird* case, such growth in scope and role "[. . .] is possibly related to the fact that it provides a more supple way of providing a remedy appropriate to the particular situation as compared to the more drastic determination and remedy inherent in the concept of regulatory expropriation."[93] The statement confirms the findings of the *CMS* tribunal[94] which first examined the claim for expropriation and then turned to the legitimate expectation principle to provide protection to the investor. This approach suggests that obligations entailed in the expropriation clause and those of fair and equitable treatment do not necessarily differ in quality, but just in intensity.

In its concluding remarks on the standard, the *CMS* tribunal went so far as to state that the connection between fair and equitable treatment and stability, i.e., respect of investor's legitimate expectations, "is not different from the international law minimum standard," and it can thus be said to have acquired customary nature.[95]

In *Saluka v. The Czech Republic*,[96] the tribunal considered that the standard of fair and equitable treatment is closely tied to the notion of legitimate expectations which, in its view, is the dominant element of that standard.

> [. . .] An investor's decision to make an investment is based on an assessment of the state of the law and the totality of the business environment at the time of the investment as well as on the investor's expectation that the conduct of the host State subsequent to the investment will be fair and equitable. The standard of 'fair and equitable treatment' is therefore closely tied to the notion of legitimate expectations which is the dominant element of that standard. By virtue of the 'fair and equitable treatment' standard included in Article 3.1 the Czech Republic must therefore be regarded as having assumed an obligation to treat foreign investors so as to avoid the frustration of investors' legitimate and reasonable expectations.[97]

In *Siemens v. Argentina*,[98] also, the tribunal understood that the current standard includes the frustration of expectations that the investor may have legitimately taken into account when it made the investment.

> The purpose of the Treaty is to promote and protect investments would be inconsistent with such commitments and purpose and the expectations created by such a document to consider that a party to the Treaty has breached its obligation only when it has acted on bad faith [. . .].[99]

In *ADF v. United States*,[100] the tribunal discussed the claimant's expectation allegedly created by existing case law but it denied the existence of a legitimate expectation in the particular case because the expectation was not created by "any misleading

93 *Thunderbird v. Mexico*, Separate Opinion (Dissent in Part) by Professor Thomas Wälde, January 26, 2006, *supra* note 63, para. 37.
94 *CMS v. Argentina*, *supra* note 87.
95 *Ibid.*, para. 284.
96 *Saluka v. The Czech Republic*, *supra* note 46.
97 *Ibid.*, paras. 301–02.
98 *Siemens v. Argentina*, *supra* note 33.
99 *Ibid.*, para. 300.
100 *ADF v. U.S.A*, *supra* note 23.

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representations made by authorized officials of the U.S. federal government but rather, by legal advice received from private counsel." The tribunal suggested that it is representations from authorized officials that provide the foundation for legitimate expectations if these representations reasonably become the basis for the investor's commitment of capital.[101]

The *Thunderbird* tribunal attempted to clarify the role to be played by the principle of legitimate expectations in the context of investment arbitration, particularly under the NAFTA. It is especially useful in providing a relatively concise description of the circumstances in which the principle will apply:

> [. . .] the concept of 'legitimate expectations' relates, within the context of the NAFTA framework, to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages.[102]

However, the tribunal did not elaborate on the precise role of the legitimate expectations principle in the context of investor-state arbitration.[103] In this respect, Professor Wälde, in his separate opinion, was more precise—approaching the principle of legitimate expectations as forming a central part of the fair and equitable test under NAFTA Article 1105:

> One can observe over the last years a significant growth in the role and scope of the legitimate expectation principle, from an earlier function as a subsidiary interpretative principle to reinforce a particular interpretative approach chosen, to its current role as a self-standing subcategory and independent basis for a claim under the 'fair and equitable standard' as under Art. 1105 of the NAFTA.[104]

But the threshold for such informal and general representations might be quite high. A legitimate expectation is assumed more readily if an individual investor receives specific formal assurances that visibly display an official character and if the official(s) perceives or should perceive that the investor intends, reasonably, to rely on such representation. The more specific the assurances that are given, the more likely they are to give rise to some basis for a legitimate expectation claim. As the *CMS* tribunal stated:

> It is not a question of whether the legal framework might need to be frozen as it can always evolve and be adapted to changing circumstances but neither is it a question of whether the framework can be dispensed with altogether when specific commitments to the contrary have been made. The law of foreign investment and

101 *Ibid.*, para. 189.

102 *Thunderbird v. Mexico, supra* note 63, para. 147.

103 For a more detailed analysis and comments on the *Thunderbird* case, see S. Fietta, *International Thunderbird Gaming Corporation v. The United Mexican States: an indication of the limits of the 'legitimate expectation' basis of claim under Article 1105 of NAFTA?*, 3(2) Transnational Dispute Management (2006).

104 *Thunderbird v. Mexico*, Separate Opinion, *supra* note 93, para. 37.

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> its protection has been developed with the specific objective of avoiding such adverse legal effects.[105]

The tribunal in *Glamis v. Unites States*[106] was of the view that, a State may be tied to the objective expectations that it creates *in order to induce* investment, but these expectations have to be specific.[107] It determined that since no specific assurances were made to induce Claimant's "reasonable and justifiable expectations," it did not need to determine the level, or characteristics, of state action in contradiction of those expectations that would be necessary to constitute a violation of NAFTA Article 1105.[108]

In *Parkerings Compagniet AS v. Republic of Lithuania*,[109] the tribunal reaffirmed that the principal basis for a legitimate expectation is an explicit promise or guaranty from the State:

> [. . .] the expectation is legitimate if the investor received an explicit promise or guaranty from the host-State, or if implicitly, the host-State made assurances or representations that the investor took into account in making the investment. Finally, in the situation where the host-State made no assurance or representation, the circumstances surrounding the conclusion of the agreement are decisive to determine if the expectation of the investor was legitimate. In order to determine the legitimate expectation of an investor, it is also necessary to analyse the conduct of the State at the time of the investment.[110]

It concluded that, due to lack of specific demonstrations by the Claimant that the modifications of laws were made specifically to prejudice its investment, the claim that the State acted unfairly, unreasonably, or inequitably in the exercise of its legislative power, could not be sustained.

This was the understanding of the tribunal in *Metalpar v. Argentina*,[111] which found that since there was no bid, license, permit, or contract of any kind between Argentina and the Claimants, there were no legitimate expectations entertained by Claimants that were breached by Argentina.[112]

In *Biwater v. Tanzania*,[113] in an unusual ruling, the tribunal held the government in breach of the fair and equitable treatment obligation for negative public statements made about an investor. The Claimant had pled that it had a legitimate expectation that the Government "would, at the very least, maintain a neutral position and not tarnish City Water's image in the eyes of the public." Yet, they complained that following the

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105 *CMS v. Argentina, supra* note 87, para. 277.

106 *Glamis v. USA*, *supra* note 26.

107 *Ibid.*, para. 621.

108 *Ibid.*, para. 622.

109 Parkerings Compagniet AS v. Lithuania, ICSID Case No. ARB/05/8, Final Award, September 11, 2007.

110 *Ibid.*, para. 331.

111 Metalpar S.A. and Buen Aire S.A. v. Argentine Republic, ICSID Case No. ARB/03/5, Award, June 6, 2008. This ruling marked the first unconditional victory for Argentina in the long series of arbitrations mounted by foreign investors in the aftermath of that country's financial crisis.

112 *Ibid.*, para. 187.

113 *Biwater v. Tanzania, supra* note 48.

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government's move to commence termination of the contract, the relevant Tanzanian Minister made a series of public announcements which denigrated the company's "poor performance" and announced that a new public entity would be taking over the service. The tribunal held that at the time of the statements by the Minister in question, the company "still had a right to the proper and unhindered performance of the contractual termination process," and that public statements attributable to Tanzania "constituted an unwarranted interference" in this contractual termination process, and inflamed and polarized public opinion so that the termination process was doomed not to play out according to the contractually agreed process.[114]

In *Continental Casualty v. Argentina*,[115] the tribunal addressed the most detailed list to date of the factors included in the "abstract" concept of "reasonable legitimate expectations" in order to evaluate its relevance applied within fair and equitable treatment and whether a breach of the latter has occurred[116]:

> i) *the specificity of the undertaking allegedly relied upon* [. . .], considering moreover that political statements have the least legal value, regrettably but notoriously so;
>
> ii) *general legislative statements engender reduced expectations*, especially with competent major international investors in a context where the political risk is high. Their enactment is by nature subject to subsequent modification, and possibly to withdrawal and cancellation, within the limits of respect of fundamental human rights and *ius cogens*;
>
> iii) *unilateral modification of contractual undertakings by governments*, notably when issued in conformity with a legislative framework and aimed at obtaining financial resources from investors *deserve clearly more scrutiny*, in the light of the context, reasons, effects, since they generate as a rule legal rights and therefore expectations of compliance;
>
> iv) *centrality to the protected investment and impact of the changes on the operation of the foreign owned business* in general including its profitability is also relevant;
> - good faith, absence of discrimination (generality of the measures challenged under the standard), relevance of the public interest pursued by the State, accompanying measures aimed at reducing the negative impact are also to be considered in order to ascertain fairness. *[emphasis added]*.

In light of the above criteria, the tribunal concluded on the facts of this case that Continental could not invoke legitimate expectations for most of the alleged behavior of the State. The only one which could be considered contrary to fair and equitable treatment in the light of previous assurances by Argentina was the de-dollarization and its specific modalities, which was covered under Argentina's necessity defense. It concluded that "the measures were not discriminatory; were general, affecting all sectors of the national economy and all classes of depositors and investors, nor did they affect the carrying-on of the insurance business of Continental in respect of which the reliance on stability of the legal environment could have been properly focused."[117]

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114 *Ibid.*, para. 627

115 *Continental Casualty v. Argentine Republic*, *supra* note 3.

116 *Ibid.*, para. 261.

117 *Ibid.*, para. 262.

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Proportionality. In view of the concern that has been expressed about possible abusive claims by investors of violations of their legitimate expectations and, consequently, the potential for abusive interpretation by tribunals—which might have a chilling effect on the governments' exercise of regulatory power, it is worth looking at the balanced positions taken by some recent tribunals, which accompanied their interpretation with a proportionate clarification.

A number of tribunals have followed the *S.D. Myers* reasoning that the determination of a breach of the obligation of "fair and equitable treatment" must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders. Therefore, it should not be handled as an inflexible yardstick.

The tribunal in *Saluka* warned against the literal interpretation of the terms stability and predictability in the regulatory environment and noted that:

> [. . .] if their terms were to be taken too literally, they would impose upon host States obligations which would be inappropriate and unrealistic. Moreover, the scope of the Treaty's protection of foreign investment against unfair and inequitable treatment cannot exclusively be determined by foreign investors' subjective motivations and considerations. Their expectations, in order for them to be protected, must rise to the level of legitimacy and reasonableness in light of the circumstances.[118]

It concluded that the determination of a breach of fair and equitable treatment standard requires a weighing of the claimant's legitimate and reasonable expectations on the one hand and the respondent's legitimate regulatory interests on the other.[119]

The *LG&E v. Argentina* tribunal also followed the balancing approach, which requires that the host State's specific investment and regulatory environment be taken into account when applying the fair and equitable treatment standard.

In *Enron v. Argentina*, the tribunal noted also that the stabilization requirement does not mean the freezing of the legal system or the disappearance of the regulatory power of the State.[120]

The tribunal in *MCI v. Ecuador* considered as well that the investor's expectations of fair and equitable treatment and good faith, in accordance with the BIT, must be paired with a legitimate objective. The legitimacy of the expectations for proper treatment entertained by a foreign investor protected by the BIT does not depend solely on the intent of the parties but on certainty about the contents of the enforceable obligations.[121]

In addition, there is a related trend recognizing that inherent business risks of an investment are to be borne by the investor, which, in the case of an investment in developing States, include acceptance of potentially less stable socioeconomic and political environments.

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118 *Saluka v. The Czech Republic*, *supra* note 46, para. 304.
119 *Ibid.*, para. 306.
120 *Enron v. Argentina*, *supra* note 35, para. 261.
121 *M.C.I v. Ecuador*, *supra* note 42, para. 278.

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In *MTD v. Chile*, the tribunal reduced by 50 percent the damages awarded to MTD on account of business risk. It noted: "[. . .] BITs are not an insurance against business risk and the claimants should bear the consequences of their own actions as experienced businessmen."[122]

The tribunal in *Parkerings v. Lithuania* insisted on the shared responsibility between a State's actions and regulations and an investor's expectations. It recognized the State's "undeniable right and privilege to exercise its sovereign legislative power" and "to enact, modify or cancel a law at its own discretion." It also stated that any businessman or investor knows that laws will evolve over time.[123] On the other hand, it recognized the right of the investor to a certain stability and predictability of the legal environment of the investment and the right of protection of its legitimate expectations—provided it exercised due diligence and that its legitimate expectations were reasonable in light of the circumstances. However, an investor must anticipate that the circumstances could change and, thus, structure its investment in order to adapt it to the potential changes of legal environment. What is prohibited is for a State to act unfairly, unreasonably, or inequitably in the exercise of its legislative power.[124] In the case at hand, the tribunal noted that the investor, by deciding to invest notwithstanding a possible instability, took the *business risk* to be faced with changes of laws possibly or even likely to be detrimental to its investment although,

> [. . .] he could (and with hindsight should) have sought to protect its legitimate expectations by introducing into the investment agreement a stabilisation clause or some other provision protecting it against unexpected and unwelcome changes.

It then drew a line between contractual expectations and expectations under international law and concluded:

> It is evident that not every hope amounts to an expectation under international law. The expectation a party to an agreement may have of the regular fulfilment of the obligation by the other party is not necessarily an expectation protected by international law. In other words, contracts involve intrinsic expectations from each party that do not amount to expectations as understood in international law. Indeed, the party whose *contractual expectations* are frustrated should, under specific conditions, seek redress before a national tribunal.[125]

Professor Wälde, in his partial dissent on the *Thunderbird* case, also expressed the view that the disappointment of legitimate expectations must be sufficiently serious and material. Otherwise, acting on any minor misconduct by a public official could go to the jurisdiction of a treaty tribunal, whose function is not to act as a general-recourse administrative law tribunal.[126]

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122 MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award, May 25, 2004.

123 *Parkerings v. Lithuania*, *supra* note 109, para. 332.

124 *Ibid.*, para. 333.

125 *Ibid.*, para. 344.

126 *Thunderbird v. Mexico*, Separate Opinion, *supra* note 93, para. 14.

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The frequently cited test set out in *Tecmed v. Mexico*, which gave primacy to the expectations that were taken into account by the foreign investor in making the investment, was the subject of the following comment by the ICSID *ad hoc* annulment Committee in *MTD v. Chile*:

> . . . the *Tecmed* Tribunal's apparent reliance on the foreign investor's expectations as the source of the host State's obligations (such as the obligation to compensate for expropriation) is questionable. The obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have. A tribunal which sought to generate from such expectations a set of rights different from those contained in or enforceable under the BIT might well exceed its powers, and if the difference were material might do so manifestly.[127]

E. Gaillard, in his commentary on this decision, observes that "in reality, it is the objective law which results from the general international law or from the investment protection treaties and not from the investor's subjectivity which allows the separation between the licit or illicit behaviour of the State . . . . The expectation is not legitimate unless it supposes on behalf of the State behaviour in conformity with international law and with the specific commitments that the latter has taken towards the investor" [translation by the author].[128]

In *Duke Energy v. Ecuador*, the tribunal acknowledged that the stability of the legal and business environment is directly linked to the investor's justified expectations and that such expectations are an important element of fair and equitable treatment. At the same time, it was mindful of their limitations and was of the view that:

> [. . .] to be protected, the investor's expectations must be legitimate and reasonable at the time when the investor makes the investment. This assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State. In addition, such expectations must arise from the conditions that the State offered the investor and the latter must have relied upon them when deciding to invest.[129]

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127 MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile, Decision on the Application for Annulment, March 21, 2007, para. 67.

128 E. Gaillard, *Chronique des Sentences Arbitrales*, Journal Du Droit International 332–33, (Janvier-Février-Mars 2008), « C'est en realité le droit objectif, qu'il résulte du droit international général ou des traités de protection des investissements, et non la subjectivité de l'investisseur, qui permet de départager les comportements licites ou illicites de l'Etat . . . . Réduite à sa plus simpel expression, l'attente n'est légitime qui si elle suppose de la part de l'Etat un comportement conforme au droit international et aux engagements spécifiques qu'il est susceptible d'avoir pris à son égard ».

129 *Duke Energy v. Ecuador*, *supra* note 51, para. 340.

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In *LESI v. Argentina*,[130] the tribunal noted that the concept of fair and equitable treatment[131] does not depend exclusively on the subjective expectations of the investor. It set out the following test:

> the State must act in a coherent, unambiguous, transparent manner, it must maintain an environment sufficiently stable to allow a reasonably diligent investor to adopt a strategy and implement it over time, and it must act in a non-arbitrary and non-discriminatory manner, without abuse of power and in compliance with its commitments[132] [*unofficial translation*].

The tribunal rejected all elements of the fair and equitable treatment claim.

In *National Grid v. Argentina*,[133] the tribunal construed "fair" and "equitable" to call for "evenhandedness" and an attention to the factual context of the investment. While the provision should protect certain expectations of foreign investors, the tribunal stressed two important qualifications: "first, that the investor should not be shielded from the ordinary business risk of the investment and, second, that the investor's expectations must have been reasonable and legitimate in the context in which the investment was made."

Along these lines, the tribunal in *EDF v. Romania*,[134] while acknowledging that protection of the investor's legitimate and reasonable expectations was a major component of the fair and equitable treatment standard in the UK-Romania treaty, cautioned that expectations of a stable legal and business framework must not be understood to require a "virtual freezing of the legal regulation of economic activities" by a State.[135] It added that, except where investors have had specific promises or representations, it would not be reasonable or legitimate for them to assume that a State's legal and economic framework may not evolve and change and fair and equitable treatment should not be conflated with so-called stabilization clauses sometimes inserted into investor-state contracts so as to provide for the express stabilization of certain laws, taxes or other regulations.[136] Moreover, the tribunal stressed that legitimate expectations must not be deduced solely in light of the subjective expectations of the investor; they must be examined as the expectations at the time the investment is made, as they

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130 LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria, ICSID Case No. ARB/05/3, Award, November 12, 2008.

131 The claimants made a claim for breach of the fair and equitable treatment obligation—a provision not found in the Algeria-Italy BIT, but imported into the arbitration thanks to the operation of the most-favored-nation (MFN) clause. It benefited from the BIT between the Belgium-Luxembourg Union and Algeria.

132 *LESI, v. Algeria, supra* note 130, para. 151.

133 National Grid PLC v. Argentine Republic, UNCITRAL case, Award, November 3, 2008 (non-published), as seen in *Investment Arbitration Reporter*, Volume 1, No 17, December 17, 2008.

134 EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13, Award and Dissenting Opinion, October 8, 2009.

135 *Ibid.*, para. 217.

136 *Ibid.*, para. 218.

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may be deduced from all the circumstances of the case, due regard being paid to the host State's power to regulate its economic life in the public interest. [137]

ADDITIONAL ELEMENTS—COMBINATION WITH OTHER SUBSTANTIVE STANDARDS

Obligation of Vigilance and Protection

In a number of early decisions, the tribunals made reference to the obligation of vigilance, also phrased as an obligation to exercise due diligence in protecting foreign investment, in order to define an act or omission of the State as being contrary to fair and equitable treatment and full protection and security. In these cases, the standards of "fair and equitable treatment" and "full protection and security" have been treated as interlocking and examined together by tribunals. The latter standard, full protection and security, is often included in treaties as a separate obligation and was applied in the past essentially when the foreign investment had been affected by civil strife and physical violence.

The obligation of vigilance has been considered a standard deriving from customary international law. Among the cases which equated the standards of fair and equitable treatment and full protection and security were *Asian Agricultural Products Ltd. (AAPL) v. Sri Lanka*[138]; *American Manufacturing & Trading (AMT), Inc. v. Republic of Zaire*[139]; *Wena Hotels v. Egypt*[140]; and *Occidental v. Ecuador*.[141] The *Wena Hotels* tribunal held that "a treatment that it is not fair and equitable automatically entails an absence of full protection and security" and considered a separate examination moot.[142] In *PSEG v. Turkey*,[143] the tribunal held that the standard applied only exceptionally to legal security—and in this case was very similar to the fair and equitable treatment standard.[144]

In *Azurix v. Argentina* however, the tribunal found that the two standards were separate and also that the full protection and security standard went beyond physical violence and covered the obligation to create a secure investment environment.[145]

137 *Ibid.*, para. 219.

138 Asian Agricultural Products Ltd (AAPL) v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Award, June 27, 1990.

139 American Manufacturing & Trading, Inc. (AMT) v. Republic of Zaire, ICSID Case No ARB/93/1, Award, February 21, 1997.

140 Wena Hotels Limited v. Arab Republic of Egypt, ICSID Case No ARB/98/4, Award, December 8, 2000.

141 Occidental Exploration and Production Company v. Republic of Ecuador, LCIA Case No. UN 3467, Award, July 1, 2004.

142 *Ibid.*, para. 187.

143 PSEG Global et al. v Republic of Turkey, ICSID Case No ARB/02/5, Award, January 19, 2007.

144 *Ibid.*, para. 259.

145 *Azurix v. Argentina*, *supra* note 39, para. 408.

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In *Parkerings v. Lithuania*[146] and *Jan de Nul N.V. v. Egypt*,[147] the tribunals also examined the two standards separately. In *Jan de Nul*, the tribunal gave weight to the fact that the two standards were placed in two different provisions of the BIT and examined them separately, "even if the two guarantees can overlap." It defined the concept as related to the exercise of due diligence.[148]

Lack of Arbitrariness and Nondiscrimination

Although most BITs include a separate provision on protection against arbitrary and discriminatory behavior, some tribunals have interpreted lack of arbitrariness and non-discrimination as elements of the fair and equitable treatment standard.[149]

In *CMS v. Argentina*,[150] the tribunal linked the standard of protection against arbitrariness and discrimination to the fair and equitable treatment standard. According to its view, "any measure that might involve arbitrariness or discrimination is in itself contrary to the fair and equitable treatment."[151]

The *MTD v. Chile*,[152] *PSEG v. Turkey*,[153] and *Saluka v. The Czech Republic*[154] tribunals also declined to distinguish the two standards.

The tribunal in *LG&E v. Argentina*,[155] examined the two standards separately and found that it was possible to violate one standard without violating the other: "characterizing the measures as non-arbitrary does not mean that such measures are characterized as fair and equitable [. . .]."[156]

NAFTA does not include separate provisions on these elements, and NAFTA tribunals have included them in their interpretation of fair and equitable standard.

In *S.D. Myers Inc v. Canada*,[157] the tribunal considered that a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or

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146 *Parkerings v. Lithuania*, *supra* note 109. The tribunal defined the violation of the standard of *full protection and security* as the failure of the State to prevent the damage, to restore the previous situation or to punish the author of the injury. The injury could be committed either by the host State, or by its agencies or by an individual, para. 355.

147 *Jan de Nul v. Egypt, supra* note 70.

148 *Ibid.*, para. 269.

149 *See* C. Schreuer, *Fair and Equitable Treatment (FET): Interaction with Other Standards*, *in* Transnational Dispute Management (2007).

150 *CMS v. Argentina*, *supra* note 87.

151 *Ibid.*, para. 290.

152 *MTD v. Chile*, *supra* note 122.

153 *PSEG v. Turkey*, *supra* note 143.

154 *Saluka v. The Czech Republic*, *supra* note 46. The tribunal agreed with *S.D. Myers, Inc. v. Canada* that 'an infringement of the fair and equitable standard requires treatment in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective.

155 *LG&E v. Argentina*, *supra* note 89.

156 *Ibid.*, para. 162.

157 S.D. Myers Inc v. Canada (UNCITRAL), First Partial Award, November 13, 2000.

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arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective.[158]

In *Waste Management v. Mexico*,[159] the tribunal stated that "the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, discriminatory," but it also added conduct that "involves a lack of due process leading to an outcome which offends judicial property [. . .]."[160]

The arbitral tribunal determined in *Saluka* that the standard of "reasonableness" has no different meaning than the "fair and equitable treatment" standard "with which it is associated."[161] Reasonableness therefore requires that the State's conduct "bears a reasonable relationship to some rational policy, whereas the standard of 'non discrimination' requires a rational justification of any differential treatment of a foreign investor."

Similarly, the arbitral tribunal in *CMS v. Argentina* stated that the standard of protection against discrimination "is related to that of fair and equitable treatment. Any measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment, provided, of course, that, to be actionable, the measure must impair the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of the investment."[162]

In *Rumeli v. Kazakhstan*, the tribunal noted that the violations alleged by Claimants and allegedly constituting unreasonable, arbitrary, or discriminatory measures, were also invoked by Claimants as constituting a violation of the fair and equitable treatment principle. The arbitral tribunal considered that these violations are better qualified and dealt with as issues falling under the fair and equitable treatment standard, which also includes in its generality the principle of no unreasonable, arbitrary, or discriminatory measures.[163]

CONCLUSION

To use the words of the *PSEG* tribunal, the standard of fair and equitable treatment has acquired prominence in investment arbitration as a consequence of the fact that other standards traditionally provided by international law might not in the circumstances of each case be entirely appropriate to do justice.[164] This is particularly the case when the facts of the dispute do not clearly support the claim for indirect expropriation, but when there are, nevertheless, events that appear to call for redress for the investor and need to be assessed under a different standard. Because the role of fair and equitable treatment changes from case to case, it is sometimes not as precise as it would be desirable.

158 *Ibid.*, para. 263.
159 *Waste Management v. Mexico, supra* note 57.
160 *Ibid.*, para. 98.
161 *Saluka v. The Czech Republic*, *supra* note 46, para. 460.
162 *CMS v. Argentina*, *supra* note 87, para. 290.
163 *Rumeli v. Kazakhstan, supra* note 49, para. 681.
164 *PSEG v. Turkey*, *supra* note 143, para. 238.

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Yet, it clearly does allow for justice to be done in the absence of breach of the more traditional international law standards.

There is diversity in the way the "fair and equitable treatment" standard is formulated in investment agreements. Because of the differences in its formulation, the proper interpretation of the "fair and equitable treatment" standard depends on the specific wording of the particular treaty, its context, the object and purpose of the treaty, as well as on negotiating history or other indications of the parties' intent.

There is a debate about whether the fair and equitable treatment standard is part of the minimum standard of customary international law or is an autonomous standard. Because of NAFTA's language linking the fair and equitable treatment standard to the minimum standard and NAFTA Free Trade Commission's binding interpretation linking the minimum standard to customary international law, NAFTA tribunals follow this interpretation On the other hand, BIT tribunals lean toward interpreting it more broadly as an autonomous standard going beyond the minimum standard. Some tribunals have questioned whether substantial differences result from this characterization.

An analysis of the opinions of the arbitral tribunals which have attempted to interpret and apply the "fair and equitable treatment" standard identified a number of elements which, singly or in combination, have been treated as encompassed in the standard of treatment: denial of justice, due diligence, transparency, stability, and respect of the investor's legitimate expectations. Sometimes tribunals refer to the obligation of vigilance and security, which usually interacts with the standard of full protection and security and the protection against arbitrariness and discrimination, which often tends to override specific treaty provisions on arbitrariness and nondiscrimination.

Denial of justice is a notion well anchored in customary international law and traditionally is referred to as an element of the fair and equitable treatment standard. The investor's legitimate expectations have emerged as a recurrent essential element of the fair and equitable treatment standard. The principle, traditionally related to transparency, can also be considered a further development of the concepts of stability and predictability. It has often been applied as a more supple way of providing a remedy appropriate to a particular situation as compared to the more drastic determination and remedy inherent in the concept of regulatory expropriation. It relates in particular to specific assurances of an official character given to the investor—either through laws and regulations or other administrative acts—and the host State's officials' perception that the investor intends, reasonably, to rely on such representation. Most tribunals have adopted a proportionate approach and agree that the disappointment of legitimate expectations must be sufficiently serious and material and that the investor should bear the inherent business risks of his investment.

Transparency, stability, and legitimate expectations are, among the interpretative elements of fair and equitable treatment, the ones not "well grounded" in customary international law but which emerge from general principles and the recurrent opinion of arbitral tribunals in the last few years. However, it is rather early to establish a definitive list of elements for the interpretation of the "fair and equitable treatment" standard, since the jurisprudence is still constantly evolving.

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Chapter 17

The National Treatment Obligation

*Andrea K. Bjorklund**

INTRODUCTION

The obligation not to discriminate on the basis of nationality is a key feature of most investment agreements.[1] National treatment is a relative obligation; it requires that a host State treat foreign-owned investments as well as similarly situated national investments, or foreign investors as well as domestic investors. Determining whether a State has violated the national treatment obligation thus usually requires identifying the appropriate comparator against which to measure the allegedly less favorable treatment. If the foreign entity is not in a like situation as compared to the more favorably treated entity, the national treatment claim will fail. Even if a tribunal determines that the foreign entity is in like circumstances with the more favorably treated domestic entity, however, it must also examine whether the host State had legitimate, nonnationality-based reasons for according the two entities different treatment.

The national treatment obligation protects against both *de jure* and *de facto* discrimination. There have been few cases of *de jure* discrimination; the gravamen of most claims of nationality-based discrimination is the differential effect of a facially neutral measure. A claimant need not demonstrate discriminatory intent in order to

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* Professor, University of California, Davis, School of Law. I thank Seán Duggan, Meg Kinnear, Jürgen Kurtz, and Andrew Newcombe for comments on an early draft of this chapter. As always, I am grateful to Deans Johnson and Amar and the U.C. Davis Academic Senate for generous research support. The librarians at U.C. Davis provided their customary efficient assistance, and I thank them for their ever-cheerful responsiveness to inevitably urgent requests.

1 United Nations Conference on Trade and Development (UNCTAD), *National Treatment* (New York & Geneva, 1999), UNCTAD/ITE/IIT/11 (Vol. IV), pp. 15–24 (noting the importance of the national treatment obligation in investment codes and international investment agreements) [hereinafter UNCTAD, *National Treatment*].

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prevail on a national treatment claim. Indeed, many tribunals have been concerned that imposing such an obligation would preclude recovery in most instances. Rather, "in the absence of a legitimate rationale for the discrimination between investors in like circumstances, the tribunal will presume—or at least infer—that the differential treatment was a result of the claimant's nationality."[2]

It is generally accepted that a claimant bears the burden of proving that there has been differential treatment more favorable to a domestic entity in like circumstances with the foreign investor or investment. This statement is misleading in its apparent simplicity, as establishing which entities are in like circumstances is a complicated endeavor and is at the heart of most national treatment claims. Another difficult question is precisely what level of treatment States are obliged to accord foreign investors or investments. Claimants frequently argue that national treatment obligates host States to accord foreign investors the best treatment afforded any single domestic investor, whereas States contend that the purpose of the provision is to provide only equality of opportunity to foreign and domestic investors.[3] Another disputed issue is whether, once a prima facie case is established, the burden of proof shifts from the claimant to the respondent State to proffer a legitimate, nonnationality based explanation for the differential treatment. Finally, most States have taken reservations to their national treatment obligations, an exercise that demonstrates the continued importance States place on reserving a measure of regulatory autonomy in order to further domestic political goals that often will favor local rather than foreign interests.

This chapter first explores the historical development of the national treatment obligation. It then addresses national treatment in practice, with particular reference to the investment treaty practice of the last decade. As part of that examination, it sets forth the difficult and unresolved issues in the national treatment jurisprudence, including the hurdles that claimants face in establishing a national treatment claim. Finally, it addresses some of the reservations to national treatment that States have included in their investment treaties.

PRECLUDING NATIONALITY-BASED DISCRIMINATION

The national treatment obligation is a response to the tendency of governments to insulate domestic investors and producers from foreign competition. National treatment obligations are usually dated to Hanseatic League treaties of the twelfth and

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2 A. Newcombe & L. Paradell, The Law and Practice of Investment Treaties 183 (Kluwer Law International 2009) [hereinafter Newcombe & Paradell].

3 C. McLachlan et al., International Investment Arbitration: Substantive Principles 251 (Oxford, Oxford University Press 2007) ("the requirement of national treatment . . . aims to provide a level playing-field for foreign investors (at least post establishment)") [hereinafter McLachlan, Shore & Weiniger]; *cf.* Newcombe & Paradell, *supra* n. 2, at 186 ("References to 'no less favorable' treatment in [international investment agreements] do not clarify whether the investor is entitled to the best treatment afforded to any other investor, national or foreign, or the average treatment afforded to a group of like investors.").

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thirteenth centuries.[4] They were part of the concessions extended to foreign merchants during what is often termed the Middle Ages and were also part of the trade treaties prevalent in the nineteenth century.[5]

Notwithstanding its long history, national treatment remains a conventional obligation.[6] "A degree of discrimination in the treatment of aliens as compared with nationals is, generally, permissible as a matter of customary international law."[7] National treatment is thus an essential feature of many treaties seeking to protect foreign nationals. It has been called "perhaps the single most important standard of treatment enshrined in international investment agreements (IIAs). At the same time, it is perhaps the most difficult to achieve, as it touches upon economically (and politically) sensitive issues."[8] National treatment is also at the heart of the General Agreement on Tariffs and Trade (GATT) and its related treaties.[9] In addition, human rights treaties require States party to them to treat equally all similarly situated persons within their respective jurisdictions.[10]

A State's promise to accord equal treatment is often viewed as a boon to foreign investors or traders, but adopting such an obligation raises some concerns even as it alleviates others. First, exactly what constitutes equal treatment is a matter of debate, as absolutely identical treatment cannot be meted out to everyone. Second, in some instances even equal treatment might not be sufficient to protect the interests of foreigners. National treatment requires only that the foreign investor or investment be given the same treatment as that given to nationals. Theoretically, at least, national treatment obligations provide no protection to foreigners should nationals be treated badly.

The Argentine jurist Carlos Calvo steadfastly maintained that national treatment was the most that foreign investors had any right to demand; the "Calvo" Clause found in the laws of several developing countries and in many state contracts recognizes that philosophical position.[11] This position illustrated the potential weakness of national treatment obligations, which provide no particular benefit to foreign investors in

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4 P. Verloren van Themaat, The Changing Structure of International Economic Law19–21 (The Hague, Martinus Nijhoff 1981); G. Schwarzenberger, *The Principles and Standards of International Economic Law*, 117 Recueil des Cours 1, 18–26 (1966).

5 Schwarzenberger, *supra* n. 4, at 67. Professor Schwarzenberger traced the evolution of international economic law standards in his course at the Hague Academy, and noted that of the seven he identified, six were concerned in some measure with equality of treatment.

6 McLachlan, Shore & Weiniger, *supra* n. 3, at 212–13.

7 R. Jennings and A. Watts (eds.), Oppenheim's International Law 932 (London, New York; Longman's, 9th ed. 1996).

8 *Ibid.*, 1.

9 *See e.g.*, General Agreement on Tariffs and Trade, art. III, Oct. 30, 1947, 55 U.N.T.S. 194; General Agreement on Trade in Services, art. XVAA, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex IB, 33 I.L.M. 1167 (1994); Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 3, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex IC, 33 I.L.M. 1212 (1994).

10 *See, e.g.*, Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, Nov. 4, 1950, Europ. T.S. No. 5; Organization of American States, American Convention on Human Rights, art. 1(1), Nov. 2, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 128; *see also* Universal Declaration of Human Rights, G.A. Res. 217A, art. 2, GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

11 D. Shea, The Calvo Clause 35–36 (Minneapolis, University of Minnesota Press 1955).

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circumstances where nationals have few rights.[12] In order to remedy this shortcoming, the minimum standard of treatment in customary international law provides a floor below which treatment cannot fall, regardless of any relevant relative comparison.[13]

Ironically, despite its historic aversion to the Calvo Clause, the United States has actually adopted a "reverse" Calvo Clause in the most recent renewal of Trade Promotion Authority, which stipulates that the executive branch should not negotiate investment treaties that confer on foreign investors greater substantive rights than are enjoyed by U.S. investors.[14]

National treatment and the international minimum standard are doctrinally separate. The first is a relative standard, while the second is absolute. The first is conventional, while the second is customary international law.[15] Yet there are some areas in which the two have converged because discrimination on the basis of nationality itself violates the international minimum standard—cases in which the national treatment obligation has become part of customary international law. The best example of this is in the provision of justice.[16] Some tribunals have determined that nondiscrimination, particularly on the basis of race, does implicate fundamental rights. Furthermore, in some contexts, such as the provision of justice, discrimination on any basis is prohibited by customary international law, and might even be *jus cogens*. For example, the Inter-American Court of Human Rights has concluded, in an advisory opinion, "the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws."[17]

In addition, some treaties protect foreign investors or their investments from "arbitrary and discriminatory" treatment.[18] For example, Article 3 of the Bolivia-Netherlands

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12 M. Kinnear et al., Investment Disputes Under NAFTA: An Annotated Guide to NAFTA Chapter 11, 2009 Update (The Hague, Kluwer Law International, November 2007), 1102.12 (noting that national treatment obligations have been used both to limit and to expand the rights of foreigner traders and investors) [hereinafter Kinnear, Bjorklund & Hannaford (2009 Update)].

13 Richard B. Lillich, The Human Rights of Aliens in Contemporary International Law 17 (1984); A. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims*, 45 Virginia J. Int'l L. (2005) 809, 836–37.

14 *See* Bjorklund, *supra* n. 13, at 891–92; Nicholas DiMascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?*, 102 American J. Int'l L. (2008) 48, 67 & n. 111.

15 *See* McLachlan, Shore & Weiniger, *supra* n. 3, at 239–40 (noting that international law does not preclude all distinctions between foreigners and nationals in the absence of a specific treaty obligation or customary international law principle).

16 *See e.g.*, Bjorklund, *supra* n. 13, at 837–38; Elihu Root, *The Basis of Protection to Citizens Residing Abroad*, 4 Am. Soc. Int'l L. Proc. 16, 20 (1910) ("Each country is bound to give to the nationals of another country in its territory the benefit of the same laws, the same administration, the same protection, and the same redress for injury which it gives to its own citizens, and neither more nor less: provided the protection which the country gives to its own citizens conforms to the established standard of civilization.").

17 Juridical Conditions and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03 of September 17, 2003, Inter-Am. Ct. H.R. (Ser. A) No. 18 (2003), ¶ 101.

18 See, for example, the award in *CMS v. Argentina*, in which the tribunal noted that it could not "hold that arbitrariness and discrimination are present in the context of the crisis noted, and to

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BIT provides, "Each Contracting Party shall ensure fair and equitable treatment to the investments of nationals of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals."[19] In that context, most tribunals have read "discriminatory" as precluding nationality-based discrimination, as well as other arbitrary distinctions.[20] Because many treaties, including the Argentina-United States BIT, contain both national treatment obligations[21] and pledges to refrain from according discriminatory and arbitrary treatment,[22] discrimination needs to extend to more than just nationality-based protection in order to give each provision meaning as required by the principle of effective interpretation.[23] Tribunals have not necessarily made this distinction in practice.[24]

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the extent that some effects become evident they will relate rather to the breach of fair and equitable treatment than to the breach of separate standards under the Treaty." CMS Gas Transmission Co. v. Argentina, ICSID Case No. ARB/01/8, Award, May 12, 2005, para. 295.

19 Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Republic of Bolivia, art. 3(1), *available at* http://www.unctadxi.org/templates/DocSearch.aspx?id=779. The BIT's full protection and security provision also contains a national treatment obligation: "More particularly, each Contracting Party shall accord to such investments full security and protection which in any case shall not be less than that accorded either to investments of its own nationals or to investments of nationals of any third States, whichever is more favourable to the investor."

20 *See e.g.*, Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award, October 12, 2005, para. 180; LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, October 3, 2006, para. 146; NEWCOMBE & PARADELL, *supra* n. 2 (referring to the OECD model treaty, which made clear that nationality-based discrimination is included in the reference to discrimination); *see also* MCLACHLAN, SHORE & WEINIGER, *supra* n. 3, at 239–40 (noting cases in which the tribunal had considered whether fair & equitable treatment requirements encompassed a nondiscrimination obligation); R. DOLZER & M. STEVENS, BILATERAL INVESTMENT TREATIES 61–63 (The Hague, Kluwer Law International 1995); *see also* A. Maniruzzaman, *Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment: An Overview*, 8 J.TRANSNAT'L LAW & POL'Y 57, 69–70 (1998) (describing different types of discrimination).

21 Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, entered into force 20 October 1994, *available at* http://www.unctadxi.org/templates/DocSearch.aspx?id=779, art II(1): "Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies . . . ." [hereinafter Argentina–United States BIT].

22 *Ibid.*, art. II(2)(b): "Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments."

23 *See* I. Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester, Manchester University Press, 2d ed. 1984), 118–19 (noting principle of effective interpretation, but cautioning that it must be read in conjunction with the teleological approach to treaty interpretation); A. MCNAIR, THE LAW OF TREATIES 385 (Oxford, Clarendon Press 1961) (quoting *Cayuga Indians Claims* case: "Nothing is better settled, as a canon of interpretation in all systems of law, than that a clause must be so interpreted as to give it a meaning rather than so as to deprive it of meaning.").

24 See discussion in the text accompanying notes 122–33, *infra*.

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The scope of the national treatment obligation to which States have adhered varies by treaty. Many treaties accord protection only after an investment has been permitted to enter the country, while others include obligations to permit entry and establishment. The U.K. Prototype only requires a host State to permit the investment of capital "subject to its right to exercise powers conferred by its laws."[25] On the other hand, many North American treaties, such as NAFTA Chapter 11, the 2004 U.S. Model BIT, and the 2004 Canadian Model FIPA, offer broad preestablishment protections.[26] Some treaties—particularly those that offer only postestablishment protections—apply only to investments.[27] If a treaty offers the right to establish an investment, its protection likely extends to investors who have not yet made an investment, as well as to the investment itself.

Treaties differ in the breadth of the protection offered to foreign investors. The Energy Charter Treaty, for example, contains an open-ended list of obligations: national treatment must be afforded investments of investors of other contracting parties, and "their related activities including management, maintenance, use, enjoyment or disposal."[28] Other treaties, such as the U.K. Prototype, contain a closed list requiring States Party to extend national treatment to the "management, maintenance, use, enjoyment or disposal of [investors'] investments."[29]

Many treaties contain general exceptions from national treatment obligations for measures taken for such diverse reasons as protecting public health, public morality, and national security.[30] Certain business or economic sectors, such as telecommunications, aviation, and energy production, tend to be subject to exceptions. [31] A few States have taken broad-based reservations to permit activity addressing "development considerations."[32] In the NAFTA Canada took an exception to protect its cultural industries.[33]

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25 Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of [Country] for the Promotion and Protection of Investments, Model Text 2005, art. 2(1), *available in* McLachlan, Shore & Weiniger, *supra* n. 3, at Appendix 4, p. 380 [hereinafter 2005 U.K. Model BIT].

26 North American Free Trade Agreement, Can.–Mex.–U.S., arts. 1102(1), 1102(2), Dec. 17, 1992, 32 I.L.M. 605, 639 [NAFTA]; 2004 U.S. Model Bilateral Investment Treaty, arts. 3(1), 3(2), *available at* http://www.state.gov/documents/organization/117601.pdf [hereinafter U.S. Model BIT]; Agreement Between Canada and --------- For the Promotion and Protection of Investments, arts 3(1), 3(2), *available at* www.investmentclaims.com/instruments [hereinafter 2003 Canadian Model FIPA].

27 Newcombe & Paradell, *supra* n. 2.

28 Energy Charter Treaty, opened for signature Dec. 17, 1994, art. 10(7), 34 I.L.M. 381 (1995).

29 U.K. Model BIT art. 3(2).

30 UNCTAD, *National Treatment*, *supra* n. 1, at 44–45.

31 *Ibid*., 45–46.

32 UNCTAD, *National Treatment*, *supra* n. 1, at 47–50.

33 NAFTA art. 2106, NAFTA Annex 2106. *See generally* Kinnear, Bjorklund & Hannaford (2009 Update), *supra* n. 12, at Article 1108 commentary; Oliver R. Goodenough, *Defending the Imaginary to the Death? Free Trade, National Identity, and Canada's Cultural Preoccupation*, 15 Ariz. J. Int'l & Comp. L. 203 (1998).

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Some treaties protect measures whose goal is to elevate the status of historically disadvantaged minorities. Thus, in its investment treaties, the United States "reserves the right to adopt or maintain any measure according rights or preferences to socially or economically disadvantaged minorities . . ."[34] South Africa did not take any such reservations, and a recently filed case against it may demonstrate the consequences. A group of Italian nationals and a Luxembourg company have filed a claim against the Republic of South Africa under the Italy-South Africa and Belgo-Luxembourg-South Africa BITs challenging a South African law that modified the mineral rights owned by companies as of May 1, 2004 and gives preferential treatment in the awarding of mining rights and licenses to companies that are partially owned by historically disadvantaged South Africans.[35] The acts have been challenged as violations of fair and equitable treatment and expropriation, rather than as denials of national treatment, although discrimination will likely play a role as the tribunal analyses the legality of the expropriation.

National treatment is relatively new in the investment context and has reached prominence only recently with the rapid increase in investor-State arbitrations that commenced in the mid-1990s. Yet national treatment is a core obligation in the General Agreement on Tariffs and Trade and has been extensively construed by GATT and WTO panels and examined comprehensively by GATT and WTO scholars. National treatment is also included in the General Agreement on Trade in Services (GATS), though there have been as yet relatively few GATS cases.[36] In GATT cases, the question is usually whether the goods that have received less favorable treatment are "like products" as compared to the more-favored goods.[37]

To what extent GATT "like products" analyses provide fruitful analogies for "like circumstances" or "like situations" analyses is unclear. Early cases, such as S.D. Myers v. Canada and Pope & Talbot v. Canada, were characterized by frequent references to GATT and WTO jurisprudence by claimants, respondents, and the tribunals themselves.[38] More recently, the *Methanex* Tribunal suggested that it "would be open to persuasion based on legal reasoning developed in GATT and WTO jurisprudence, if relevant,"[39] but that GATT like-products analysis offered inappropriate guidance for a tribunal construing an investment treaty's "like circumstances" language.[40] In particular, the *Methanex* Tribunal rejected the claim that because two producers manufactured goods that competed in the gasoline oxygenate market, their producers were necessarily in like circumstances with each other. To the contrary, according to the *Methanex* Tribunal, the NAFTA negotiators were "fluent in GATT law and incorporated, in very

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34 NAFTA Annex II-U-6.

35 *See* Luke Eric Peterson, *More Details Emerge of Miner's Case Against South Africa*, INVESTMENT TREATY NEWS (Nov. 30, 2007).

36 KINNEAR, BJORKLUND & HANNAFORD (2009 Update), *supra* n. 12, at 1102.15–16.

37 *See e.g.*, WTO Appellate Body Report, European Communities–Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R (April 5, 2001), para. 99.

38 *See generally* KINNEAR, BJORKLUND & HANNAFORD, *supra* n. 12, at 1102.10–17a.

39 Methanex Corp. v. United States of America, UNICTRAL, Award, Aug. 3, 2005, Part II, Ch. B, para. 6.

40 *Ibid.*, Part II, Ch. B, para. 6.

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precise ways, the term 'like goods' and the GATT provisions relating to it when they wished to do so."[41] Article 1102 of NAFTA does not contain any reference to "any like, directly competitive or substitutable goods."[42] Thus, the Article 1102 like circumstances inquiry is different from that conducted by a typical WTO Tribunal.

This summarizes well what is likely to be the general approach: investor-state tribunals may consult GATT/WTO practice when called upon to consider issues that have also arisen in the trade context, but they will not necessarily follow the same analytical path. Particularly as investment treaty tribunals themselves develop an investment-specific approach in the increasing number of investment treaty cases, their incentives to find guidance in GATT/WTO jurisprudence will likely wane.[43]

NATIONAL TREATMENT IN PRACTICE

No one disputes that national treatment obligations in investment treaties extend to *de facto*, as well as *de jure*, discrimination. Indeed, there are remarkably few cases of *de jure* discrimination. The key issue is ordinarily not identifying evidence of a State's intent to discriminate, but, rather, which entity or entities should the allegedly injured party be measured against when it comes to assessing the treatment accorded?

Most national treatment cases have arisen under NAFTA Chapter 11, and most NAFTA Chapter 11 cases have contained allegations of national treatment violations.[44] Despite these initial allegations, national treatment has not necessarily been the basis for the decision in every one of the awards rendered. In some cases, the focus shifted to other grounds during the case's development.[45] Notwithstanding this qualification, however, NAFTA Chapter 11 awards have played a leading role in developing the national treatment jurisprudence.

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41 *Ibid.*, Part IV, Ch. B, para. 30.

42 *Ibid.*, Part IV, Ch. B, para. 37.

43 Many have recently written on investment arbitral awards as a source of law, and even of quasi-precedent. *See e.g.*, G. Kaufmann-Kohler, *The 2006 Freshfields Lecture: Arbitral Precedent: Dream, Necessity, or Excuse?*, 23 Arb. Int'l 357 (2007); C. Schreuer, *Diversity and Harmonization of Treaty Interpretation in Investment Arbitration*, 3 Transnat'l Dispute Management (April 2006); J. Commission, *Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence*, 24 J. Int'l Arb. 129 (2007); A. Bjorklund, *Investment Treaty Arbitral Decisions as Jurisprudence Constante*, *in* International Economic Law: The State and Future of the Discipline 265 (C. Picker et al., eds., Hart Publishing 2008).

44 As of August 2007, all but two NAFTA statements of claim included alleged national treatment violations. Kinnear, Bjorklund & Hannaford (2009 Update), *supra* n. 12, at 1102.18. None of the three cases (two of which were consolidated) recently filed against the Government of Canada contained national treatment allegations. *See* Vito G. Gallo v. Canada, UNCITRAL (Notice of Arbitration) (March 29, 2007) (claiming violations of Articles 1105 and 1110); Mobil Investments Canada Inc. and Murphy Oil Corp. v. Canada, ICSID Case No. ARB(AF)/07/4, Notice of Arbitration, Nov. 1, 2007 (claiming violation of Article 1106).

45 *Ibid.* (noting that in *Azinian v. Mexico*, *Mondev v. United States*, and *Metalclad v. Mexico*, the national treatment allegations played virtually no role in the conduct of the case).

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Joost Pauwelyn and Nicholas DiMascio suggest that national treatment claims are more likely in cases brought against developed countries, in which violations of minimum standards or the prohibition against expropriation are unlikely to be at issue.[46] This explanation is not altogether convincing, as nearly every case brought against the United States and Canada, the two most frequent developed-country defendants, has involved allegations that the minimum standard of treatment was also violated, and often those claims have eclipsed the national treatment allegations. Yet allegations of nationality-based discrimination might play an important role in creating a particular atmosphere around the case. After all, one of the reasons for having an investment treaty is to level the playing field for a foreign investor who might be at a disadvantage in a home State's courts and who might have less political leverage than domestic investors. Thus, claiming national treatment violations can help set the tone for the rest of the case.

While there is no universally accepted approach to addressing a national treatment claim, a common essential element is the identification of the appropriate domestic comparator—the entity in "like circumstances"—against which to assess the treatment accorded the allegedly injured foreign investment (or investor). A part of that analysis requires identifying the treatment itself that is less favorable than that given the domestic comparator. A third inquiry usually involves an assessment of whether the host government had nondiscriminatory reasons that justified the difference in treatment.[47]

Most tribunals will address the three analytical questions suggested, but they will not necessarily do so in the order suggested or in discrete steps. In certain cases, the type of treatment at issue cannot be severed from the like circumstances inquiry. In the *UPS* Dissent, for example, Dean Cass cautioned against deciding that two entities are not in like circumstances *because of* the different treatment accorded them, rather than because the host State had legitimate reasons for structuring the differential treatment.[48]

The Like Circumstances Inquiry

The most important component of the national treatment analysis in almost any national treatment case is the identification of the appropriate comparator, as the outcome usually depends on whether the allegedly favored entity was actually in like circumstances with the foreign investor or investment.[49] By far the bulk of national treatment cases

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46 DiMascio & Pauwelyn, *supra* n. 14, at 67.

47 Newcombe & Paradell, *supra* n. 2, at 162; McLachlan, Shore & Weiniger, *supra* n. 3, at 253–54.

48 United Parcel Service of America Inc. v. Canada, UNCITRAL, Separate Statement of Dean Cass, May 24, 2007, paras. 49–50 [hereinafter *UPS* Dissent] (noting that the determination of whether circumstances are like could not be segregated completely from the question of whether less favorable treatment had actually been accorded the foreign investment).

49 Kinnear, Bjorklund & Hannaford (2009 Update), *supra* n. 12, at 1102.20–40c; McLachlan, Shore & Weiniger, *supra* n. 3, at 251–54, 263. Some treaties refer to those "similarly situated" or "in like situations." Newcombe & Paradell, *supra* n. 2. It is unlikely that any difference in outcome hinges on the use of "same" or "like" or "similar." *Ibid*.

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have involved facially neutral statutes or regulations that allegedly had a disparate impact on foreign investors or investors. If the allegedly favored entity is not like the less-favored entity, the inquiry ends as the claimant will not have any way of showing the discriminatory effect of facially neutral treatment. While some treaties, particularly those that prohibit arbitrary and discriminatory treatment, do not specify that the assessment of discrimination must involve a comparative assessment, tribunals to date have assumed that the inquiry requires the identification of a similarly situated comparator or comparators.[50] The existence of only one comparator can suffice to establish a violation if that entity receives more favorable treatment in circumstances that suggest nationality considerations explain the distinction made.

De Jure National Treatment. In cases of *de facto* national treatment violations, the absence of any actual comparator will nearly always be fatal. This contrasts with the situation presented by a *de jure* measure, as a claimant need not show a disparate impact if the discrimination is inherent in the terms of the measure. For example, legislation establishing an investment incentive but limiting its availability to domestic-owned entities could serve as the basis for a national treatment claim, even if no domestic entities had sought to take advantage of the opportunity.[51] Yet even *de jure* cases can fail if the apparently discriminatory measure does not in fact confer any advantage on a domestic investor that is in like circumstances with the foreign investor.

A section on *de jure* national treatment must necessarily be short and largely hypothetical as there are no decided cases based strictly on *de jure* measures. Several investment treaty cases have had *de jure* elements, but most have been treated more like *de facto* cases. For example, *S.D. Myers v. Canada* included statements by the then-Minister of the Environment, Sheila Copps, that closing the Canadian border to prevent exports of PCB waste was essential to ensure the health of the domestic PCB waste remediation industry. In the House of Commons, as well as on other occasions, she stated that it was Canada's policy that PCB waste should be remediated in Canada by Canadians.[52] There were also reports that she had promised the Canadian industry that she would close the border.[53] The measure itself, however, was neutral in that it prohibited *any* entity from exporting PCB waste. The case thus focused on *de facto*, rather than *de jure*, national treatment. The impulse giving rise to the export prohibition did, however, lead to an inference that the border had been closed to limit competition from U.S. PCB waste remediation entities.[54]

ADF involved a challenge to the United States' apparently facially discriminatory "Buy America Act," which requires government contractors using funds provided by

50 *See, e.g.*, Occidental Exploration and Production Company v. Ecuador, LCIA Case No. UN 3467, Final Award, July 1, 2004, para. 170; Nykomb Synergetics Technology Holding AB v. Latvia,Stockholm Chamber of Commerce, Award, December 16, 2003, 34; Consortium RFCC v. Morocco, ICSID Case No. ARB/00/6, Award, December 22, 2003, para. 53.

51 *See e.g.*, McLachlan, Shore & Weiniger, *supra* n. 3, at 35 (discussing possible national treatment violation if preferential tax treatment were offered only to qualified domestic investments).

52 S.D. Myers Inc. v. Canada, UNCITRAL, Partial Award, November 13, 2000, para. 244.

53 *Ibid.*, para. 172.

54 *Ibid.*, paras. 252–55.

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the U.S. government to purchase U.S.-origin products. On its face, the statute appears *de jure* discriminatory, and the tribunal held first that the purchase of steel by the State of Virginia for use in a highway construction project constituted government procurement that was excepted from NAFTA's national treatment obligations.[55] Yet the tribunal also analyzed the case on the merits to determine whether the application of the law resulted in a violation of the national treatment provision, and it did so by identifying the appropriate comparators to determine whether ADF was in like circumstances with more favorably treated entities.

Canadian-owned ADF proposed to purchase steel manufactured in the United States and transport it to Canada for fabrication before conveying it to the contractor. The processing done to the steel in Canada would make it "Canadian" for purposes of the Buy America Act and ineligible for purchase with federal funds. Based on the treatment proposed, the tribunal concluded that the appropriate comparison was to examine the treatment accorded the investment of the investor, which it identified as its steel in the United States, and that accorded to the investments of U.S. investors, which it defined as U.S.-origin steel.[56] Because all of the investments would lose their U.S.-origin designation if subject to sufficient fabrication in Canada, the tribunal concluded that, for the investments in like circumstances, there was no difference in treatment.[57]

A *de jure* case need not inevitably involve a like circumstances determination, yet one tribunal faced with an arguably *de jure* case dismissed the national treatment claim when it sought to no avail an appropriate comparator. In *The Loewen Group Inc. v. United States*, the claimants (The Loewen Group Inc. and its U.S. subsidiary, collectively "Loewen") challenged the acts of the Mississippi judiciary as national treatment violations on the grounds that they were permeated with bias because of Loewen's Canadian origin. The *Loewen* Tribunal concluded that there was no comparator against which it could assess the treatment accorded to Loewen. The other litigant would be inappropriate, and there were no other comparators in like circumstances.[58] It seems correct that the other litigant is not an appropriate comparator—the mere fact that the domestic party wins and the foreign party loses a trial should be an insufficient basis for finding a national treatment violation. Yet in the case of alleged *de jure* national treatment, in which the presiding judge failed to rein in adverse commentary about the nationality of the defendant that could have had an effect on the outcome of the trial, requiring that there be a comparator seems superfluous. The appropriate question would be whether the treatment has actually injured the claimant.[59]

Identifying the appropriate comparators. Tribunals have not adopted a uniform approach to identify the entity or entities in like circumstances. Rather, they have made

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55 ADF Group Inc. v. United States, ICSID Case No. ARB(AF)/00/1, Award, January 9, 2003, paras. 162–68.

56 *Ibid.*, para. 155.

57 *Ibid.*, para. 156.

58 The Loewen Group Inc. & Raymond L. Loewen v. United States, ICSID Case No. ARB(AF)/98/3, Award, June 26, 2003, para. 149.

59 The *S.D. Myers* tribunal has suggested that protectionist intent alone is insufficient to sustain a claim absent actual injury. *See* text accompanying note 106, *infra*.

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clear that the approach needs to be flexible and could vary according to the circumstances of the investment or investor and according to the treatment at issue. One NAFTA tribunal has said "[b]y their very nature, 'circumstances' are context dependent and have no unalterable meaning across the spectrum of fact situations . . . the concept of 'like' can have a range of meanings, from 'similar' all the way to 'identical.'"[60] Another tribunal borrowed phraseology from a WTO decision: "The accordion of 'likeness' stretches and squeezes in different places as different provisions of the WTO Agreement are applied."[61]

Most, but not all, entities in like circumstances with each other will have a competitive relationship. This analysis stems in part from the GATT/WTO context, in which the question for the panel is whether products are "like" each other, which ordinarily means that they compete in the same economic sector or that one product is substitutable for the other, such that a measure limiting market access will protect the local product that would otherwise face competition and potential displacement by the rival product. In the investment context, the existence of a competitive relationship between the domestic comparator and the claimant is not an essential prerequisite to a tribunal's finding that they are in like circumstances, but it is helpful in that the protection a measure gives an apparently competing entity might lead to an inference of nationality-based preference.

Most of the attention is on the entity or entities to which the tribunal is comparing the foreign investment (or investor). Yet this focus can obscure an important nuance in the like circumstances analysis. The appropriate comparison will often be between the like-circumstanced *treatment* accorded the investments (or investors), rather than between the like-circumstanced investments (or investors) themselves. This emphasis explains the approach many tribunals take when they are identifying the appropriate comparators and is also consistent with the statutory language in many investment agreements. NAFTA Article 1102, for example, provides, "Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, *in like circumstances*, to its own investors. . . ."[62] The like circumstances qualification appears to modify the word "treatment," rather than "investor." There is thus textual encouragement for tribunals to be sure that their comparative analysis takes into account the regulatory context, as well as any market-based competition, in determining the identity of those in like circumstances with the foreign claimant.[63]

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60 Pope & Talbot Inc. v. Canada, UNCITRAL, Award on the Merits of Phase 2, April 10, 2001, para. 75.

61 *S.D. Myers*, Partial Award, *supra* n. 52, at para. 244 (citing *Japan–Alcoholic Beverages*, WT/DS38/AB/R paras. 8.5 & 9), cited approvingly in *Attorney General of Canada v. Myers*, 2004 FC 38, at 32 (Trial Divison) (Jan. 13, 2004).

62 NAFTA art. 1102(1) (emphasis added). The same language is in Article 3(1) of the 2004 U.S. Model BIT.

63 DiMascio & Pauwelyn, *supra* n. 14, at 76. *Cf.* Corn Products Int'l v. Mexico, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, Jan. 15, 2008, para. 126 (cautioning against giving too much weight to differences in the ways products are "owned, managed, regulated, or priced" because they are inevitable and doing so would negate the effectiveness of nondiscrimination clauses).

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Many of these subtleties are best illustrated by the case law. In *S.D. Myers v. Canada*, a U.S. investor, S.D. Myers, challenged Canada's closing of its border to the export of polychlorinated biphenyls (PCB) waste as discriminatory because it was not able to compete in Canada for contracts to process PCB waste at its Ohio remediation facility. In its like-circumstances analysis, the tribunal determined that generally comparisons should be made between firms operating in the same business and economic sectors and that general policy considerations, such as environmental concerns, should also play a role.[64] The tribunal weighed environmental concerns that might justify treating companies differently to protect public health and safety and also considered Canada's obligations to avoid unjustified trade distortions.[65] Ultimately, the tribunal concluded that S.D. Myers and its Canadian investment were in like circumstances with the Canadian PCB waste-disposal industry. Their competitive relationship was a significant factor in its conclusion: "It was precisely because [S.D. Myers International] was in a position to take business away from its Canadian competitors that [they] lobbied the Minister of the Environment to ban exports when the U.S. authorities opened the border."[66]

In *United Parcel Service Inc. v. Canada*, United Parcel Service (UPS) alleged that Canada accorded more favorable treatment to Canada Post in the nonmonopoly postal services market than it accorded UPS or its Canadian subsidiary, UPS Canada. UPS also alleged that Canada Post's monopoly network conferred on it an advantage in purveying nonmonopoly postal services. In particular, UPS claimed that courier companies had to pay customs fees for the processing of mail that Canada Post did not have to pay and that Canada Post collects certain import duties on behalf of Customs Canada for which it is paid a fee.

UPS's claim failed because the majority of the *UPS* Tribunal found that neither UPS nor UPS Canada was in like circumstances with Canada Post. It based this decision on a distinction between postal imports and courier imports and held that the different characteristics of each warranted different customs treatment.[67] The dissenting arbitrator, on the other hand, found that the appropriate comparison was between the investor and the entity with which it was in a competitive relationship with respect to the matters at issue; the provision of services for mail not in the regular postal stream.[68] He thus focused on two of UPS's allegations: the first was that Canada Customs pays handling fees to Canada Post for services that UPS must perform without compensation, and the second was that Canada Customs does not penalize Canada Post for failure to comply with Customs regulations as it does UPS, nor does it collect the same duties and taxes from Canada Post. He concluded that UPS was indeed similarly situated to Canada Post but was accorded different treatment.[69]

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64 *S.D. Myers* Partial award, *supra* n. 52, at para. 250.
65 *Ibid*., paras. 247, 250.
66 *Ibid*., para. 251.
67 United Parcel Service of America, Inc. v. Canada, UNCITRAL, Award, May 24, 2007, para. 99.
68 *UPS* Dissent, *supra* n. 48, at para. 17.
69 *Ibid*., paras. 33, 39.

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The *UPS* tribunal also considered whether Canada's Publications Assistance Program (PAP), under which the government subsidizes Canada Post's delivery of eligible Canadian publications, violated NAFTA's national treatment obligation.[70] Although the majority found that the PAP was covered by the cultural industries exception to NAFTA,[71] it considered whether UPS would have been in like circumstances with Canada Post for purposes of the PAP had it gone on to consider the merits of the case and concluded it was not. The basis for this decision was that only Canada Post had the ability to deliver to every postal address in Canada, while UPS's capabilities were slightly more limited.[72] Given the objectives of the PAP, UPS and Canada Post were not in like circumstances and Canada did not breach any NAFTA obligations.[73]

Again the dissenting arbitrator came to a different conclusion. He found that UPS had made a prima facie showing that it was in like circumstances with Canada Post with respect to the PAP: both UPS and Canada Post deliver materials of the sort that the PAP subsidizes; both do so routinely as a part of their business, and both do so to make money.[74] The burden thus shifted to Canada to explain the difference in treatment. Here he found Canada's proffered justification—that only Canada Post could deliver to every address in Canada—to be a *post hoc* rationalization designed to defend the program during dispute settlement proceedings.[75]

In the two high-fructose corn syrup (HFCS) cases—the most recent decisions under NAFTA Chapter 11—the tribunals had to decide whether U.S.-controlled manufacturer of HFCS, a corn-based sweetener used as a sugar substitute, were treated less favorably than Mexican cane sugar producers.[76] Mexico had imposed a 20 percent tax on the transfer and importation of any beverage using a sweetener other than cane sugar and a 20 percent tax on distribution agreements that involved transferring products using any sweeteners besides cane sugar.[77] Those obligated to pay the taxes were also subject to other government-imposed requirements.[78] The *ADM* Tribunal was the first to issue a decision. It determined that identifying the appropriate comparators required focusing on the competitive requirement of the parties in the marketplace. The tribunal concluded that Mexican cane sugar producers were in like circumstances with the claimants' joint venture that produced HFCS in Mexico given their face-to-face competition supplying sweeteners to the Mexican food and beverage industry and Mexico's

70 *UPS* Award, *supra* n. 67, at para. 146.

71 *Ibid*., para. 137. *See* discussion in the text accompanying notes 169–75, *infra*.

72 *Ibid*., paras. 173–74.

73 Given its conclusion with respect to the cultural industries exception, the majority did not consider whether the program also fell within the purview of the subsidies exception. The dissenting arbitrator concluded that it did not.

74 *UPS* Dissent, *supra* n. 48, at para. 94.

75 *Ibid*., paras. 124–25.

76 Corn Products Int'l Decision, *supra* n. 63; Archer Daniels Midland Co et al. v. Mexico, ICSID (W. Bank) ARB(AF)/04/05, Award, Nov. 21, 2007.

77 *ADM Award*, *supra* n. 76, at para. 82.

78 *Ibid*.

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having filed a WTO case against HFCS at the behest of the Mexican sugar industry.[79] The *Corn Products* Tribunal came to a similar decision.[80]

In *Champion Trading Co. v. Egypt*, a claim brought under the Egypt-United States BIT, the claimants alleged that Egypt had failed to include their investment, a cotton company, in the settlements they paid to certain Egyptian cotton producers to compensate them for the losses they incurred by selling their cotton to government-owned collection centers, which paid a fixed price to producers, rather than by selling the cotton on the open market. Egypt had promised to compensate producers who were penalized by participating in the state-regulated cotton market. Champion's claim failed, however, because the claimants' cotton company could not show it was in like circumstances with the favored producers. Although the investments at issue operated in the same economic sector, that alone was insufficient to sustain the claim that they were in like circumstances with respect to the treatment at issue.[81] Champion's company had not sold any cotton to government-owned collection centers and was thus ineligible to collect any of the settlement monies made available to those who did.

As is clear from the discussion of the preceding cases, the like circumstances determination cannot be cordoned off from the treatment alleged to cause injury. The policy considerations motivating the treatment can have a significant effect on the outcome. In *Pope & Talbot v. Canada*, the claimant was a U.S. investor that owned three lumber mills in British Columbia which brought a Chapter 11 challenge to Canada's implementation of the U.S.-Canada Softwood Lumber Agreement, which suspended for five years the long-running trade dispute over Canadian exports of softwood lumber to the United States. Under the terms of the Agreement, Canada agreed to limit the exports of softwood lumber from four "covered" provinces—Alberta, British Columbia, Quebec, and Ontario—that had historically been the largest exporters of softwood lumber to the United States. Lumber exports from the noncovered provinces were not limited. In return, the United States would not institute any unfair trade remedies cases against Canadian softwood lumber exporters.

The Agreement required that Canadian softwood lumber be broken into three categories. Up to 14.7 billion board feet of lumber could be exported free of charge; exports between 14.7 and 15.35 billion board feet would be charged a duty at the rate of US$ 50 per board foot; and exports in excess of 15.35 billion board feet would be charged a duty at the rate of US$ 100 per board foot.[82] To implement the Agreement, Canada allocated the quota among Canadian lumber producers in each of the covered provinces. That allocation was based primarily on their historic levels of export to the United States.

Pope & Talbot claimed a violation of Article 1102, NAFTA's national treatment provision, because lumber producers in the noncovered provinces were not subject to the quota and were thus accorded more favorable treatment than lumber producers in

79 *Ibid.*, paras. 199, 201.

80 *Corn Products Decision*, *supra* n. 63, at paras. 120–21.

81 Champion Trading Co. et al. v. Arab Republic of Egypt, ICSID Case No. ARB/02/9 (Award) (Oct. 23, 2006), paras. 131, 155–56.

82 *Pope & Talbot* Phase II Merits Award, *supra* n. 60, at para. 18.

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the covered provinces. Pope & Talbot also claimed that it was treated less favorably than some other producers in the covered provinces.

The *Pope & Talbot* tribunal had to make separate like circumstances determinations to resolve these different allegations. The first question for the *Pope & Talbot* Tribunal was whether Pope & Talbot was in like circumstances with lumber producers in the noncovered provinces. The *Pope & Talbot* Tribunal approached this question by conflating the initial determination of like circumstances and whether the government offered a rationale for the difference in treatment. The first inquiry was whether the foreign investor was in like circumstances with the allegedly more favorably treated domestic investor, which required merely that the two entities operating in the same economic sector received differential treatment.[83] If the foreign investor could make such a showing, the burden then shifted to Canada to show that some legitimate government objective justified the differential treatment and thereby demonstrate that the two were not really in like circumstances: "once a difference in treatment between a domestic and a foreign-owned investment is discerned, the question becomes, are they in like circumstances?"[84]

Using this approach, the *Pope & Talbot* Tribunal determined that Pope & Talbot's investments in British Columbia were not in like circumstances with any of the allegedly more favorably treated investments because Canada had justifiable policies explaining the differences in treatment. First, the tribunal concluded that limiting exports only from the four covered provinces was rational given the historical background of the case. Because the United States had never imposed duties on producers in the noncovered provinces, limiting exports from only the covered provinces was "reasonably related to the rational policy of removing the threat of CVD [countervailing duty] actions."[85] Second, the tribunal concluded that the allegedly more favorable treatment given to producers within the covered provinces (and particularly in Quebec) than to producers in British Columbia was also warranted as it was based on the allocation of some quota to new entrants into the lumber industry, most of whom were in Quebec. Thus, British Columbian producers were not in like circumstances with Quebecois new entrants; in any event, Pope & Talbot was not a new entrant.[86] Finally, within British Columbia, producers of lumber operating in the interior of the province, rather than on the Coast, were required to pay an extra fee to settle a dispute about British Columbian stumpage fees (the amount British Columbia charges producers for the privilege of cutting timber on Crown land). Again, the *Pope & Talbot* Tribunal determined that Pope was not in like circumstances with the more favorably treated coastal producers.[87]

Occidental Exploration and Production Co. v. Ecuador provides the unusual example of a tribunal finding two entities to be in like circumstances notwithstanding the lack of any competitive relationship between them. Ecuador has a value-added tax (VAT)

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83 *Ibid*., para. 78.
84 *Ibid*., para. 79.
85 *Ibid*., para. 87.
86 *Ibid*., para. 93.
87 *Ibid*., para. 103.

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refund program that permits exporters dealing in certain products, including flowers and seafood, to claim a refund of the VAT on all products exported from the country. Occidental was not permitted to claim a VAT refund on exports of oil, which it claimed violated the national treatment obligation in the Ecuador-United States BIT. In defense, Ecuador argued that the VAT refund was not available to any exporters of oil, including Petroecuador, the State-owned oil company, and that there was thus no evidence of any attempt to discriminate against foreign companies.

The tribunal found Ecuador's arguments unavailing. Because the purpose of the national treatment obligation is to protect foreign investors, it would be inappropriate to address "exclusively the sector in which that particular activity is undertaken."[88] Going further, the tribunal concluded that exporters should not be placed at a disadvantage in foreign markets because they had to pay more taxes in the country of origin.[89]

The *Occidental* Tribunal's conclusion that exporters *qua* exporters are in like circumstances is unlikely to be replicated often. The lack of any competitive relationship between the comparators would ordinarily be a difficult hurdle to overcome with respect to the like-circumstances determination. On the other hand, to the extent the tribunal's decision reflected an assessment that VAT refunds are denied the oil exploration sector because it is dominated by foreign competitors, the decision is less surprising.[90]

Few vs. many comparators. Some tribunals have grappled with the analytical challenge posed when a claimant alleges the discriminatory effect of a facially neutral measure, but there are few entities against which to compare the treatment accorded. *Feldman v. Mexico* involved a challenge to a Mexican tax rebate law by a U.S. investor in a Mexican enterprise, CEMSA, which resold and exported cigarettes from Mexico. Feldman claimed that Mexican laws discriminated against his company because the rebates were available only to exporters who were also producers of cigarettes, rather than to resellers of cigarettes. Moreover, notwithstanding the provisions of the law, Feldman alleged that in practice Mexican resellers/exporters of cigarettes were able to claim rebates.

The *Feldman* Tribunal determined that CEMSA was not in like circumstances with the producers/exporters because Mexico had rational bases for treating producers differently from resellers, including "better control over tax revenues, discourag[ing] smuggling, protect[ing] intellectual property rights, and prohibit[ing] gray market sales."[91] The decision does not clarify whether the tribunal was determining that

88 *Occidental* Award, *supra* n. 50, at para. 60.

89 *Ibid*., para. 175.

90 Ecuador moved to set aside the award, but its petition was denied. Because the award was subject to challenge on only limited grounds, the English courts did not address the proper application of the nondiscrimination principle. *See* Occidental Exploration Production Co. v. Republic of Ecuador, [2005] EWCA Civ. 1116 (September 9, 2005); Republic of Ecuador v. Occidental Exploration & Production Co., [2006] EWHC 345 (Comm.) (March 2, 2006); Republic of Ecuador v. Occidental Exploration & Production Co., [2007] EWCA Civ. 656 (July 4, 2007). *See generally* Susan D. Franck, *International Decision: Occidental Exploration & Production Co. v. Republic of Ecuador*, 99 American J. Int'l L. 675, 679–80 (2005).

91 Feldman v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002, paras. 17–72.

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CEMSA was not in like circumstances with the producers/exporters, or whether, notwithstanding the facially like circumstances, Mexico had good reason for treating the two differently.[92] The difference in these approaches is the stage at which the burden shifts to the respondent to justify the difference in treatment.

On the other hand, the *Feldman* Tribunal did find that CEMSA was in like circumstances with one Mexican reseller/exporter of cigarettes and that it was given less favorable treatment.[93] The dissenting arbitrator departed from this analysis on the ground that a tribunal could not find *de facto* discrimination based on a single domestic comparator who allegedly received advantageous treatment but only if there were "composite acts involving a set of conducts of a State evincing a systematic practice"[94] as described in the International Law Commission's State Responsibility article on composite acts.[95]

The composite acts argument misses the mark. Nothing in treaty language or practice suggests that only systemic discrimination can qualify as a violation of a State's national treatment obligation. The crux of ILC State Responsibility Article 15 is that certain breaches consist of composite acts that occur over an extended time; it is not that only composite acts can be a breach of a State's obligations.[96] Rather, the real concern when there are few comparators is whether the differential treatment can be explained only by nationality-based distinctions or whether the differences are mere happenstance.[97]

GAMI v. Mexico is another instance of a case in which the number of entities in like circumstances was small. *GAMI* involved a challenge to Mexico's decision to nationalize some, but not all, sugar mills. GAMI's Mexican subsidiary, GAM, owned five mills, all of which were expropriated. The question was whether GAM was in like circumstances with owners of nonexpropriated mills. Although GAMI presented evidence showing that one domestic-owned mill with very similar characteristics to GAM's mills was not expropriated, the tribunal concluded that the circumstances were not so alike as to make the difference in treatment wrong.[98] The tribunal concluded that GAM's mills fell within the category of insolvent sugar mills that Mexico had determined to nationalize in the public interest. While Mexico's drawing of the line between mills to expropriate and not to expropriate might have been clumsy, there was no evidence that it was discriminatory.[99] Again, the mere fact that one domestic comparator happened to fall on the more favorable side of the line was insufficient to demonstrate nationality-based discrimination.

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92 *Ibid*., para.170.

93 *Ibid*., paras. 177–80.

94 Feldman v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Dissenting Opinion of Arbitrator Covarrubias Bravo, December 3, 2002, 15.

95 *Ibid*., para. 15.

96 James Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries 141–44 (Cambridge, Cambridge University Press 2002).

97 *See* the commentary, 'The inference of nationality-based discrimination', pages 430–34, *infra*.

98 GAMI Investments Inc. v. Mexico, UNCITRAL, Final Award, November 15, 2004, para. 113.

99 *Ibid*., para. 114.

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In *Bayindir v. Pakistan*, the tribunal had to consider whether the claimant was in like circumstances with one allegedly more favorably treated entity, and concluded that it was not. Bayindir had a contract with the Government of Pakistan to build a motorway from Islamabad to Peshawar.[100] When construction under the contract did not proceed as planned, Pakistan terminated its relationship with Bayindir, requested bids on the project, and engaged another company to complete the construction project. Bayindir alleged that the domestic company was a nearly ideal comparator, and that Pakistan had given it much more favorable terms under which to complete the work on the motorway. The tribunal concluded that the domestic entity was not in like circumstances with Bayindir. Even though the two operated in the same project and business sectors, the terms of the specific contracts were very different, including the fact that the new contract did not permit payment in foreign exchange, and that the scope of work was different.[101] The tribunal was not troubled by the fact that there was only one comparator, but the claimant's inability to point to other favorably treated entities meant its claim failed.

In *Methanex Corp. v. United States*, a Canadian methanol producer challenged California's ban on methyl tertiary butyl ether (MTBE), a gasoline oxygenate for which methanol is a feedstock, on the grounds that the ban resulted in more favorable treatment being accorded to the U.S.-based ethanol industry. High-pollution areas in the United States are required to sell only oxygenated gasoline in order to improve air quality, but the only effective oxygenates are MTBE and ethanol, as others are not yet commercially viable.

In contrast to *Feldman* and *GAMI*, *Methanex* involved a situation in which there were many possible comparators, including U.S. producers of ethanol, methanol and MTBE. Methanex had to show that it was in like circumstances with producers of ethanol, who received the more favorable treatment, rather than only with producers of methanol, or producers of MTBE. Methanex did not overcome this hurdle. According to the *Methanex* Tribunal, "it would be as perverse to ignore identical comparators if they were available and to use comparators that were less 'like,' as it would be perverse to refuse to find and to apply less 'like' comparators when no identical comparators existed."[102] Methanex could not prevail on its national treatment claim because it was in like circumstances with other producers of methanol and was accorded the same treatment as they were.[103]

For investors, convincing the tribunal that the more favorable treatment is accorded to entities in like circumstances is crucial to their case. An entity not like the allegedly more favorably treated entity can sustain no claim, regardless of the difference in treatment. Yet the like circumstances analysis cannot be segregated from considerations of the type of treatment accorded.

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100 Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş v. Pakistan, ICSID Case No. ARB/03/29, Award, Aug. 27, 2009.

101 *Ibid*., paras. 403–11.

102 *Methanex* Award, *supra* n. 39, at Part IV, Ch. B, para. 17.

103 *Ibid*., Part IV, Ch. B, para. 28.

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Establishing like circumstances is easier when the differentially treated entities compete in the same economic sector, and the more favorable treatment accords domestic entities a competitive advantage. Yet, even demonstrating that the foreign investment is similarly situated to more favorably treated domestic entities is not sufficient if other domestic entities bear the same burden placed on the allegedly less-favorably treated foreign entity. On the other hand, *Occidental* illustrates that even entities in different sectors can be like if it appears the State is taking advantage of sectoral dominance by foreign entities to impose a burden on them.

Treatment Accorded the Investor

To sustain its national treatment claim, an investor (or investment) must demonstrate that a host State has accorded more favorable treatment to the domestic investor (or investment). In most instances, this will not be difficult as the alleged advantage conferred will be relatively clear. Yet there are nuances here, too, that give rise to difficulty in application. One question is the degree to which the differential treatment need give rise to an inference of nationality-based prejudice, while another is the level of treatment that need be given the foreign investor. Is she entitled to treatment that ensures an equal playing field, or is she entitled to the best treatment given any domestic investor in like circumstances?

The inference of nationality-based discrimination. De facto national treatment obligations by definition challenge measures that have a differential effect on foreign investors. Some claimants have argued that the disparate impact alone is sufficient to permit them to maintain a national treatment claim. In other words, any adverse effect on a foreign investor violates the national treatment obligation, whether or not the differential treatment is attributable to nationality-based considerations.

The argument that any disparate impact can sustain a national treatment claim fails for historical as well as textual reasons. First, it does not comport with the general understanding that the purpose of the national treatment obligation is to discourage protectionism. Second, such an interpretation is also inconsistent with the existence in most treaties of noncontingent obligations. Unreasonable differential treatment accorded a foreign-owned investment is likely a violation of the fair and equitable treatment standard, so interpreting the national treatment obligation to prohibit it would render one of the two provisions redundant. This is particularly evident for those treaties that contain a prohibition against "arbitrary or discriminatory" treatment as well as a national treatment obligation, as the effect of this argument is to import the whole of the discrimination element in that standard into the national treatment obligation.[104]

It is important to note, however, that prevailing on a nationality-based discrimination claim does not require actual *proof* of protectionist intent. As the *Feldman* Tribunal noted, imposing such an evidentiary hurdle would make it too difficult for claimants to

104 *See* discussion in the text accompanying notes 122–33, *infra*.

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prevail on *de facto* national treatment claims.[105] Intent-based claims are hard enough to sustain when the allegation is directed against an individual actor. When the defendant is a government entity, it might be especially difficult to demonstrate that a governmental department formed the requisite intent. Different actors within the department might have had different motivations, some of which were innocent of any nationality-based concerns.

Even if a claimant can demonstrate discriminatory intent, that alone will not be sufficient to sustain a claim unless there is damage to the individual investor. The *S.D. Myers* Tribunal said, "Intent is important, but protectionist intent is not necessarily decisive on its own. . . . The word 'treatment' suggests that practical impact is required to produce a breach of Article 1102, not merely a motive or intent that is in violation of Chapter 11."[106]

The case law accords with the position that the less favorable treatment must be motivated, at least inferentially, by nationality-based discrimination. In *GAMI*, which illustrates a clear example of differential treatment—some U.S.-owned sugar mills were expropriated, while some Mexican-owned sugar mills were not—the tribunal dismissed the idea that differential treatment alone violated Mexico's national treatment obligations: "[i]t is not conceivable that a Mexican corporation becomes entitled to the anti-discrimination protections of international law by virtue of the sole fact that a foreigner buys a share of it."[107] The difference in treatment had to create the inference that the distinction had been made on the basis of nationality to sustain the claim.

The S*.D. Myers* Tribunal was faced with a situation in which Canada's ban on the export of PCB waste was facially neutral, but the alleged practical effect of the ban was to put the claimant at a disadvantage compared with the Canadian PCB waste disposal industry.[108] The tribunal concluded it had to assess "whether the practical effect of the measure is to create a disproportionate benefit for nationals over non-nationals."[109] The tribunal also examined "whether the measure, on its face, appears to favour its nationals over non-nationals who are protected by the relevant treaty."[110] The effect of the measure, coupled with evidence that the ban was motivated at least in part by protectionist motives, led the tribunal to reject Canada's argument that the ban was simply part of a uniform regulatory regime.[111]

The *UPS* Tribunal considered the matter of according treatment to be distinct from the question of discrimination. Thus, the first question was whether Canada had accorded any treatment whatsoever to either the investor or its investment. The tribunal determined that Canada had indeed accorded treatment to UPS and UPS Canada. In so doing it rejected Canada's arguments that the only treatment alleged to have been given was the processing of goods shipped by UPS into Canada[112] and that the processing did

105 *Feldman* Award, *supra* n. 91, at para. 183.
106 *S.D. Myers* Award, *supra* n. 52, at para. 254.
107 *GAMI* Award, *supra* n. 98, at para. 115.
108 *Ibid*., para. 209.
109 *S.D. Myers* Award, *supra* n. 52, at para. 252.
110 *Ibid*., para. 252.
111 *Ibid*., para. 242.
112 *UPS* Award, *supra* n. 67, at para. 85.

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not encompass treatment accorded to UPS or UPS Canada. Such an argument, said the tribunal, "would essentially open an enormous hole in the protection of investments and investors."[113] Given the *UPS* Tribunal's decision with respect to like circumstances, it did not need to consider whether the treatment allegedly given was less favorable or was based on nationality. It did suggest in *obiter dicta*, however, that the appropriate question would be whether the disparate treatment suggested some nationality-based motivation: "the rationale for providing distribution assistance through Canada Post does not comprise any nationality-based discrimination."[114]

The tribunal in *ADF* addressed the question of discrimination only briefly and in *obiter dicta* due to its conclusion that the alleged treatment fell within the government procurement exception to NAFTA Article 1102. The tribunal acknowledged that the facially equal treatment it had identified—that all steel was treated the same, regardless of ownership—could hide *de facto* discrimination. In order to make such a determination, however, the tribunal suggested it would need information, such as evidence that steel fabrication costs were much lower in Canada, to demonstrate that the measure had actual discriminatory effect and had been adopted as a result of a protectionist impulse.[115]

The *Loewen* Tribunal addressed national treatment cursorily but confirmed its view that NAFTA's national treatment obligation relates only to "nationality-based discrimination and . . . it proscribes only demonstrable and significant indications of bias and prejudice on the basis of national origin, of a nature and consequence likely to have affected the outcome of the trial.[116]

The *ADM* Tribunal found producers of HFCS were discriminated against based on both the intent and effect of the tax imposed against them.[117] The tribunal discerned the intent from Mexico's desire to protect the Mexican sugar industry,[118] and the effect from the more favorable treatment accorded to cane sugar producers.[119] The *Corn Products* Tribunal, for its part, also concluded that circumstances demonstrated Mexico's intent to treat HFCS producers differently on the grounds of nationality, although proof of discriminatory intent was not required to sustain the claim.[120] In an ironic twist, the tribunal found in Mexico's assertion of a counter-measures defense—that its imposition of the tax should be excused because it was enacted in retaliation for U.S. discrimination against Mexican interests—evidence of Mexico's intent to discriminate. "If the HFCS tax was intended as a countermeasure targeted against the United States, it had to have been crafted in such a way that it bore especially heavily upon U.S. interests . . . the very fact that such a justification has been advanced amounts

113 *Ibid*.
114 *Ibid*., para. 177.
115 *ADF* Award, *supra* n. 55, at para. 157.
116 *Loewen* Award, *supra* n. 58, at para. 139.
117 *ADM* Award, *supra* n. 76, at para. 209.
118 *Ibid*., para. 210.
119 *Ibid*., para. 211.
120 *Corn Products* Decision, *supra* n. 63, at para. 138.

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to a recognition by Mexico that HFCS producers and suppliers were targeted, in part a least, because of the extent of their links to the United States."[121]

In *Consortium RFCC v. Morocco*, an ICSID case, the tribunal suggested that a national treatment claim must be predicated on distinctions made because of nationality. *Consortium RFCC* involved tenders made by Italian and Moroccan companies for the concession to construct portions of the highway between Rabat and Fez. The tribunal held that the tenders were objectively different, and the choice between them was made on the basis of objective criteria, thus suggesting no way in which the nondiscrimination provision of the BIT was violated.[122]

A few tribunals have been a bit more ambiguous about whether a successful national treatment claim can rest on differential treatment alone. At bottom, they seem to agree that the differential treatment must give rise to an inference of nationality-based discrimination to be actionable but would impose a strong presumption in the claimant's favor that differential treatment is the result of nationality-based discrimination.

In *Pope & Talbot*, the focus was the allegedly differential effect of the implementation of the Softwood Lumber Agreement. Canada allocated quotas to all mills in the covered provinces, whether Canadian or foreign-owned. Canada argued that Pope & Talbot needed to show that Canadian-owned mills received a disproportionate advantage, a test similar to that employed in some WTO cases, when compared to U.S.-owned mills in order to prevail on its national treatment claim. The *Pope & Talbot* Tribunal rejected this approach. Because NAFTA plainly contemplated a case brought by one investor to vindicate its rights, the question was whether that particular investor was at a disadvantage because of the ostensibly neutral government measure.[123] Requiring the claimant to gather evidence to permit comparisons between all U.S.-owned lumber producing companies and all Canadian-owned lumber producing companies would place too large a burden on the investor, which in turn would be inconsistent with the investment-liberalizing principles of the NAFTA. Such an approach "would hamstring foreign owned investments seeking to vindicate their Article 1102 rights."[124]

Nonetheless, the *Pope & Talbot* Tribunal appeared to endorse a requirement that claimants demonstrate some nationality-based motivation for the difference in treatment once a claimant had made a preliminary like-circumstances showing, stating that "*any* difference in treatment [must] be justified by showing that it bears a reasonable relationship to rational policies not motivated by preference of domestic over foreign owned investments."[125]

The *Feldman* Tribunal's decision is also less than clear on the question of whether differential treatment alone can sustain a national treatment claim. The tribunal cited the U.S. Statement of Administrative Action's description of Article 1102's purpose

121 *Ibid.*, para. 137.

122 *Consortium RFCC*, *supra* n. 50, at para. 75.

123 *Ibid.*, paras. 56, 71.

124 *Ibid.*, para. 72.

125 *Ibid.*, para. 79.

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being to prevent discrimination "by reason of nationality,"[126] but also described the plain language of Article 1102 as "by its terms suggest[ing] that it is sufficient to show less favorable treatment for the foreign investor than for domestic investors in like circumstances."[127] The *Feldman* Tribunal's concern, for which it found support in the *Pope & Talbot* Tribunal's decision, was that requiring proof of nationality-based discrimination would forestall most *de facto* national treatment claims. Ultimately, the *Feldman* tribunal seemed to suggest that some presumption of national-origin discrimination must underlie that differential treatment. Like the *Pope & Talbot* Tribunal, it would establish a presumption that differential treatment between similarly situated foreign and domestic investors was a result of nationality-based discrimination.[128] In the end, however, the tribunal found a fairly strong connection between the discrimination and the claimant's U.S. nationality.[129] Mexico offered no explanation for the treatment accorded CEMSA "other than the obvious fact that CEMSA was owned by a very outspoken foreigner who had, prior to the initiation of the audit, filed a NAFTA Chapter 11 claim against the Government of Mexico."[130]

The *Bayindir v. Pakistan* Tribunal endorsed the approach of *Feldman*. It described the approach as objective and rejected any requirement that a claimant prove intent: "a showing of discrimination [against] an investor who happens to be a foreigner is sufficient."[131]

The clearest statement in favor of a pure differential impact statement is found in *International Thunderbird Gaming Corporation v. Mexico*. The *Thunderbird* Tribunal emphasized that Thunderbird need not show that any less favorable treatment accorded it was "motivated because of nationality."[132] Notwithstanding this apparent rejection of any nationality-based reason for the differential treatment, the tribunal also suggested that Thunderbird, in addition to proving the existence of less favorable treatment, also needed to show "the *reason* why there was a less favorable treatment."[133] What reason would suffice to sustain a claim was not addressed.

"Arbitrary and Discriminatory" Treatment

Several investment agreements prohibit "arbitrary and discriminatory" treatment. A threshold question is whether nationality-based discrimination is included in that formulation. Most tribunals have concluded that it is, even when there is a separate national treatment provision. Several United States BITs have such dual provisions. The Argentina-United States BIT is one example; Article II(1) prohibits nationality-based discrimination, while Article II(2)(b) prohibits a host State from engaging

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126 *Feldman* Award, *supra* n. 91, at para. 181.
127 *Ibid*.
128 *Ibid*., paras. 183–84.
129 *Ibid*., para. 182.
130 *Ibid*.
131 *Bayindir* Award, *supra* n. 100, at para. 390.
132 International Thunderbird Gaming Corp. v. Mexico, UNCITRAL, Award, January 26, 2006, paras. 175–76.
133 *Ibid*., para. 177 (emphasis added).

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in arbitrary and discriminatory treatment.[134] The BITs between Romania and the United States and the Czech Republic and the United States have virtually identical provisions.[135]

Several of the tribunals in cases brought under the Argentina-United States BIT have addressed claims brought under that provision. In *LG&E v. Argentina*, for example, the claimant argued that gas distribution companies were treated less favorably than other public utility companies in violation of the prohibition against arbitrary and discriminatory treatment. The tribunal held that the nationality-based aspect of discriminatory treatment was missing: Claimants had not proved that the measures targeted their investments specifically as *foreign* investments, although the measures did treat gas distribution companies worse than others.[136] On the other hand, the *Enron v. Argentina* Tribunal did not treat the provision as encompassing nationality-based discrimination, but only as requiring rational reasons for according different treatment to different sectors. "The Tribunal does not find that there has been any capricious, irrational or absurd differentiation in the treatment accorded to the Claimants as compared to other entities or sectors."[137]

In *Noble Ventures v. Romania*, the owners of a U.S.-owned steel mill claimed that judicial measures initiated against it were "unreasonable or discriminatory" under the Romania-United States BIT. The tribunal assumed that the U.S. investor would have to show the measures were "directed specifically against a certain investor by reason of his, her or its nationality" to sustain a claim under the article.[138] The claimant could not do so as there was no suggestion that Romanian-owned ventures that were similarly situated were not also the subject of proceedings initiated by the Romanian government.[139]

The *Lauder v. Czech Republic* Tribunal decided that the Czech Republic-United States BIT's prohibition on according "arbitrary and discriminatory" treatment required that a claimant show discrimination on the basis of nationality.[140] The question arose as the Czech Republic argued that it was not enough for the claimant to show arbitrary treatment; to prevail, the treatment needed to be both arbitrary and discriminatory. The tribunal agreed, and bolstered its conclusion that discriminatory meant nationality-based discrimination by referring to Clause 3 of the Treaty Annex, which provides that "Consistent with Article II, paragraph 1, the Czech and Slovak Federal Republic

134 Argentina–United States BIT, *supra* n. 21.

135 Treaty Between the Government of the United States of America and the Government of Romania Concerning the Reciprocal Encouragement and Protection of Investment, 28 May 1992 (entered into force Jan. 15, 1994); Treaty with the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment (the Czech Republic later succeeded to the Agreement), Oct. 22, 1991 (entered into force Dec. 19, 1992).

136 *LG&E* Award, *supra* n. 20, at para. 147.

137 Enron Corp. & Ponderosa Assets LP v. Argentina, ICSID Case No. ARB/01/3, Award, May 22, 2007, para. 282. The award in *Sempra v. Argentina* was similar. Sempra Energy International v. Argentina, ICSID Case No. ARB/02/16, Award, Sept. 28, 2007, para. 319.

138 *Noble Ventures* Award, *supra* n. 20, at para. 180.

139 *Ibid.*

140 Ronald S. Lauder v. Czech Republic, UNCITRAL, Award, September 3, 2001, paras. 219–20.

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reserves the right to make or maintain limited exceptions to national treatment in the sectors or matters it has indicated below."[141] This provision served as textual evidence of the meaning of discrimination. The tribunal also referred to Article II(1) itself (the prohibition against national treatment) as evidence that nationality-based discrimination was precluded by the treaty. Furthermore, it said that if Article II(2)(b) required only the showing of arbitrary or discriminatory measures, it would be redundant of Article II(1).[142]

On that basis, the *Lauder* Tribunal found that the Czech Republic had violated the obligation because its refusal to award to a German company a license to operate a television station in the Czech Republic resulted from fear of the adverse political repercussions should a foreign-owned entity be awarded such a license.[143] Mr. Lauder did not receive any damages, however, as he and his affiliates were able to structure their holdings to avoid the nationality requirements. Without actual injury, Mr. Lauder could not prevail on his claim.[144]

What might be described as *Lauder*'s companion case, *CME v. Czech Republic*, was brought by Mr. Lauder's Dutch subsidiary based on the Czech Republic-Netherlands BIT, which also contained a provision precluding arbitrary or discriminatory measures. That tribunal's conclusion rested primarily on the expropriation provision of the BIT. Nonetheless, it held that "[t]he behaviour of the Media Council also smacks of discrimination against the foreign investor."[145]

Determining the Level of Treatment that Must Be Accorded a Foreign Investor

Most investment treaties require that host States accord foreign investments treatment "no less favorable" than that accorded to domestic investments in like circumstances, while some refer to "the same" or "as favorable" treatment.[146] Any of these formulations permit foreign investments to be treated more favorably than domestic investments.[147] Yet none of them specify whether a foreign investment must be given the *most* favorable treatment given to any domestic investment, or whether a State need only establish a level playing field in which foreigners and nationals compete equally. As yet, the "most favorable treatment" argument has not been outcome-determinative in any case, but some tribunals have been called on to address the point.

The tribunal in *Pope & Talbot v. Canada* concluded that the national treatment guarantee in NAFTA Article 1102 required a State to give the foreign investor the best

141 *Ibid.*, para. 218.
142 *Ibid.*, para. 219.
143 *Ibid.*, paras. 229–31.
144 *Ibid.*, paras. 232–35.
145 CME Czech Republic B.V. v. Czech Republic, UNCITRAL, Partial Award, September 13, 2001, para. 612.
146 UNCTAD, *National Treatment*, *supra* n. 1, at 37.
147 *Ibid.*, 35–37.

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treatment accorded any one domestic investor.[148] In coming to its decision, the *Pope & Talbot* Tribunal rejected the contentions of all three NAFTA parties that treatment "no less favorable" did not mean the best treatment accorded to any domestic investor.[149]

The *Pope & Talbot* Tribunal was able to engage in further textual analysis because of the portion of NAFTA's national treatment obligation specifically applicable to state and local governments. NAFTA Article 1102(3) provides:

> The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.

Does "treatment no less favorable than the *most* favorable treatment accorded" articulate a more demanding requirement than the simpler "no less favorable" formulation in the other paragraphs of Article 1102? If so, subnational government units would actually have a more stringent obligation than the federal governments, an outcome unusual given the general tendency to impose lesser obligations on subnational government units [150] This unlikely result was one of the reasons the *Pope & Talbot* Tribunal concluded that the NAFTA requires host States to afford the most favorable treatment given to any domestic investor.[151]

The *Feldman* Tribunal also faced the argument, but because there was only one other entity in like circumstances with Feldman's investment, the *Feldman* tribunal did not in fact decide whether NAFTA's text required such a determination.[152] The *Feldman* Tribunal said that the provision was "on its face unclear as to whether the foreign investor must be treated in the most favorable manner provided for any domestic investor, or only with regard to the treatment generally accorded to domestic investors, or even the least favorably treated domestic investor."[153] Yet the *Feldman* tribunal also compared the language in Article 1102 to that in Article 1103, the MFN provision, which clearly provides for a covered investor to receive the same treatment afforded the "most-favored" nation.[154] The implication of this textual analysis is that the national treatment obligation is less onerous.

Because the *UPS* tribunal disposed of the case on like-circumstances grounds, it did not address the issue. In his dissent, Dean Cass suggested that the national treatment obligation required "an effective parity" between foreign and domestic investors and investments.[155] His view of parity would preclude a host State from favoring a national

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148 *Pope & Talbot* Phase II Merits Award, *supra* n. 60, at para. 41.

149 *Ibid*., para. 39. *See also* Kinnear, Bjorklund & Hannaford (2009 Update), *supra* n. 12, at 1102.51–54.

150 See the text accompanying footnotes 159–161 *infra*, for more discussion of the meaning of this provision.

151 *Pope & Talbot* Phase II Merits Award, *supra* n. 60, at para. 40.

152 *Feldman* Award, *supra* n. 94, at para. 186.

153 *Feldman* Award, *supra* n. 91, at para. 185.

154 *Ibid*., para. 185.

155 *UPS* Dissent, *supra* n. 48, at para. 59.

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entity over foreign entities, even if some domestic entities also received less favorable treatment.[156]

The Role of Burden Shifting in National Treatment Analysis

A claimant bears the burden of proof to sustain his or her claims under international law.[157] Exactly what is required to establish a prima facie case of a national treatment violation is not clear, and most tribunals have given at most limited attention to burden of proof. Moreover, tribunals have not taken a uniform approach to analyzing the existence of a national treatment violation so that discerning a general practice is difficult. Implicit in most cases is that the arguments made by the claimant must give rise to an inference that the difference in treatment was attributable to nationality-based considerations or that the distinction made between apparently similarly situated entities disguises protectionist intent. The main difference in cases seems to be the ease with which an assumption of discriminatory intent can be established.

The *Pope & Talbot* and *Feldman* Tribunals adopted a burden-shifting approach that would be triggered after a showing of differential treatment—a conclusion that seems to set a low hurdle for a claimant to establish a prima facie case. The *Pope & Talbot* Tribunal stated, "[d]ifferences in treatment will presumptively violate Article 1102(2), unless they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or *de facto*, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA."[158] The *Feldman* Tribunal explicitly embraced a burden-shifting approach,[159] although the dissenting arbitrator took issue with the majority's conclusion: "neither the NAFTA nor international law provide any grounds to account for the fact that, as in this case, the burden of proof should shift to the Respondent" when the claimant has made a prima facie case.[160] Rather, the burden should remain with the claimant at all times.[161]

The tribunal in *Nykomb v. Latvia*, an Energy Charter Treaty case, interpreted international law differently than did the *Feldman* dissent. It endorsed a burden-shifting approach that would be triggered once the claimant had established that it was in like circumstances with a more favorably treated entity. After the claimant makes such a showing, "and in accordance with established international law, the burden of proof lies with the Respondent to prove that no discrimination has taken or is taking place. The Arbitral Tribunal finds that such burden of proof has not been satisfied, and therefore *concludes* that Windau has been subject to a discriminatory measure in violation of Article 10 (1)."[162]

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156 *Ibid*., para. 60.

157 II S. Rosenne, The Law and Practice of the International Court, 1920–1996, at 1083 (The Hague; Boston, Martinus Nijhoff Publishers 1997).

158 *Pope & Talbot* Phase II Merits Award, *supra* n. 64, at para. 78.

159 *Feldman* Award, *supra* n. 91, at para. 177 (quoting *United State Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, p. 14 (May 23, 1997)).

160 *Feldman* Dissent, *supra* n. 94, at 9–10.

161 *Ibid*.

162 *Nykomb* Award, *supra* n. 50, at 34.

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In *UPS*, once the dissenting arbitrator had determined that UPS was similarly situated to Canada Post with respect to the provision of courier services but was subject to less favorable treatment, the burden shifted to Canada to show that the difference in treatment was justified.[163] He emphasized that UPS was not challenging Canada Post's delivery of products using regular postal channels; rather, the question was whether Canada Post's express mail services were similar to courier services.[164] In marked contrast to the determination made by the majority, he suggested that the different characteristics advanced by Canada to explain why mail services were different from courier services not only did not justify less favorable treatment of the latter but actually illustrated that even providing equal treatment to the courier services would not suffice to place courier services on an even playing field with postal services.[165] This was because customs inspection of courier imports was actually less costly than the inspection of postal imports.[166] Arbitrator Cass did not go so far as to claim that the national treatment obligation in Article 1102 would actually require such equalizing action.[167]

Adopting a burden-shifting approach is not inconsistent with requiring that the claimant present a prima facie case. In discrimination cases, the respondent ordinarily has access to the evidence that would rebut the presumption established by the investor. Thus, shifting the burden of proof to the respondent makes sense from the standpoint of ensuring procedural fairness. The real question is at which stage the burden should shift. Professor Newcombe suggests that the claimant be required to identify the relevant subjects for comparison, demonstrate that it is in like circumstances with the domestic entity with respect to the treatment at issue, and demonstrate that it has received less favorable treatment.[168] The burden would then shift to the state to adduce legitimate public policy considerations justifying the measure.[169] Under this approach, the plaintiff bears the burden of presenting a prima facie case but does not face an insurmountable hurdle. This outcome is a reasonable balance between protecting the ability of the investor to succeed on a national treatment claim and those of the host State in defending itself against allegations of misconduct.

RESERVATIONS AND EXCEPTIONS

Most investment treaties contain national treatment obligations, but most investment treaties also contain many exceptions and reservations to those obligations. Reservations and exceptions come in many sizes and shapes, so to speak. Some are temporally focused. Thus, broad reservations, particularly those regarding economic sectors

163 *Ibid.*, paras. 33, 39.
164 *Ibid.*, paras. 43–45.
165 *Ibid.*, paras. 46–48.
166 *Ibid.*, paras. 46–47.
167 *Ibid.*, para. 48.
168 Newcombe & Paradell, *supra* n. 2, at 163.
169 *Ibid.*

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worthy of special treatment, such as telecommunications, aviation, or energy, preserve the ability of a state to take particular actions in future. Others are retrospective and protect existing laws but require that future measures be changed only to accord more favorable treatment for foreign investments.[170]

State, Provincial, or Municipal Government Measures

Federal governments whose constituent states have a good deal of autonomy pose special problems for national treatment obligations and for exceptions to those obligations. These difficulties have more to do with internal domestic politics than international law. It is axiomatic that, under customary international law, federal governments are responsible for the acts of their constituent states. Thus, state or local government measures that violate national treatment obligations contained in an investment treaty entail international responsibility for the federal government. Because local government entities frequently give preferential treatment to local industries, many investment treaties exclude their activities from the treaty's purview in order to protect the federal government from liability.

Some investment treaties have special provisions pertaining to state and local governments both with respect to exceptions and reservations and with respect to the national treatment obligation itself. NAFTA, for example, excluded from the national treatment obligation existing nonconforming federal government measures set out in a Schedule to Annex I; existing state or provincial government measures to be identified within two years of NAFTA's entry into force; and existing local government measures.[171] As the deadline for the state and provincial governments to list their existing nonconforming measures became imminent, the Parties agreed simply to a short general reservation excluding all existing state or provincial government measures.[172] NAFTA's national treatment article also contains a specific section identifying the obligations of state and provincial governments, but the import of that provision has not always been clear.

The ambiguity in the text of NAFTA's provision respecting state and provincial measures is problematic on two fronts. First, it has caused confusion regarding the extent of the obligation of the federal government, as discussed *supra*. Second, the language does not even clearly explain the obligations borne by the state and provincial governments.

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170 *See, e.g.*, D. Price, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement*, 27 Int'l Lawyer (1993) 727, 731; Kinnear, Bjorklund & Hannaford (2009 Update), *supra* n. 12, at 1108.13.

171 *See e.g.*, NAFTA art. 1108; Kinnear, Bjorklund & Hannaford (2009 Update), *supra* n. 12, at commentary to Article 1108.

172 NAFTA Trilateral Agreement on Listing State and Provincial Reservations (1996), *available at* http://w01.international.gc.ca/MinPub/Publication.aspx?lang=Eng&publication_id=376523&docnum=55; Kinnear, Bjorklund & Hannaford (2009 Update), *supra* n. 12, at 1108.13

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Article 1102(3) provides that provinces accord foreign investors (and investments) treatment "no less favourable than the most favourable treatment accorded, in like circumstances," to investors (and investments) "of the Party of which it forms a part." If an "investor of the Party of which it forms a part" includes *any* investor, whether hailing from within or without the province, then it seems that the province can make no distinction as between them. Yet this interpretation means that states would have the same obligations as the federal government, and those obligations would have been encompassed in Article 1102(1) and 1102(2). The *Pope & Talbot* Tribunal's interpretation of this language borrowed the "most favorable" standard from Article 1102(3), but made the obligations of state and provincial authorities and federal authorities uniform. If provinces were to have only the same obligation as federal States, however, there would have been no need to include a specific provision to extend that obligation to the provinces, as international obligations undertaken by the federal government extend to the States. Thus, contrary to the conclusion of the *Pope & Talbot* Tribunal, the better interpretation of Article 1102 is that "investor of the Party of which it forms a part" includes only investors hailing from outside the province. Then the obligation would permit provinces to discriminate in favor of local, in-province investors but would require provinces to treat foreign investors the same way it treats the most-favored extra-provincial investor.

Moreover, the United States has revised the text of the model BIT commensurate with the interpretation that permits in-province discrimination:

> The treatment to be accorded . . . means, with respect to a regional level of government, treatment no less favorable than the treatment accorded, in like circumstances, by that regional level of government to natural persons resident in and enterprises constituted under the laws of other regional levels of government of the Party of which it forms a part, and to their respective investments."[173]

Mexico has offered another possible interpretation of Article 1102(3). In an Article 1128 submission (Article 1128 is the provision of NAFTA that permits nondisputing States to file *amicus curiae*-type memorials on matters of NAFTA interpretation), Mexico argued that that Article 1102(3) means that the treatment given by one province is not the standard by which to judge treatment given by another province.[174] If, for example, Alabama offers tax incentives to lure investment, Florida cannot be required to give similar tax breaks. This interpretation is less consistent with the language of the provision than that suggested by the United States' clarification of the language in its 2004 Model BIT, but it does give some meaning to the text.

Measures to Protect Health, Safety, and the Environment

Many, though not all, investment instruments contain exceptions to national treatment obligations for the protection of public health, order, and morals.[175] The Energy Charter

173 2004 U.S. Model BIT.

174 Pope & Talbot Inc. v. Canada, UNCITRAL,Mexican 1128 Submission, April 3, 2000, para. 65.

175 UNCTAD, *National Treatment*, *supra* n. 1, at 44.

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Treaty, for example, contains in Article 24 a general exception for the adoption or enforcement of measures "necessary to protect human, animal or plant life or health."[176] On the other hand, NAFTA Chapter 11 is not subject to such a provision. Although Article 2101 contains exceptions virtually identical to those included in Article XX of the General Agreement on Tariffs and Trade (including measures necessary to protect public morals, necessary to protect human, animal, or plant life or health and that relate to the conservations of exhaustible natural resources), Article 2101 does not apply to Chapter 11.[177] Notwithstanding this exclusion, however, at least one arbitrator has suggested that the treaty be construed to encompass such an exception.

NAFTA Chapter 11 contains certain provisions that address environmental and health concerns. For example, Article 1106, which generally prohibits performance requirements, permits host States to require measures "necessary to protect human, animal or plant life or health" or "necessary for the conservation of living or non-living exhaustible natural resources."[178] Article 1114 states that nothing in Chapter 11 should be construed to prevent a host State from adopting measures to ensure that "investment activity in its territory is undertaken in a manner sensitive to environmental concerns" and that parties should not derogate from such measures with a view toward encouraging investment.[179]

The *S.D. Myers* Tribunal was faced with a situation in which Canada defended its closure of the border to the export of PCB waste on the grounds that it had a legitimate desire, consistent with its obligations under the Basel Convention, to maintain its ability to remediate PCB waste in Canada. The tribunal recognized the legitimacy of Canada's goal but not its means of effectuating that goal: "Canada's right to source all government requirements and to grant subsidies to the Canadian industry are but two examples of legitimate alternative measures."[180] The concurring arbitrator in *S.D. Myers* would have gone further with respect to incorporating environmental protection objectives into the investment chapter (even though in the particular case, he found Canada's arguments unavailing): he would have concluded that Article 2101 applied to Chapter 11, that a legitimate policy goal such as environmental protection would justify differential treatment under Article 1102 so long as it was pursued by using the least restrictive means available, and that the precautionary principle could justify measures that violate national treatment.[181]

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176 Energy Charter Treaty art. 24(2)(b)(i). Article 24 does not apply to the prohibition on expropriation. Expropriating property for the reasons listed in Article 24, *inter alia*, might render the expropriation legal as done to further a public purpose, but would not alleviate the host State's obligation to pay compensation.

177 NAFTA art. 2101.

178 NAFTA art. 1106(6).

179 NAFTA art. 1114(1) & (2). *See generally* the commentary on Article 1114 in Kinnear, Bjorklund & Hannaford, *supra* n. 12.

180 *S.D. Myers* Partial Award, *supra* n. 52, at para. 255.

181 *Ibid.*, separate opinion of Bryan Schwartz, para. 129.

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Measures to Protect Local Culture

Canada took an exception for cultural industries in the Canada-U.S. Free Trade Agreement and maintained that exception in the NAFTA as to the United States and Mexico (it does not apply as between Mexico and the United States).[182] Canada has long believed that the encroachment of U.S. products—including television programs, books, magazines, newspapers, and audio or video recordings—on the Canadian market would result in the dilution of Canadian culture.[183] The *UPS* Tribunal also considered whether Canada's Publications Assistance Program (PAP), under which the government subsidizes Canada Post's delivery of eligible Canadian publications, fell under this exception.[184] The tribunal noted that Canada's program of subsidizing postal rates for eligible Canadian publications had two main purposes: "to connect Canadians to each other through the provision of accessible Canadian cultural products" and to "sustain and develop the Canadian publishing industry."[185] The majority found first that the PAP was covered by the cultural industries exception to NAFTA.[186] It went on to consider, however, whether UPS would have been in like circumstances with Canada Post had it considered the merits of the case and concluded it was not. Only Canada Post had the capacity to deliver to every postal address in Canada. Given this ability, the tribunal found that Canada Post was not in like circumstances with UPS, which had somewhat more limited delivery capabilities.[187] Given the objectives of the PAP, Canada was justified in limiting the availability of the subsidy to Canada Post.[188]

CONCLUSIONS

The national treatment obligation is at the core of the international investment law regime. A successful national treatment claim is more likely to be based on discriminatory effect, rather than on discriminatory intent, given the difficulty of proving the latter. The primary challenge for any tribunal hearing *de facto* (and even most *de jure*) national treatment claims is to determine the appropriate comparator. Is the less favorably treated entity "like" the more favorably treated entity with respect to the treatment at issue? If not, the national treatment claim must fail. Usually the comparators will

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182 NAFTA art. & Annex 2106.

183 For a general discussion of Canada's cultural industries exception, see Kinnear, Bjorklund & Hannaford, *supra* n. 12, at 1108.21–23 (2009 Update). *See also* Culture/Trade Quandary: Canada's Policy Options (Dennis Browne ed., 1998); Oliver R. Goodenough, *Defending the Imaginary to the Death? Free Trade, National Identity, and Canada's Cultural Preoccupation*, 15 Ariz. J. Int'l & Comp. L. 203, 207–08 (1998).

184 *UPS* Award, *supra* n. 67, para. 146.

185 *Ibid*.

186 *Ibid*., para. 137.

187 *Ibid*., paras. 173–74.

188 Given its conclusion with respect to the cultural industries exception, the majority did not consider whether the program also fell within the purview of the subsidies exception. The dissenting arbitrator concluded that it did not.

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operate in the same economic sector as the allegedly disfavored foreign-owned investment, although this assessment might change depending on the kind of treatment accorded.

A claimant's challenge in bringing a national treatment claim is to establish a prima facie case—that the investor (or investment) is like a domestic entity whose more favorable treatment gives rise to an inference of nationality-based discrimination. Once the claimant has been successful, the burden shifts to the respondent to offer neutral reasons for the difference in treatment. If at the stage of the like circumstances analysis the reasons for the difference in treatment are evident, a tribunal will very likely determine that the suggested comparators are not like and terminate the analysis at that stage, thus obviating the need for burden shifting.

National treatment allegations can be used by claimants to paint a contextual picture for the rest of their claim, even if those complaints turn out not to be the gravamen of their case. Even though many cases have tended recently to coalesce around the ubiquitous "fair and equitable treatment" obligation, those cases often include allegations of nationality-based bias as well as a failure by the host State to meet the investor's legitimate expectations. In addition, discriminatory treatment is one of the factors involved in assessing whether a State has illegally expropriated a foreign investment. Thus, whether or not it is the crux of an investor's case, concerns about nationality-based discrimination are likely to permeate most investment cases.

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Chapter 18

Indirect Expropriation and the Right to Regulate: How to Draw the Line?

Katia Yannaca-Small

INTRODUCTION

It is a well-recognized rule in international law that the property of aliens cannot be taken, whether for public purposes or not, without adequate compensation.[1] Three decades ago, the disputes before the courts and the discussions in academic literature focused mainly on the standard of compensation and the measuring of expropriated value. The divergent views of the developed and developing countries[2] raised issues

1 *See generally*, J. Paulsson and Z. Douglas, *Indirect Expropriation in Investment Treaty Arbitrations*, *in* Arbitrating Foreign Investment Disputes 145–58 (N. Horn ed., Kluwer Law International 2004); M. Reisman and R. Sloane, *Indirect Expropriation and its Valuation in the BIT Generation*, *in* The British Year Book of International Law(Oxford University Press 2003); A. Reinisch, *Expropriation*, *in* The Oxford Handbook of International Investment Law 407–58 (P. Muchlinski, F. Ortino, C. Schreuer eds., Oxford University Press 2008); T. Waelde & A. Kolo, *Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law*, 50 Int'l & Comp. L.Q. 811 (2001); C. Schreuer, *The Concept of Expropriation under the ECT and other Investment Protection Treaties*, *in* Investment Arbitration and the Energy Charter Treaty 108–59 (C. Ribeiro ed., JurisNet, LLC 2006); K. Yannaca-Small, Comment on C. Schreuer's Rapport: *Indirect Expropriation and the Right of the Governments to Regulate: Criteria to Articulate the Difference*, *ibid.*; C. McLachlan, L. Shore, M. Weiniger, International Investment Arbitration, Substantive Principles (Oxford University Press 2007); A. Newcombe and L. Paradell, Law and Practice of Investment Treaties: Standards of Treatment (BV The Netherlands, Kluwer Law International 2009); K. Yannaca-Small, *Indirect Expropriation and the Right to Regulate in International Investment Law*, *in* International Investment Law: A Changing Landscape, International Investment Perspectives (OECD 2005). The present chapter has been inspired from these previous publications of the author.

2 A number of developed countries endorsed the "Hull formula," first articulated by the United States Secretary of State Cordell Hull in response to Mexico's nationalization of American

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regarding the formation and evolution of customary law. Today, the more positive attitude of countries around the world toward foreign investment and the proliferation of bilateral treaties and other investment agreements requiring prompt, adequate,and effective compensation for expropriation of foreign investments have largely deprived that debate of practical significance for foreign investors.

Disputes on direct expropriation—which were essentially related to the nationalizations that marked the 70s and 80s—have been replaced by disputes related to foreign investment regulation and "indirect expropriation." Largely prompted by the numerous cases brought under NAFTA, the Energy Charter Treaty, and the approximately 2700 bilateral investment treaties and free trade agreements with investment chapters, the debate has shifted to the application of indirect expropriation to regulatory measures aimed at protecting the environment, health, and other welfare interests of society. The question that arises is to what extent a government may affect the value of property by regulation, either general in nature or by specific actions in the context of general regulations, for a legitimate public purpose without effecting a "taking" and having to compensate a foreign owner or investor for this act. The issue of the definition of indirect expropriation in this context has become one of the dominant issues in international investment law.[3]

Despite the fact that an increasing number of arbitral cases and a growing body of literature have shed some light on the issue, the line between the concept of indirect expropriation and governmental regulatory measures not requiring compensation has not been clearly articulated and always depends on the specific facts and circumstances of the case. However, while case-by-case consideration remains necessary,[4] there are

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petroleum companies in 1936. Hull claimed that international law requires "prompt, adequate and effective" compensation for the expropriation of foreign investments. Developing countries supported the Calvo doctrine during the 1960s and 1970s as reflected in major United Nations General Assembly resolutions. In 1962, the General Assembly adopted its Resolution on Permanent Sovereignty over Natural Resources, which affirmed the right to nationalize foreign-owned property and required only "appropriate compensation". This compensation standard was considered an attempt to bridge differences between developed and developing states. In 1974, the UN General Assembly decisively rejected the Hull formula in favour of the Calvo doctrine in adopting the Charter of Economic Rights and Duties of States. While Article 2(c) repeats the "appropriate compensation" standard, it goes on to provide that "in any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalising State and by its tribunals . . ." Nowadays, the Hull formula and its variations are often used and accepted and considered as part of customary international law.

3 R. Dolzer, *Indirect Expropriations: New Developments*, Article of the Colloquium on Regulatory Expropriation organised by the New York University on April 25–27, 2002; 11 Environmental Law Journal 64.

4 *See* J. Paulsson ("[. . .] international investment agreements that promise compensation for measures tantamount to expropriation will be hopelessly unreliable unless it is accepted that the competent international tribunals have the authority to exercise their judgment in each case. There is no magical formula, susceptible to mechanical application that will guarantee that the same case will be decided the same way irrespective of how it is presented and irrespective of who decides it. Nor is it possible to guarantee that a particular analysis will endure over time; the law evolves, and so do patterns of economic activity and public regulation"), *in Indirect Expropriation: Is the Right to Regulate at Risk?*, Presentation at the Symposium "Making the

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some criteria emerging from the examination of some international agreements and arbitral decisions for determining whether an indirect expropriation requiring compensation has occurred.

Although the present chapter will focus on the way arbitral tribunals have dealt with expropriation claims based on investment agreements, it would also be useful to look at the cross-fertilization with another two sources of jurisprudence which deal with similar issues, under different circumstances and different legal bases, i.e., the US-Iran Claims tribunal and the European Court of Human Rights.

This chapter presents the issues at stake and (i) describes the basic concepts of the obligation to compensate for indirect expropriation; (ii) reviews whether and how legal instruments and other texts articulate the difference between indirect expropriation and the right of the governments to regulate without compensation; and (iii) attempts to identify a number of criteria which emerge from jurisprudence and state practice for determining whether an indirect expropriation has occurred, and compensation is due.

Basic Concepts of the Obligation to Compensate for Expropriation

Customary international law does not preclude host States from expropriating foreign investments provided certain conditions are met. The conditions for a "lawful" expropriation are that the taking of the investment is for a public purpose, as provided by law, in a nondiscriminatory manner and with compensation.

Expropriation or "wealth deprivation"[5] could take different forms. It could be direct where an investment is nationalized or otherwise expropriated[6] through formal transfer of title or outright physical seizure. In addition to the term expropriation, terms such as "dispossession," "taking," "deprivation," or "privation" are also used.[7] Expropriation or deprivation of property could also occur through interference by a State in the use of that property or with the enjoyment of the benefits even where the property is not seized and the legal title to the property is not affected. The measures taken by the State have a similar effect to expropriation or nationalization and are generally termed "indirect," "creeping,"[8] or *"de facto"* expropriation or measures "tantamount" to expropriation.

Most of International Investment Agreements: A Common Agenda" co-organized by ICSID, OECD, and UNCTAD, December 12, 2005, OECD Paris.

5 "Wealth deprivation" is a term which according to *Weston* avoids most, if not all, of the major ambiguities and imprecision of the traditional terminology. *See* B. Weston, *Constructive Takings' under International Law: A Modest Foray into the Problem of 'Creeping Expropriation*, 16 VIRGINIA J. INT'L LAW 103–75,112 (1975)

6 In general, expropriation applies to individual measures taken for a public purpose while nationalization involves large-scale takings on the basis of an executive or legislative act for the purpose of transferring property or interests into the public domain.

7 DOLZER & STEVENS, BILATERAL INVESTMENT TREATIES 98 (Martinus Nijhoff Publishers 1995).

8 On this point, Dolzer notes that, "'creeping expropriation' suggests a deliberate strategy on the part of the state, which may imply a negative moral judgement". *See* Dolzer, *Indirect Expropriation of Alien Property*, ICSID REV.–FILJ 41–59, 44 (1986) Reisman and Sloane note that: "A creeping expropriation [] denotes [. . .] an expropriation accomplished by a cumulative

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However, under international law, not all state measures interfering with property are expropriation. As Ian Brownlie has stated, "state measures, prima facie a lawful exercise of powers of governments, may affect foreign interests considerably without amounting to expropriation. Thus, foreign assets and their use may be subjected to taxation, trade restrictions involving licenses and quotas, or measures of devaluation. The assets may be subject to seizure in execution of judgements or liens. While special facts may alter cases, in principle such measures are not unlawful and do not constitute expropriation."[9]

It is an accepted principle of customary international law that where economic injury results from a bona fide nondiscriminatory regulation within the police powers of the State, compensation is not required. A State measure will be discriminatory if it results "in an actual injury to the alien . . . with the intention to harm the aggrieved alien to favour national companies."[10]

The Restatement (Third) of Foreign Relations Law recognizes the nondiscrimination rule: "One test suggested for determining whether regulation and taxation programs are intended to achieve expropriation is whether they are applied only to alien enterprises."[11]

As mentioned before, there is no generally accepted and clear definition of the concept of indirect expropriation and what distinguishes it from noncompensable regulation, although this question is of great significance to both investors and governments.

> To the investor, the line of demarcation between measures for which no compensation is due and actions qualifying as indirect expropriations (that require compensation) may well make the difference between the burden to operate (or abandon) a non-profitable enterprise and the right to receive full compensation (either from the host State or from an insurance contract). For the host State, the definition determines the scope of the State's power to enact legislation that regulates the rights and obligations of owners in instances where compensation may fall due. It may be argued that the State is prevented from taking any such measures where these cannot be covered by public financial resources.[12]

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series of regulatory acts or omissions over a prolonged period of time, no one of which can necessarily be identified as the decisive event that deprived the foreign national of the value of its investment. Moreover, they may be interspersed with entirely lawful state regulatory actions. By definition, then, creeping expropriations lack the vividness and transparency not only of formal expropriations, but also of many regulatory or otherwise indirect expropriations, which may be identified more closely with a few discrete events. The gradual and sometimes furtive nature of the acts and omissions that culminate in a creeping expropriation tends to obscure what tribunals ordinarily denominate the 'moment of expropriation,'" *in Indirect Expropriation and its Valuation in the BIT Generation*, *supra* note 1.

9 Ian Brownlie, Principles of Public International Law 509 (Oxford University Press, 6th ed. 2003).

10 Dolzer & Stevens, *supra* note 7.

11 *Restatement (Third) of the Foreign Relations Law of the United States*, 1 American Law Institute Section 712 (1987).

12 Dolzer & Stevens, *supra* note 7, p. 99.

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As R. Higgins wrote in her study on the taking of property by the state, the issue can be further refined as the determination of who is to pay the economic cost of attending to the public interest involved in the measure in question. Is it to be the society as a whole, represented by the state, or the owner of the affected property?[13]

The Notion of "Property"

In the context of international law, "property" refers to both tangible and intangible property. Under Article 1139 of the NAFTA, the definition of "investment" covers, among other things, "real estate or other property, *tangible or intangible* [emphasis supplied], acquired in the expectation or used for the purpose of economic benefit or other business purposes." Likewise, most BITs contain a relatively standard definition of investment[14] that also covers intangible forms of property: "intellectual property and contractual rights." The U.S. Free Trade Agreements (FTAs) with Australia, Chile, Dominican Republic-Central America, Morocco, Singapore, and Peru provide, "An action or series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment."

One of the first instances in which the violation of an intangible property right was held to be an expropriation was the *Norwegian Shipowners' Claims* case. Although the United States contended that it had requisitioned only ships and not the underlying contracts, the tribunal found that a taking of property rights ancillary to those formally taken had occurred and required compensation.[15]

In the 1926 case of German Interests in Polish Upper Silesia—*the Chorzów Factory* case—the Permanent Court of International Justice found that the seizure by the Polish government of a factory plant and machinery was also an expropriation of the closely interrelated patents and contracts of the management company, although the Polish government at no time claimed to expropriate these.[16]

However, certain intangible property rights or interests, by themselves, may not be capable of being expropriated but may be viewed instead as elements of value of business. In the 1934 *Oscar Chinn* case, the Permanent Court did not accept the contention that good will is a property right capable, by itself, of being expropriated. The Permanent Court of International Justice (PCIJ) found that a granting of a *de facto* monopoly did not constitute a violation of international law, stating that "it was unable to see in [Claimant's] original position—which was characterised by the possession of customers—anything in the nature of a genuine vested right" and that "favourable

13 R. Higgins, *The Taking of Property by the State: Recent Developments in International Law, in* 176 Recueil des Cours—Académie de Droit International 276–77 (1982)

14 See Chapter 11 of the present book, K. Yannaca-Small, *Definition of "Investment": An Open-ended Search for a Balanced Approach.*

15 Nor. v. U.S., 1 R.I.A.A. 307, 332 (Perm. Ct. Arb. 1922).

16 F.R.G. v. Pol., 1926 P.C.I.J. (ser. A) No 7, May 1925.

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business conditions and good will are transient circumstances, subject to inevitable changes."[17]

The Iran-United States Claims Tribunal stated that "[the Claimants] rely on precedents in international law in which case measures of expropriation or takings, primarily aimed at physical property, have been deemed to comprise also rights of a contractual nature closely related to the physical property . . . ." It has consistently rejected attempts made by Iranian respondents for a narrow interpretation of "property" and has confirmed that shareholder rights, contractual rights and other immaterial rights can be the object of expropriation.[18,19]

Under the Protocol 1 of the European Convention on Human Rights, the concept of property is very broadly defined by reference to all the proprietary interests of an individual. It covers a range of economic interests: "movable or immovable property, tangible and intangible interests, such as shares, patents, an arbitration award, the entitlement to a pension, a landlord's entitlement to rent, the economic interests connected with the running of a business and the right to exercise a profession . . . ." The European Court of Human Rights also held that rights under judicial decisions are protected property that can be the object of an expropriation.[20]

In a BIT arbitration, *Saipem v. Bangladesh*,[21] the tribunal also found that a judicial act could result in an expropriation[22] and in the case at hand it recognized that the residual contractual rights under the investment, as crystallised in an ICC Award were property which could be expropriated. Saipem's claim was based *inter alia*, on the local courts revocation of its right to pursue ICC arbitration of its disputes with the Bangladesh Oil Gas and Mineral Corporation (Petrobangla). Ultimately, the tribunal held that the actions of the Bangladeshi courts amounted to measures tantamount to an expropriation.[23]

In two NAFTA cases, the tribunals addressed claims concerning market access and market share and suggested that these might be property rights for purposes of expropriation. In neither case, however, did the tribunal find that market access or market share could be capable themselves of being expropriated nor did either tribunal find that an expropriation had taken place.[24]

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17 1934 P.C. I. J. Ser A/B, no 63.

18 Starrett Housing Corp. v. Islamic Republic of Iran, 4 Iran-U.S. Cl. Trib. Rep. 122, 156–57 (1983), Amoco International Finance Corporation v. Iran, Award No 310-56-3 (July 14, 1987), 15 Iran-U.S. Cl. Trib. Rep. 189-89.

19 Phillips Petroleum Iran v. Islamic Republic of Iran et National Iranian Oil Company, Iran-US Claims Tribunal, Case No. 39, Chamber Two, Award No. 425-39-2 of June 29, 1989, Yearbook of Commercial Arbitration, Vol. XVI (1991), pp. 298–321, para. 75.

20 Stran Greek Refineries and Stratis Andreadis v. Greece—13427/87 [1994] ECHR 48 (December 9, 1994), paras. 59–62, *available at* http://worldlii.org/eu/cases/ECHR/1994/48.html.

21 Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, March 21, 2007,

22 *Ibid.*, para. 132.

23 *Saipem*, Award, June 30, 2009, para. 129.

24 Pope & Talbot, Inc v. Canada, Interim Award, June 26, 2000, paras. 96–98, and S.D. Myers, Inc. v. Canada, November 13, 2000, Partial Award, 232, I.L.M. 408, para. 232. *See also, e.g.*, G. White, Nationalization of Foreign Property 49 (1961); The Iran-United States Claims

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LEGAL INSTRUMENTS AND OTHER TEXTS

Protection against indirect expropriation has been included in various forms of international instruments. Literally all relevant treaties and draft treaties provide for indirect expropriation or measures tantamount to expropriation. However, most of them stay mute on the treatment of the noncompensable regulatory measures. For example, treaties entered into by France refer to "measures of expropriation or nationalisation or any other measures the effect of which would be direct or indirect dispossession." The former U.S. Model BIT mentions "measures tantamount to expropriation or nationalisation." Several U.S. treaties are more specific on these measures: "any other measure or series of measures, direct or indirect, tantamount to expropriation (including the levying of taxation, the compulsory sale of all or part of an investment, or the impairment or deprivation of its management, control of economic value) . . ."[25]

Article 13 of the Energy Charter Treaty provides that, "investments of investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation" except where such measure complies with the rules of customary international law in this matter (public purpose, due process, nondiscrimination, and compensation).

Article 1110 of NAFTA protects against the expropriation of foreign investments with the following language

> 1. No Party may directly or indirectly nationalise or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalisation or expropriation of such an investment, except:
>
> (a) for a public purpose;
>
> (b) on a non-discriminatory basis;
>
> (c) in accordance with due process of law and Article 1105(1)[26] and
>
> (d) on payment of compensation in accordance with [subsequent paragraphs specifying valuation of expropriations and form and procedure of payment].

The OECD Draft Convention on the Protection of Foreign Property and the draft OECD Multilateral Agreement on Investment, while themselves silent on the noncompensable regulatory measures, were accompanied by commentaries which did address the issue. Other texts which addressed it are the Harvard Draft Convention on International Responsibility and the Restatement (Third) of the Foreign Relations of the United States which, while the work of scholars, not state practice, constitute an influential element of doctrine.

TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY 196–97 (Richard Lillich & Daniel Magraw eds., 1998).

25 DOLZER & STEVENS, *supra* note 7.

26 Article 1105(1) provides: "each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."

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The relevant principles for the purposes of the European Convention of Human Rights are included in Article 1 of Protocol 1, concluded in 1952 and entered into force in 1954. Though this article does not say so explicitly, it strongly implies that the duty to compensate is not applicable to normal regulation[27]:

> Every natural or legal person is entitled to the peaceful enjoyment of its possessions. No one should be deprived of his possessions except in the public interest and subject to the conditions provided for by the law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

In 1961, the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, drafted by Louis B. Sohn and R.R. Baxter, assumed a taking to occur in the case of any "unreasonable interference with the use, enjoyment or disposal of property as to justify an interference that the owner thereof will not be able to use, enjoy or dispose of the property within a reasonable period of time after the inception of such interference." In its Article 10(5), it recognized the existence of a category of noncompensable takings:

> An uncompensated taking of an alien property or a deprivation of the use or enjoyment of property of an alien which results from the execution of tax laws; from a general change in the value of currency; from the action of the competent authorities of the State in the maintenance of public order, health or morality; or from the valid exercise of belligerent rights or otherwise incidental to the normal operation of the laws of the State shall not be considered wrongful.

Article 3 of the 1967 OECD Draft Convention on the Protection of Foreign Property,[28] states that "no Party shall take any measures depriving, directly or indirectly, of his property a national of another Party" unless four conditions are met, according to recognized rules of international law.[29] An accompanying note on the nature of the obligation and its scope states the duty to compensate in a broad way:

> Article 3 acknowledges, by implication, the sovereign right of a State, under international law, to deprive owners, including aliens, of property which is within its territory in the pursuit of its political, social or economic ends. To deny such a right would be to attempt to interfere with its powers to regulate—by virtue of its independence and autonomy, equally recognised by international law—its political and social existence. The right is reconciled with the obligation of the State to respect

27 The jurisprudence attached to the Convention by the European Court of Human Rights has consistently taken this line.

28 OECD Draft Convention on Foreign Property, October 12, 1967, pp. 23–25.

29 The measures in question must be taken (i) in the public interest; (ii) under due process of law; (iii) must not be discriminatory; and furthermore, iv) just and effective compensation must be paid.

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> and protect the property of aliens by the existing requirements for its exercise—before all, the requirement to pay the alien compensation if his property is taken.

However, subsequent notes make clear that the concept of "taking" is not intended to apply to normal and lawful regulatory measures short of direct taking of property rights, but rather, to misuse of otherwise lawful regulation to deprive an owner of the substance of his rights:

> 4(a). . . . By using the phrase 'to deprive . . . directly or *indirectly* . . .' in the text of the Article it is, however, intended to bring within its compass *any* measures taken with the *intent* of wrongfully depriving the national concerned of the substance of his rights and *resulting* in such loss (e.g. prohibiting the national to sell his property of forcing him to do so at a fraction of the fair market price)" (emphasis in original).
>
> 4(b). . . . Thus in particular, Article 3 is meant to cover "creeping nationalisation" recently practiced by certain states. Under it, measures otherwise lawful are applied in such a way:
>
> . . . as to deprive ultimately the alien of the enjoyment of value of his property, without any specific act being identifiable as outright deprivation. As instances may be quoted excessive or arbitrary taxation; prohibition of dividend distribution coupled with compulsory loans; imposition of administrators; prohibition of dismissal of staff; refusal of access to raw materials or of essential export or import licences.

The commentary to the American Law Institute's Restatement (Third) of the Foreign Relations Law of the United States[30] was designed to assist in determining, *inter alia*, how to distinguish between an indirect expropriation and valid government regulation:

> A state is responsible as for an expropriation of property when it subjects alien property to taxation, regulation, or other action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien's property or its removal from the state's territory. . . . *A state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory* . . . [italics added].

The MAI Negotiating Text was almost identical to the NAFTA provision. However, the MAI Commentary noted that by extending protection to "measures having equivalent effect" to expropriation, the text was intended to cover "creeping expropriation." MAI negotiators addressed the distinction between indirect expropriation and general regulations in the Report by the Chairman of the Negotiating Group (Chairman's Report),[31] which was put forward at a late stage of the negotiations. In its Annex 3,

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30 *Restatement (Third) of the Foreign Relations Law of the United States*, 1 AMERICAN LAW INSTITUTE Section 712, Comment g (1987).

31 The Multilateral Agreement on Investment (Report by the Chairman of the Negotiating Group) DAFFE/MAI(98)17, May 4, 1998, *available at* http://www1.oecd.org/daf/mai/pdf/ng/ng9817e.pdf.

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Article 3 (Right to Regulate) and an interpretative note to Article 5 (Expropriation and Compensation),[32] it is stated:

> Article 3 "Right to Regulate
>
> [a] a Contracting Party may adopt, maintain, or enforce any measure that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety or environmental concerns provided that such measures are consistent with this agreement".

Interpretative note to Article 5 "Expropriation and Compensation":

> This Article [] [is] intended to incorporate into the MAI existing international norms. The reference . . . to expropriation or nationalisation and 'measures tantamount to expropriation or nationalisation' reflects the fact that international law requires compensation for an expropriatory taking without regard to the label applied to it, even if title to the property is not taken. It does not establish a new requirement that Parties pay compensation for losses which an investor or investment may incur through regulation, revenue raising and other normal activity in the public interest undertaken by governments.

A Declaration adopted by the OECD Council of Ministers on April 28, 1998, states that "the MAI would establish mutually beneficial international rules which would not inhibit the normal non-discriminatory exercise of regulatory powers by governments and such exercise of regulatory powers would not amount to expropriation."[33]

As a response to the growing jurisprudence in this field, the U.S. FTAs with Australia,[34] Chile,[35] Dominican Republic-Central America,[36] Morocco,[37] Singapore,[38] and Peru[39] and the 2004 US model BIT[40] provide explicit guidance on what constitutes an indirect expropriation. In the Annexes on Expropriation, they state that:

> The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors;
>
> > (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

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32 *Ibid.*, pp. 13–15.

33 For a discussion on regulatory expropriations in the MAI, see the article by R. Geiger, *Regulatory Expropriations in International Law: Lessons from the Multilateral Agreement on Investment*, 11(1) N.Y.U. Environmental Law Journal 94–109, 104 (2002).

34 U.S.-Australia Free Trade Agreement, signed on March 1, 2004 [Annex 11-B, Article 4(b)].

35 U.S.-Chile Free Trade Agreement, signed on June 6, 2003 (Annex 10-D).

36 U.S-Dominican Republic-Central America Free Trade Agreement, signed on August 5, 2004, (Annex 10-C). The countries Parties to the Agreement are: Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua,and the United States.

37 U.S-.Morocco Free Trade Agreement, signed on June 15, 2004 (Annex 10-B).

38 U.S. Trade Representative Robert Zoellick to Singapore Minister of Trade and Industry, George Yeo, on May 6, 2003.

39 U.S.-Peru Free Trade Agreement, signed on April 12, 2006.

40 For the text of the model BIT, see http://www.state.gov/documents/organization/38710.pdf.

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(ii) the extent to which the government action interferes with distinct, reasonable, investment-backed expectations; and

(iii) the character of the government action.

In addition, they address indirect expropriation and the right to regulate:

> Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations.

Canada's 2004 model Foreign Investment Promotion and Protection Agreement (FIPA)[41] stipulates that it:

> incorporates a clarification of indirect expropriation which provides that, except in rare circumstances, non-discriminatory measures designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation and are not subject, therefore, to any compensation requirements.

It stipulates, as an example of the "rare circumstances," "when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith.

MAIN SOURCES OF JURISPRUDENCE

Although almost every investor-state dispute has included a claim on indirect expropriation, very few of these claims have been successful. Indirect expropriation claims are usually accompanied by a claim based on the violation of fair and equitable treatment, which has a lower threshold and is very often retained.[42]

In the past few years, there has been a debate over the criteria which determine whether an indirect expropriation or a taking has occurred. As mentioned, few legal texts attempted to address directly how to distinguish legitimate noncompensable regulations having an effect on the economic value of foreign investments and indirect expropriation, requiring compensation. Scholars recognized the existence of the distinction but did not shed much light on the criteria for making the distinction. This may reflect the difficulty in attempting to lay down simple, clear rules in a matter that is subject to so many varying and complex factual patterns and a preference to leave the resolution of the problem to the development of arbitral or judicial decisions on a case-by-case basis.[43] The two most prominent early sources of such decisions were the

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41 For the text of the new FIPA model, see http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/what_fipa.aspx.

42 *See* Chapter 16 of the present book, K. Yannaca-Small, *Fair and Equitable Treatment standard*.

43 Christie wrote in 1962 that "[i]t is evident that the question of what kind of interference short of outright expropriation constitutes a 'taking' under international law presents a situation where the common law method of case by case development is pre-eminently the best method, in fact probably the only method, of legal development". G. Christie, *What Constitutes a Taking of Property under International Law?*, *in* British Yearbook of International Law 307–38

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Iran-United States Claims Tribunal and decisions arising under Article 1, Protocol 1 of the European Convention for the Protection of Human Rights. The recent period has seen a further body of jurisprudence, from cases based on NAFTA, the Energy Charter Treaty, and bilateral investment agreements. At the same time, a new generation of investment agreements, including investment chapters of free trade agreements, has developed, which attempt to formulate criteria to articulate the difference between indirect expropriation and noncompensable regulation.

The cross-fertilization mentioned earlier between the U.S.-Iran Tribunal and the European Court of Human Rights and the investment arbitration tribunals is evident in the influence of these two tribunals in the development of investor-state jurisprudence, although the legal bases and scope are substantially different. These bodies of jurisprudence embody two doctrines which have influenced the investment arbitration tribunals: the "effects doctrine," which focuses on the effect of the governmental measure on the investor (U.S.-Iran tribunal), and the "proportionality" doctrine, embraced by the European Court of Human Rights, which respects a balance between the various interests at stake and does not impose a disproportionate burden on the Claimants. Investment arbitration tribunals have been influenced by either one or the other of these doctrines and have added to their analysis a classic doctrine of international law, the police powers doctrine. Under this doctrine, the governments are traditionally entitled to take private property without compensation in certain circumstances.

The Iran-U.S. Tribunal

The Iran-United States Claims tribunal was established in 1981 to adjudicate claims by nationals of each country following the Iranian revolution. Its creation was pursuant to the Algiers Declarations which resolved the hostage crisis between Iran and the United States.

This "modern pioneer of the international takings jurisprudence"[44] has covered a substantial amount of claims related to expropriation over a period of almost 30 years. The particularity of the Tribunal, which differentiates it from the investment arbitration tribunals, is that it was established as a result of a single agreement between the parties with the aim of resolving claims between nationals of the two parties, including claims for "expropriation or other measures affecting property rights," in the extraordinary

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(1962). Sornarajah noted that the difficulty is "in the formulation of a theory that could be used as a predictive device so that there could be guidance as to whether the taking is a compensable or not. Here, though several efforts have been made at devising a theory capable of making the distinction, none has been successful. Sornarajah, The International Law on Foreign Investment (Cambridge University Press 1994). Dolzer, after an extensive review of judicial precedent and state practice acknowledged that one cannot but admit at this stage that the law of indirect expropriation can be established, at this moment, on the basis of primary sources of international law, only in a very sketchy and rough manner," *see supra* note 8.

44 V. Heiskanen, *The Doctrine of Indirect Expropriation in Light of the Practice of the Iran-Unites States Claims Tribunal*, TDM, October 2006.

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mass-claims context of the Islamic Revolution.[45] The majority of the expropriation claims were related to physical seizures or appropriation of property by governmental entities or individuals close to the government or deprivations of property rights through the appointment by the government of temporary managers, for instance.[46]

The tribunal followed a consistent line which was guided by the exceptional circumstances under which it was called to adjudicate. The main features consisted of a particular definition of the notion of deprivation[47] and also the focus on the effect of the measure on the foreign investor without consideration of the governmental intent—the "sole effect" doctrine (analysis will follow). Cases such as *Tippetts* and *Starrett Housing* set the tone for subsequent decisions. Only in two cases, which were not related to the Islamic revolution, did the tribunal engage in a legality analysis and evoke the police powers doctrine (*Emmanuel Too* and *Sedco Inc)*.[48]

The European Court of Human Rights

The European Court of Human Rights is the Court established by the Council of Europe under the Protection of Human Rights and Fundamental Freedoms Convention, to determine questions brought before it by individual petitioners or signatory states concerning violations of human rights by signatory states. It does not distinguish between foreign and domestic owners,[49] and the disputes between Contracting States

45 The tribunal's jurisdiction was established in Article II of the Claims Settlements Declaration, which provides that: "An international arbitral tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the Unites States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the contract, transaction or occurrence that constitutes the subject matter of that national's claim, if such claims and counterclaims . . . arise out of debts, contracts . . . expropriations or other measures affecting the property rights . . .", January 19, 1981, *reprinted in* 1 Iran-US Cl. Trib. Rep. 9.

46 Sornarajah suggests that "although the awards of the Iran-United States Claims Tribunal have been a fruitful recent source for the identification of indirect takings, they dealt with takings that took place in the context of a revolutionary upheaval and the propositions the tribunal formulated may not have relevance outside the context of the events that attended the Iranian upheaval following the overthrow of the Shah of Iran." *See supra* note 43, p. 282. For instance, these actions and the context in which they occurred are, in many ways, different from the sorts of environmental and land-use regulations that have been the subjects of NAFTA or other BIT claims.

47 "The Tribunal prefers the term 'deprivation' to the term 'taking', although they are largely synonymous, because the latter may be understood to imply that the Government has acquired something of value, which is not required. A deprivation of taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected." *See* Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, Award No 141-7-2, June 29, 1984.

48 Heiskanen, *supra* note 44.

49 The European Commission on Human Rights has recognized this repeatedly: "[. . .] it [the State party] undertakes to secure these rights and freedoms not only to its own nationals and those of other High Contracting Parties but also to nationals of States not parties to the

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and their own nationals form the large majority of the cases before the Court. However, it refers to the conditions provided by the "general principles of international law" which apply only to foreigners, i.e., in case of expropriation and also refers to the right of the state to regulate. Its distinctions as to compensable and noncompensable takings on a human rights basis are relevant for international investment law purposes.

Only very few cases which have been decided by the Court and the Commission targeting foreigners concerned interferences with property rights.[50] In one group of cases, the Court refused to decide whether the interference was an expropriation, a control of use, or other interference into property rights.[51] In other cases, the Court held that the interferences were control of use and not expropriations.[52] Therefore, it never applied in practice the general principles of international law on property interference—which only apply to foreigners. The reference to the application of the general principles of international law[53] includes full compensation, whereas it is possible that less than full compensation may be paid to nationals. In the *Lithgow v. United Kingdom* case, the Court held that the guarantee of protection and standard of compensation will vary depending on whether the applicant is a national of the expropriating state or not:

> Firstly, [it] enables non-nationals to resort directly to the machinery of the Convention to enforce their rights on the basis of the relevant principles of international law, whereas otherwise they would have to seek recourse to diplomatic channels or to other available means of dispute settlement to do so.[54]
>
> Secondly, although a taking of property must always be effected in the public interest, different considerations may apply to nationals and non-nationals and there may well be legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals.[55]

What is important to retain with respect to the ECHR jurisprudence is that States are given a very wide margin of appreciation concerning measures for the public interest and that the ECHR has recognized that it is for national authorities to make the initial assessment[56] of the existence of a public concern warranting measures that result in a "deprivation" of property.

Convention and to stateless persons, as the Commission itself has expressly recognized in previous decisions", ECommHR, Austria v. Italy, Appl. No.788/60, YB IV (1961), 116 at 140.

50 For a detailed analysis, see U. Kriebaum, *Nationality and the Protection of Property under the European Convention on Human Rights*, 6(1) TDM, March 2009.

51 ECHR, Beyeler v. Italy, Judgment of January 5, 2000, ECHR 2000-I; ECHR, Sovtransavto Holding v. Ukraine, No. 48553/99, Judgment of July 25, 2002, ECHR 2002-VII.

52 ECHR, Rosenzweig and Bonded Warehouses Ltd. v. Poland, no. 51728/99, Judgment of July 28, 2005; ECHR, Zlínsat, Spol. S.R.O. v. Bulgaria, no. 57785/00, Judgment of June 15, 2006; ECHR, Bimer S.A. v. Moldova, no. 15084/03, Judgment of July 10, 2007.

53 Brownlie states that "the rubric may refer to rules of customary law, to general principles of law as in Article 38(1)(c) or to logical propositions resulting from judicial reasoning on the basis of existing international law and municipal analogies," *in* Principles of Public International Law, *supra* note 9, p.18.

54 Lithgow v. United Kingdom, Judgment of July 8, 1986, Series A, para. 115.

55 *Ibid.*, para. 116.

56 The state margin of appreciation is justified by the idea that national authorities have better knowledge of their society and its needs, and are therefore "better placed than [an] international

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In addition, the Court has adopted the proportionality approach to "deprivations" or "controls" of use of property. It examines whether the interference at issue strikes a reasonable balance between the demands of the general interest of the community and the private interests of the alleged victims of the deprivation and whether an unjust burden has been placed on the Claimant. In order to make this assessment, the Court proceeds into a factual analysis insisting that precise factors which are needed to be taken into account vary from case to case.

Investor State Tribunals

Investor-state tribunals were in uncharted territory when first called upon to respond to indirect expropriation claims in the context of investment agreements. The influence, therefore, of the existing bodies of jurisprudence was critical in their own analysis. The "sole effect doctrine" and the proportionality doctrine, imported from the jurisprudence of the Iran-U.S. tribunal and the ECHR, were put alongside the police power doctrine in order to determine whether or not a measure was expropriatory, requiring compensation. There are different variations and gradations in the way investor-state tribunals applied these doctrines, and doing so allowed the development of a number of criteria for determining whether an indirect expropriation has occurred. However, these criteria are subject to a constant evolution since case-by-case determination, based on the measures in question and the overall factual and legal context remains the cornerstone of the investment tribunals' analysis.

As the tribunal in *Generation Ukraine*[57] stated:

> [. . .] It would enhance the sentiment of respect for legitimate expectations if it were perfectly obvious why, in the context of a particular decision an arbitral tribunal found that a government action or inaction crossed the line that defines acts amounting to an indirect expropriation. But there is no checklist, no mechanical test to achieve that purpose. The decisive considerations vary from case to case, depending not only on the specific facts of a grievance but also on the way the evidence is presented, and the legal bases pleaded. The outcome is a judgment, i.e., the product of discernment, and not the printout of a computer programme.[58]

The tribunal in *Saluka v. The Czech Republic*[59] similarly very clearly noted that international law has yet "to draw a bright and easily distinguishable line between non-compensable regulations on the one hand and, on the other, measures that have the effect of depriving foreign investors of their investment and are thus unlawful and compensable in international law."[60] It went on and stated:

> It thus inevitably falls to the adjudicator to determine whether particular conduct by a state 'crosses the line' that separates valid regulatory activity from expropriation.

[court] to appreciate what is in the public interest," see James v. United Kingdom, 98 Eur. Ct H.R. (ser. A) 9, 32 (1986).

57 Generation Ukraine, Inc. v. Ukraine, ICSID Case No. ARB/00/9, Award, September 16, 2003.

58 *Ibid.*, para. 20.29.

59 Saluka Investments BV v. Czech Republic, Partial Award, March 17, 2006.

60 *Ibid.*, para. 264.

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> Faced with the question of when, how and at what point an otherwise valid regulation becomes, in fact and effect, an unlawful expropriation, international tribunals must consider the circumstances in which the question arises. The context within which an impugned measure is adopted and applied is critical to the determination of its validity.[61]

CRITERIA INDICATING WHETHER AN INDIRECT EXPROPRIATION HAS OCCURRED

Although there are differences in the ways tribunals have distinguished legitimate noncompensable regulations having an effect on the economic value of foreign investments and indirect expropriation requiring compensation, a careful examination reveals that, in very broad terms, they have identified and have had recourse to the following criteria which look very similar to the ones laid out by the new generation of investment agreements: (i) the degree of interference with the property right, including the duration of the regulation; (ii) the character of governmental measures, i.e., the purpose and the context of the governmental measure; (iii) the proportionality element between the public policy objective pursued by a measure and the impact of such measure on the property of the investor; and (iv) the interference of the measure with reasonable and investment-backed expectations.

As the tribunal in *Archer Daniels v. Mexico*[62] stated:

> [. . .] Other factors may be taken into account, together with the effects of the government's measure, including whether the measure was proportionate or necessary for a legitimate purpose; whether it discriminated in law or in practice; whether it was not adopted in accordance with due process of law; or whether it interfered with the investor's legitimate expectations when the investments was made.[63]

Degree of Interference with the Property Right

Severe economic impact. Most international decisions treat the severity of the economic impact caused by a government action as an important element in determining whether it rises to the level of an expropriation requiring compensation. International tribunals have often refused to require compensation when the governmental action did not remove essentially all or most of the property's economic value. There is broad support for the proposition that the interference has to be substantial in order to constitute expropriation, i.e., when it deprives the foreign investor of fundamental rights of ownership or when it interferes with the investment for a significant period of time.

61 *Ibid.*, para. 265.

62 Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States, ICSID Case No ARB(AF)/04/5, Award, Redacted version, November 21, 2007.

63 *Ibid.*, para. 250.

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Several tribunals have found that a regulation may constitute expropriation when it substantially impairs the investor's economic rights, i.e., ownership, use, enjoyment, or management of the business, by rendering them useless. Without such substantial impairment, mere restrictions on the property rights do not constitute takings. The ECHR has found deprivation where the investor has been definitely and fully deprived of the ownership of his/her property. If the investor's rights have not disappeared but have only been substantially reduced, and the situation is not "irreversible," there will be no "deprivation" under Article 1, Protocol 1 of the European Convention of Human Rights.[64]

The Iran-United States Claims tribunal,[65] in *Starrett Housing*,[66] which dealt with the appointment of Iranian managers to an American housing project, concluded that an expropriation had taken place:

> [I]t is recognised by international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner.

In the *Tippetts*[67] case, the tribunal found an indirect expropriation because of the actions of a government-appointed manager, rather than because of his appointment *per se*[68] and equated that deprivation of property rights with a taking of property.[69] The tribunal said:

> While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that the deprivation is not merely ephemeral . . . .

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64 *See* cases: Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser.A) at 29 (1976); Poiss v. Austria, 117 Eur. Ct.H.R. (ser. A) 84, 108 (1987); Matos e Silva, Lda v. Portugal, App. No. 15777/89, 24 Eur. Ct. H.R. Rep. 573, 600–01 (1996). See, for discussion, H. Ruiz Fabri, *The Approach Taken by the European Court of Human Rights to the Assessment of Compensation for 'Regulatory Expropriations' of the Property of Foreign Investors*, 11 (1) N.Y.U. Envtl. L.J. 148–73 (2002).

65 For details on these cases, see G. H. Aldrich, *What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claim Tribunal*, 88 The American Journal of International Law 585–609.

66 *Starrett Housing*, *supra* note 18, p. 154.

67 *Tippetts*, *supra* note 47.

68 While Tippetts was able to work with the Iranian appointed manager for some months and reestablished its rights as a partner, its personnel left Iran following the seizure of the American Embassy and the new manager broke off communications with Tippetts by refusing to respond to its letters and telexes.

69 In this case, the Tribunal said that it "prefers the term 'deprivation' to the term 'taking,' although they are largely synonymous, because the latter may be understood to imply that the government has acquired something of value, which is not required".

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In the NAFTA context, in the *Pope & Talbot v. Canada* case,[70] the tribunal found that although the introduction of export quotas resulted in a reduction of profits for the Pope& Talbot company, sales abroad were not entirely prevented and the investor was still able to make profits. It stated, ". . . while it may sometimes be uncertain whether a particular interference with business activities amounts to an expropriation, the test is whether the interference is sufficiently restrictive to support a conclusion that the property has been taken from the owner . . . ."[71]

In *S.D. Myers v. Canada*,[72] S.D Myers, a U.S. company which operated a PCB remediation facility in the United States, alleged that Canada had violated NAFTA Chapter 11 by banning the export of PCB waste to the United States. This tribunal also distinguished regulation from expropriation primarily on the basis of the degree of interference with property rights: "expropriations tend to involve the deprivation of ownership rights; regulations [are] a lesser interference."[73]

In *Marvin Roy Feldman Karpa v. Mexico*,[74] CEMSA, a registered foreign trading company and exporter of cigarettes from Mexico, was allegedly denied the benefits of the law that allowed certain tax refunds to exporters and claimed expropriation under NAFTA Article 1110. The tribunal found that there was no expropriation since "the regulatory action has not deprived the Claimant of control of his company, interfered directly in the internal operations of the company or displaced the Claimant as the controlling shareholder. The Claimant is free to pursue other continuing lines of business activity . . . . Of course, he was effectively precluded from exporting cigarettes . . . . However, this does not amount to Claimant's deprivation of control of his company."

In *GAMI v. The United Mexican States*,[75] the case concerned the impact of Mexico's expropriation of several sugar mills on GAMI, a minority shareholder in some of those mills. GAMI proceeded on the basis that "Mexico's conduct impaired the value of its shareholding to such an extent that it must be considered tantamount to expropriation."[76] The tribunal found that:

> With knowledge of the magnitude of diminution one might be in a position to consider whether a line is to be drawn beyond which the loss is so great as to constitute a taking. But GAMI has staked its case on the proposition that the wrong done to it did in fact destroy the whole value of its investment. GAMI seeks to lend

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70 *Pope & Talbot v. Canada*, *supra* note 24.

71 In addition, the tribunal stated that: "Regulations can indeed be characterised in a way that would constitute creeping expropriation . . . . Indeed, much creeping expropriation could be conducted by regulation, and a blanket exception for regulatory measures would create a gaping loophole in international protection against expropriation." *Ibid.*, para. 99.

72 *S.D. Myers v.Canada*, *supra* note 24.

73 The tribunal added that: "the distinction between expropriation and regulation screens out most potential cases of complaints concerning economic intervention by a state and reduces the risk that governments will be subject to claims as they go about their business of managing public affairs."

74 In this case, Marvin Feldman, a United States citizen, submitted claims on behalf of CEMSA. ICSID Case No. ARB(AF)/99/1, Award of December 16, 2002, pp. 39–67 at 59.

75 Gami v. The Government of the United Mexican States, (UNCITRAL) Award, November 15, 2004.

76 *Ibid.*, para. 35.

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> credibility to its posture by agreeing to relinquish its shares in GAM as a condition of the award it seeks. It suggests that any residual value is therefore of no moment. This posture is untenable. The Tribunal cannot be indifferent to the true effect on the value of the investment of the allegedly wrongful act . . . .GAMI has not proved that its investment was expropriated for the purposes of Article 1110.[77]

In *Archer Daniels v. Mexico*,[78] the tribunal rejected the Claimants' argument that their losses as a result of a tax were tantamount to an expropriation. The tribunal had little difficulty in determining that the measures at issue did not deprive the Claimants of their fundamental rights of ownership or management; nor did the measure affect most of the investment's economic value.

In *Glamis v. the United States*,[79] Glamis claimed that the United States, through both the federal and state actions, expropriated the mining rights possessed by Glamis in violation of Article 1110 of the NAFTA. The tribunal denied Glamis' claim, on the ground that the right was never rendered substantially without value by the actions of the U.S federal government and the State of California.[80] The tribunal did not need to examine whether deprivations motivated by public welfare objectives must lead to compensation for the foreign investors.

The European Court of Human Rights, in the most widely cited case under Article 1, Protocol 1 of the European Convention of Human Rights, *Sporrong and Lönnroth v. Sweden*,[81] did not find indirect expropriation to have occurred as a result of land use regulations that affected the claimant's property because,

> . . . although the right [of peaceful enjoyment of possessions] lost some of its substance, it did not disappear . . . The Court observes in this connection that the [claimants] could continue to utilise their possessions and that, although it became more difficult to sell properties [as a result of the regulations], the possibility of selling subsisted.

Another relevant decision is the *Revere Copper*[82] case (1980). The case arose from a concession agreement—which was to last for 25 years—made by a subsidiary of the Revere Copper Company with the government of Jamaica. The government, despite a stabilization clause in the agreement ensuring that taxes and other financial liabilities would remain as agreed for the duration of the concession, increased the royalties. The company found it difficult to continue operations, closed them, and claimed

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77 *Ibid.*, para. 133.

78 Archer Daniels v. Mexico, *supra* note 62.

79 Glamis v. The Unites States of America, (UNCITRAL), Award, June 8, 2009.

80 *Ibid.*, para. 536.

81 In this case, long-term expropriation permits (23 and 8 years) had been granted by the city of Stockholm in respect of the applicant's properties. These did not of themselves expropriate the property, but gave local authorities the power to do so, should they so decide in the future. Sporrong and Lönnroth complained that it was impossible for them to sell these properties and that it amounted to an interference with their right to peaceful enjoyment of possessions. The Swedish government, by contrast, emphasised the public purpose of the permits system and the intentions of the city of Stockholm to make improvements for the general good. *See* R. Higgins, *supra* note 13, pp. 276–77.

82 Revere Copper & Brass Inc. v. Overseas Private Investment Corporation, 56 I.L.M. 258.

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compensation under its insurance contract. The Arbitral tribunal,[83] assuming that the contract was governed by international law, found that there had been a taking by the government and observed:

> In our view the effects of the Jamaican Government's actions in repudiating its long-term commitments to RJA [the subsidiary of RC] have substantially the same impact on effective control over use and operation as if the properties were themselves conceded by a concession contract that was repudiated. . . .[84]

Although the insurance agency (OPIC) argued that RJA still had all the rights and property and that it could operate as it did before, the tribunal responded that "this may be true . . . but . . . we do not regard RJA's 'control' of the use and operation of its properties as any longer 'effective' in view of the destruction by Government action of its contract rights."

Several BIT tribunals have also retained the criterion of the severity of the impact to qualify an act as an expropriation.

In *CME v. The Czech Republic*,[85] CME had purchased a joint venture media company in the Czech Republic and alleged, *inter alia*, that the actions of the national Media Council were a breach of the obligation of the [host country] not to deprive the investor of its investment.[86] The tribunal, citing, *inter alia*, the *Tippetts* and *Metalclad* cases, found that an expropriation had occurred because "the Media Council's actions and omissions . . . caused the destruction of the [joint-venture's] operations, leaving the [joint venture] as a company with assets, but without business."[87] It stated also that, although "regulatory measures are common in all types of legal and economic systems in order to avoid use of private property contrary to the general welfare of the host state,"[88] the administrative measures taken by the host country did not fall under this category. It therefore concluded that:

> Expropriation of [the company's] investment is found as a consequence of the [host country's] actions and inactions as there is no immediate prospect at hand that the [joint venture] will be reinstated in a position to enjoy an exclusive use of the licence . . . .[89]

In *Generation Ukraine v. Ukraine,*[90] a series of acts or omissions by the Kyiv City State Administration, culminating with its failure to provide lease agreements for a

83 The Tribunal was set up under the American Arbitration Association.

84 For discussion, see R. Higgins, *supra* note 13, pp. 331–37, Sornarajah, *supra* note 43, p. 301, and R. Dolzer, *supra* note 8, pp. 51–52.

85 CME v. Czech Republic, Partial Award, September 13, 2001.

86 Article 5 of the 1991 Netherlands-Czech Republic BIT.

87 *CME v. Czech Republic*, para. 591, p. 166.

88 *Ibid.*, para. 603, p. 170.

89 *Ibid.*, para. 607, p. 171.

90 The Claimant, a U.S. corporation, sought damages in excess of $USD 9.4 billion, for alleged harm to its investment in commercial property in Kyiv, Ukraine, namely the "Parkview Office Building Project." The Claimant contended that it was encouraged by the Ukrainian Government in late 1992 to invest in Ukraine; that it established a local investment company and that, after obtaining approval of the project, it found itself blocked by interference from local administrative

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construction project of an office building, did not constitute a creeping expropriation since according to the tribunal:

> . . . the conduct of the Kyiv City State Administration . . . does not come close to creating a persistent or irreparable obstacle to the Claimant's use, enjoyment or disposal of its investment."[91].

The tribunal explained further:

> A plea of creeping expropriation must proceed on the basis that the investment existed at a particular point in time and that subsequent acts attributable to the State have eroded the investor's rights to its investment to an extent that is violative of the relevant international standard of protection against expropriation. It is conceptually possible to envisage a case of creeping expropriation where the investor's interests in its investment develop in parallel with the commission of the acts complained of. But such a plea, in order to be successful, would demand a high level of analytical rigorousness and precision that is absent from the submissions before this Tribunal.[92]

In *Occidental v. Ecuador*,[93] Occidental claimed that the Ecuadorian authorities' refusal to refund to Occidental the value-added tax, to which it was entitled under Ecuadorian law, constituted an expropriation. The tribunal made reference to the *Metalclad*[94] and *CME* cases[95] and held that "Ecuador did not adopt measures that could be considered as amounting to direct or indirect expropriation" since:

> In fact, there has been no deprivation of the use . . . of the investment, let alone measures affecting a significant part of the investment. The criterion of 'substantial deprivation' under international law identified in *Pope & Talbot* is not present in this case.[96]

In *CMS v. Argentina,*[97] the indirect expropriation claim concerned the suspension by Argentina of a tariff adjustment formula for gas transportation applicable to an enterprise in which the claimant had an investment. The tribunal described its task as follows:

> . . . the essential question is. . . . to establish whether the enjoyment of the property has been effectively neutralised. The standard that a number of tribunals have

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authorities over the course of the next six years. Such interference included, *inter alia*, the alleged final expropriatory act or measure: the Kyiv City State Administration's "failure to produce revised land lease agreements with valid site drawings." Generation Ukraine Inc. v. Ukraine, ICSID Case No. ARB/00/9, Award, September 16, 2003, paras. 20.1, 20.21.

91 *Ibid.*, para. 20.32.

92 *Ibid.*, para. 20.26.

93 Occidental Exploration and Production Co. v. Ecuador, Award, July 1, 2004, at 80–92.

94 Metalclad Corporation v. United Mexican States, Decision, August 30, 2000.

95 *CME v. The Czech Republic*, *supra* note 85.

96 *Pope & Talbot v. Canada, supra* note 24, para. 89.

97 CMS Gas Transmission Company v. The Argentine Republic, ICSID Case No. ARB/01/8, Award, May 12, 2005, para. 262.

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> applied in recent cases where indirect expropriation has been contended is that of substantial deprivation.

Although the tribunal recognized that the disputed measures had an important effect on the claimant's business, it found no substantial deprivation and thus no breach of the expropriation article in the U.S.-Argentina BIT had occurred. It noted that "the investor is in control of the investment; the government does not manage the day-to-day operations of the company; and the investor has full ownership and control of the investment."[98]

Under the Energy Charter Treaty, in *Nykomb Synergetics Technology Holding AB, Stockholm v. The Republic of Latvia*,[99] the claimant contended, *inter alia*, that the non-payment of double tariffs by the state-owned purchaser of power from claimant's cogeneration plants constituted an indirect expropriation, since it allegedly resulted in a substantial loss of sales income making the enterprise economically nonviable and its investment worthless. While the claimant prevailed on other grounds, regarding the indirect expropriation claim, the tribunal found that:

> . . . 'regulatory takings' may under the circumstances amount to expropriation or the equivalent of an expropriation. The decisive factor for drawing the border line towards expropriation must primarily be the degree of possession taking or control over the enterprise the disputed measures entail. In the present case, there is no possession taking of [the Claimant's wholly-owned subsidiary] or its assets, no interference with the shareholder's rights or with the management's control over and running of the enterprise—apart from ordinary regulatory provisions laid down in the production license, the off-take agreement, etc.

In *Vivendi II v. Argentina*,[100] the tribunal came to the conclusion that the measures taken by the Province of Tucumán undermined the legitimacy of the Concession Agreement and deprived the investment of its economic use. It held that:

> Paraphrasing the words of the *Tecmed*, *CME*, *Santa Elena*, and *Starrett Housing* tribunals, Claimants were radically deprived of the economic use and enjoyment of their investment, the benefits of which (*i.e.* the right to be paid for services provided) had been effectively neutralised and rendered useless . . . . By leaving Claimants with no other rational choice, we conclude that the Province thus expropriated Claimants' right of use and enjoyment of their investment under the Concession Agreement.[101]

In *Sempra v. Argentina*,[102] although the tribunal found that many of the measures discussed had a very adverse effect on the conduct of the business concerned, this was

98 *Ibid.*, para. 263.

99 Nykomb Synergetics Technology Holding AB, Stockholm v. The Republic of Latvia, Award, December 16, 2003, at 4.3.1.

100 Compañíá de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic, ICSID Case No. ARB/97/3, Award, August 20, 2007.

101 *Ibid.*, para. 7.5.34.

102 Sempra Energy International v. The Argentine Republic, ICSID Case No ARB/02/16, Award, September 28, 2007.

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a question addressed by the treaty in the context of other safeguards of protection. It stated that:

> A finding of indirect expropriation would require more than adverse effects. It would require that the investor no longer be in control of its business operation, or that the value of the business have been virtually annihilated. This is not the case in the present dispute.[103].

Duration of the regulation. The duration of the regulation has been often used to measure whether the regulation has had a severe enough impact on property to constitute a taking.[104, 105]

The Iran-United States Claims tribunal has acknowledged this was an issue, but it has had little difficulty in finding that the appointment of "temporary" managers may constitute a taking of property, when the consequent deprivation of property rights is not "merely ephemeral" (in the *Tippetts, Phelps Dodge*, and *Saghi* cases).

In *S.D. Myers v. Canada*,[106] the NAFTA tribunal accepted that "in some contexts and circumstances it would be appropriate to view a deprivation as amounting to an expropriation even if it were partial and temporary." However, it concluded that Canada's initiative "was only valid for a time." Under these circumstances, "an opportunity was delayed," but no indirect expropriation could be found.

In *Wena Hotels v. Egypt*,[107] the tribunal in its award found that the seizure of Wena's hotel lasting for almost a year was not "ephemeral" but amounted to an expropriation.[108] In its Decision on Interpretation, the tribunal held that:

> It is true that the Original Tribunal did not explicitly state that such an expropriation totally and permanently deprived Wena of its fundamental rights of ownership. However, in assessing the weight of the actions described above, there was no doubt in the Tribunal's mind that the deprivation of Wena's fundamental rights of ownership was so profound that the expropriation was indeed a total and permanent one.[109]

In *LG&E v. Argentina*,[110] the tribunal also held that the duration of the measure is an element to be taken into account and that the permanent character of the interference leads to an expropriation:

> Similarly, one must consider the duration of the measure as it relates to the degree of interference with the investor's ownership rights. Generally, the expropriation

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103 *Ibid.*, para. 285.

104 J.M. Wagner, *International Investment, Expropriation and Environmental Protection*, 29(3) Golden Gate U. Law Rev. 465–38 (1999).

105 Professor Christie, in his 1962 article, discusses when a "temporary seizure" ripens into an expropriation, *supra* note 43.

106 *S.D. Myers v. Canada, supra* note 24.

107 Wena Hotels Ltd v. Arab Republic of Egypt, ICSID Case No ARB/98/4, Award, December 8, 2000, 41 ILM 896.

108 *Ibid.*, para. 99.

109 *Ibid.*, Decision on Interpretation, October 31, 2005, para. 120.

110 LG&E v. Argentina, ICSID Case No ARB/02/1, Decision on Liability, October 3, 2006.

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must be permanent, that is to say, it cannot have a temporary nature . . . ."[111] [. . .] without a permanent severe deprivation of LG&E's rights with regard to its investment, or almost complete deprivation of the value of LG&E's investment, the Tribunal concludes that these circumstances do not constitute expropriation.[112]

Economic impact as the exclusive criterion. There is no serious doubt that the severity of the impact upon the legal status and the practical impact on the investor's ability to use and enjoy his/her property are among the main factors in determining whether a regulatory measure effects an indirect expropriation. What is more controversial "is the question of whether the focus on the effect will be the only and exclusive relevant criterion—'sole effect doctrine'—or whether the purpose and the context of the governmental measure may also enter into the takings analysis."[113] The outcome in any case may be affected by the specific wording of the particular treaty provision. From the doctrine and the case examination, it seems, however, that the balanced approach is predominant. In addition, the "sole effect" doctrine is not likely to represent the intent of the government parties to the investment protection agreements.

A few cases have focused on the effect on the owner as the main factor in discerning a regulation from a taking. As mentioned before, this is one of the main characteristics of the Iran-U.S. tribunal's jurisprudence. In the *Tippetts* case, the tribunal held that:

the intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact.

In the *Phelps Dodge* case,[114] a transfer of management was made pursuant to a pre-revolutionary law designed to prevent the closure of factories, ensure payments due to the workers, and protect any debts owed to the Government, which in this case included loans made by a bank that had been nationalised in 1979. Citing *Tippetts*, the Iran-United States tribunal stated that:

The Tribunal fully understands the reasons why the respondent felt compelled to protect its interests through this transfer of management, and the Tribunal understands the financial, economic and social concerns that inspired the law pursuant to which it acted, but those reasons and concerns cannot relieve the Respondent of the obligation to compensate Phelps Dodge for its loss.

In the NAFTA context, in the case *Metalclad v. Mexico*,[115] Metalclad alleged that its subsidiary COTERIN's attempt to operate a hazardous waste landfill that it constructed in the municipality of Guadalcázar had been thwarted by measures attributable to Mexico. Metalclad commenced an action under the NAFTA, claiming that an ecological decree promulgated after the claim was made, violated Article 1110 requiring

111 *Ibid.*, para. 151.
112 *Ibid.*, para. 200.
113 Dolzer, *supra* note 3, para. 79.
114 *Phelps Dodge*, 10 Iran-U.S. Cl. Trib. Rep. at 130.
115 *Metalclad v. Mexico*, *supra* note 94.

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compensation for expropriation. The tribunal found a violation of NAFTA Article 1110 and stated that in order to decide on an indirect expropriation, it "need not decide or consider the motivation, nor intent of the adoption of the Ecological Decree." The tribunal stated:

> expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use of reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.

The case *Compañía del Desarrollo de Santa Elena v. Costa Rica*,[116] although referring to a direct expropriation, not an indirect taking, has attracted particular attention because the panel expressly stated that the environmental purpose had no bearing on the issue of compensation. In this case, the Claimant (Company Santa Elena) was formed primarily for the purpose of purchasing Santa Elena—a 30-kilometer terrain in Costa Rica—with the intention of developing it as a tourist resort. In 1978, Costa Rica issued an expropriation decree for Santa Elena aiming at declaring it a preservation site. Twenty years of legal proceedings between the Parties finally ended with a decision by an ICSID panel. While in this case the issue was the date of the taking for purposes of determining compensation, the panel, citing the *Tippetts* case, indicated that a compensable expropriation could occur through measures of a state which deprive the owner of "access to the benefit and economic use of his property" or "ha[ve] made those [property] rights practically useless." The panel held that:

> While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the Property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking. That is, the purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid.[117] The international source of the obligation to protect the environment makes no difference.

It also added that:

> Expropriatory environmental measures—no matter how laudable and beneficial to society as a whole—are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains.

116 Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica, ICSID Case No. ARB/96/1, February 17, 2000.

117 For this reason, the Tribunal did not analyze the detailed evidence submitted regarding what Costa Rica referred to as its international obligations to preserve the unique Santa Elena ecological site.

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Character of Governmental Measures, i.e., the Purpose and the Context of the Governmental Measure—The Police Powers of the State[118]

A very significant factor in characterizing a government measure as falling within the expropriation sphere or not is whether the measure refers to the State's right to promote a recognized "social purpose"[119] or the "general welfare"[120] by regulation. "The existence of generally recognized considerations of the public health, safety, morals or welfare will normally lead to a conclusion that there has been no 'taking.'"[121] As one commentator has noted, "non-discriminatory measures related to anti-trust, consumer protection, securities, environmental protection, land planning are non-compensable takings since they are regarded as essential to the functioning of the state."[122] The notion that the exercise of the State's "police powers"[123] will not give rise to a right to compensation has been widely accepted in international law.

In the NAFTA context, in the *S.D. Myers* case,[124] the tribunal found that the expression "tantamount to expropriation" in NAFTA's Article 1110(1) was understood as "equivalent to expropriation" and added:

> Both words require a tribunal to look at the substance of what has occurred and not only at form. A tribunal should not be deterred by technical or facial considerations from reaching a conclusion that an expropriation or conduct tantamount to an expropriation has occurred. It must look at the real interests involved and the purpose and effect of the government measure.

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118 One commentary on the law on expropriation and the State's "police powers" is the commentary to the American Law Institute's Restatement (Third) of the Foreign Relations Law of the United States, which was designed to assist, *inter alia*, in determining how to distinguish between an indirect expropriation and valid governmental regulation: ". . . a state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of the states, if it is not discriminatory . . . ."

119 The Iran-US Claims Tribunal: Its Contribution to the Law of State Responsibility, *supra* note 24, p. 200.

120 B.H. Weston, *supra* note 5, p. 116.

121 Christie, *supra* note 43, p. 338.

122 M. Sornarajah, *supra* note 43.

123 The Governments of Canada and the United States have jointly agreed that a new tax introduced by the Canadian Government in October of 2006 does not constitute an expropriation under the terms of the North American Free Trade Agreement (NAFTA). The joint determination—which was confirmed in an exchange of letters in April 2008—ensures that a group of individual U.S. investors cannot proceed with an expropriation claim against Canada pursuant to NAFTA Chapter 11. In October 2007, the investors (Marvin Gottlieb, et. al.) had formally signaled their "intent" to sue Canada, following a decision by Canada to introduce a tax on so-called income trusts in the energy sector.

124 *S.D Myers v. Canada*, *supra* note 24.

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In *Marvin Roy Feldman v. Mexico*,[125] the tribunal explained that:

> . . . the ways in which governmental authorities may force a company out of business, or significantly reduce the economic benefits of its business, are many. In the past, confiscatory taxation, denial of access to infrastructure or necessary raw materials, imposition of unreasonable regulatory regimes, among others, have been considered to be expropriatory actions. At the same time, governments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary law recognises this.

In *Methanex v. USA*,[126] the tribunal found that a ban by the California government on the gasoline additive MTBE did not constitute expropriation because the measure was adopted for a public purpose and was not discriminatory:

> In the Tribunal's view, Methanex is correct that an intentionally discriminatory regulation against a foreign investor fulfils a key requirement for establishing expropriation. But as a matter of general international law, a non-discriminatory regulation for a public purpose . . . is not deemed expropriatory and compensable . . . .[127]

In *Saluka v. The Czech Republic*,[128] the tribunal stated that a deprivation can be justified if it results from the exercise of regulatory actions aimed at the maintenance of public order. It further noted that:

> It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare."[129] . . . In the opinion of the Tribunal, the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are 'commonly accepted as within the police power of States' forms part of customary international law today. There is ample case law in support of this proposition.[130]

Although it found that the investor had been deprived of its investment, the tribunal justified the Czech National Bank's measures given the critical financial circumstances which could affect the country.[131]

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125 *Marvin Roy Feldman v. Mexico, supra* note 74.
126 Methanex v. The United States of America, Award, August 3, 2005.
127 *Ibid.*, Part IV, Chapter D, para. 4.
128 *Saluka v. The Czech Republic*, *supra* note 59.
129 *Ibid.*, para. 255.
130 *Ibid.*, para. 262.
131 *Ibid.*, paras. 266–75.

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In the context of the Iran-United States Claims tribunal, two awards referred to the police powers doctrine. However, in both of them, the allegations occurred outside the context of the Islamic Revolution.

In *Too v. Greater Modesto Insurance Associates*,[132] the Claimant sought compensation for the seizure of his liquor license by the United States Internal Revenue Service. The tribunal rejected the allegation of taking on the grounds of police power regulations:

> . . . A State is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation or any other action that is commonly accepted as within the police power of States, provided it is not discriminatory and is not designed to cause the alien to abandon the property to the State or to sell it at a distress price . . . .

In *Sedco, Inc. v. National Iranian Oil Co*., Iran argued that no liability should exist for a transfer of shares of stock pursuant to a law authorizing the nationalization of companies whose debts to banks exceeded their net assets. The tribunal noted that it was an "accepted principle of international law that a State is not liable for economic injury which is a consequence of bona fide regulation within the accepted police power of States."[133]

The tribunal in the *Lauder v. The Czech Republic*[134] case said about the issue of interference with property rights that ". . . . Parties to [the Bilateral] Treaty are not liable for economic injury that is the consequence of bona fide regulation within the accepted police powers of the State."

In the case of *Tecmed S.A, v. Mexico*,[135] although the tribunal found an expropriation, it stated that:

> the principle that the State's exercise of its sovereign power within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is undisputable.[136]

Proportionality

The proportionality doctrine figures prominently in the jurisprudence of the ECHR. In the context of this jurisprudence, the State may affect control on activities by individuals by imposing restrictions which may take the form of "planning controls, environmental orders, rent controls, import and export laws, economic regulation of professions, [and] the seizure of properties for legal proceedings or inheritance laws."[137]

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132 Too v. Greater Modesto Insurance Associates, Award of December 29, 1989, 23 Iran-U.S. Cl. Trib. Rep. 378. *See also* G. H. Aldrich, *supra* note 65.

133 Sedco, Inc. et al. v. National Iranian Oil Co. et al., Award, No. ITL 55-129-3, October 28, 1985, *reprinted in* 9 Iran-U.S. Cl. Trib. Rep. 248.

134 Lauder v. Czech Republic, Final Award, September 3, 2002.

135 Técnicas Medioambientales Tecmed, S.A. v. United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003.

136 *Ibid*., para. 119.

137 See D.J. Harris et al., referring to the jurisprudence of the European Court of Human Rights in the Law of the European Convention on Human Rights 535 (1995).

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In addition, the Court has adopted a common approach to "deprivations" and "controls" of use of property. In either case, there has to be a reasonable and foreseeable national legal basis for the taking because of the underlying principle in stability and transparency and the rule of law.[138] In relation to either deprivation or control of use, the measures adopted must be proportionate. The Court examines whether the interference at issue strikes a reasonable balance between the demands of the general interest of the community and the private interests of the alleged victims of the deprivation and whether an unjust burden has been placed on the Claimant. In order to make this assessment, the Court proceeds into a factual analysis, insisting that precise factors which are needed to be taken into account vary from case to case. In the *James v. United Kingdom* case,[139] for example, the Court said that:

> The taking of property in pursuance of a policy calculated to enhance social justice within the community can properly be described as being 'in the public interest.' In particular, the fairness of a system of law governing the contractual or property rights of private parties is a matter of public concern and therefore legislative measures intended to bring about such fairness are capable of being in the 'public interest,' even if they involve the compulsory transfer of property from one individual to another.

In the *Sporrong and Lönnroth v. Sweden* case,[140] the Court stated that Article 1 contains "three distinct rules":

> The first rule, which is of a general nature, enounces [*sic*] the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence in the same paragraph. The third rule recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph.

The European Court of Human Rights found no expropriation as a result of the first test, yet found compensation to be required as a result of the second test. Under the "fair balance test," it found that over the years the state had failed to take proper account of individual interests involved. Since the state had neither shortened the temporal effect of the rules nor paid compensation, the Court ruled that the State had placed "an individual and excessive burden" on plaintiffs and therefore acted in violation of Article 1.

In the case of *Tecmed S.A, v. Mexico*,[141] the investor alleged that the Mexican government's failure to relicense its hazardous waste site contravened various rights

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138 *See* H. Mountfield, *Regulatory Expropriations in Europe: the Approach of the European Court of Human Rights*, 11(1) N.Y.U. Envtl. L.J. 136–47 (2002).

139 This case concerns a reform undertaken by the United Kingdom regarding the right of individuals with long leases to acquire the freehold of their leasehold property. This reform, according to James, the Claimant, "deprived" the freeholders of their property since they could neither refuse to sell nor set the price for it, *James v. UK*, *supra* note 56.

140 *Sporrong and Lönnroth v. Sweden, supra* note 81.

141 *Tecmed v. Mexico, supra* note 135.

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and protections set out in the bilateral investment treaty between Spain and Mexico and was an expropriatory act. The tribunal in order to determine whether the acts undertaken by Mexico were to be characterized as expropriatory, citing the ECHR's practice, considered "whether such actions or measures are proportional to the public interest presumably protected thereby and the protection legally granted to investments, taking into account that the significance of such impact plays a key role in deciding the proportionality."[142] It added that "there must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realised by an expropriatory measure."[143]

This approach was endorsed subsequently by the arbitral decisions in *Azurix*[144] and *LG&E v. Argentina*.[145] In *LG&E v. Argentina*, the tribunal stated that:

> With respect to the power of the State to adopt its policies, it can generally be said that the State has the right to adopt measures having a social or general welfare purpose. In such a case, the measure must be accepted without any imposition of liability, except in cases where the State's action is obviously disproportionate to the need being addressed.[146]

Interference of the Measure with Reasonable Investment-backed Expectations

Another criterion is whether the governmental measure affects the investor's reasonable expectations. In these cases, the investor has to prove that his/her investment was based on a state of affairs that did not include the challenged regulatory regime. The claim must be objectively reasonable and not based entirely upon the investor's subjective expectations.

In the 1934 *Oscar Chinn*[147] case, the Permanent Court of International Justice (PCIJ) did not accept the contention of indirect taking,[148] noting that in those circumstances, a granting of a *de facto* monopoly did not constitute a violation of international law and that "favourable business conditions and good will are transient circumstances, subject to inevitable changes":[149]

> No enterprise . . . can escape from the chances and hazards resulting from general economic conditions. Some industries may be able to make large profits during a period of general prosperity, or else by taking advantage of a treaty of commerce or of an alteration in customs duties; but they are also exposed to the danger of ruin or

142 *Ibid.*, para. 122.

143 *Ibid.*

144 Azurix v. The Argentine Republic, ICSID Case No ARB/01/12, Award, July 14, 2006.

145 *LG&E v. Argentina*, *supra* note 110.

146 *Ibid.*, para. 195.

147 *Oscar Chinn, supra* note 17.

148 The P.C.I.J. employed "effective deprivation" as the standard for determining if the interference was sufficiently serious to constitute a compensable taking.

149 H. Sedigh, *What Level of Host State Interference Amounts to a Taking under Contemporary International Law?*, 2(4) J.World Investment, 631–84, 646 (2001).

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> extinction if circumstances change. Where this is the case, no vested rights are violated by the State.

The Iran-U.S. Claims tribunal in *Starrett Housing Corp. v. Iran*[150] took into account the reasonable expectations of the investor:

> Investors in Iran, like investors in all other countries, have to assume a risk that the country might experience strikes, lock-outs, disturbances, changes of economic and political system and even revolution. That any of these risks materialised does not necessarily mean that property rights affected by such events can be deemed to have been taken.

The tribunal in *Metalclad* stated that ". . . .Metalclad was led to believe, and did believe, that the federal and state permits allowed for the construction and operation of the landfill."[151] It held that expropriation includes deprivation in whole or in significant part of the use or "reasonably to-be-expected economic benefit of property."[152]

In *Marvin Roy Feldman v. Mexico,*[153] the NAFTA tribunal noted as part of its reasoning denying the expropriation claim:

> Governments, in their exercise of regulatory power, frequently change their laws and regulations in response to changing economic circumstances or changing political, economic or social considerations. Those changes may well make certain activities less profitable or even uneconomic to continue . . . .

In *Thunderbird v. Mexico*,[154] the tribunal gave a general definition of "legitimate expectations":

> Having considered recent investment case law and the good faith principle of international customary law, the concept of 'legitimate expectations' relates, within the context of the NAFTA framework, to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages.

In *Tecmed S.A, v. Mexico*,[155] the tribunal attempted to determine whether the Mexican government's measures were "reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation."

> . . . Even before the Claimant made its investment, it was widely known that theinvestor expected its investments in the Landfill to last for a long term and that ittook this into account to estimate the time and business required to recover suchinvestment and obtain the expected return upon making its tender offer for the acquisition

150 *Starrett Housing Corp. v. Iran, supra* note 66.

151 *Metalclad v. Mexico, supra* note 94, para. 100.

152 *Ibid.*, para. 103.

153 *Marvin Roy Feldman v. Mexico, supra* note 125.

154 International Thunderbird Gaming Corporation v. United Mexican States, UNCITRAL (NAFTA) Award, January 26, 2006, para. 147.

155 *Tecmed v. Mexico*, *supra* note 135.

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> of the assets related to the Landfill. To evaluate if the actions attributable to the Respondent—as well as the Resolution[156]—violate theAgreement, such expectations should be considered legitimate and should beevaluated in light of the Agreement and of international law.[157]

Based on this and the fact that the "Resolution" was not proportionate to the "infringements"[158] by Tecmed, the tribunal found that the "Resolution" and its effects amounted to an expropriation.

In *Occidental v. Ecuador*,[159] the tribunal acknowledged the reasonable expectations by the investor as a factor for determining an expropriatory act: ". . . there has been no deprivation of the use or reasonably expected economic benefit of the investment [. . .] ."

In *Azurix v. Argentina*,[160] the tribunal also discussed the issue of legitimate expectations. It held that expectations "are not necessarily based on a contract but on assurances explicit or implicit, or on representations made by the State which the investor took into account in making the investment."[161] Although it found that Argentina had created these reasonable expectations, it found that no expropriation took place because Azurix had not lost control over its investment.

CONCLUSION

Expropriation (direct and indirect) requires compensation based on clearly established rules of customary international law. However, while a determination of direct expropriation is relatively straightforward to make, determining whether a measure falls into the category of indirect expropriation has required tribunals to undertake a thorough examination of the specific circumstances of the case and a careful consideration of the specific wording of the treaty. Ultimately, however, the tribunals have only in a few cases found an indirect expropriation to occur. This results from the fact that the threshold for characterizing a governmental measure as expropriation is very high. Instead, recourse to another protection standard such as the violation of the fair and equitable standard, which represents a lower threshold, seems to gain ground.

The line between the concept of indirect expropriation and noncompensable regulatory governmental measures has not been systematically articulated. However, a close examination of the relevant jurisprudence reveals that, in broad terms, there are some criteria that tribunals have used to distinguish these concepts: (i) the degree of interference with the property right; (ii) the character of governmental measures, i.e., the purpose and the context of the governmental measure; (iii) the proportionality element

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156 *Ibid.*, the resolution was the decision not to renew the license.

157 *Ibid.*, para. 50.

158 "All the infringements committed were either remediable or remediated or subject to minor penalties." *Ibid.*, para. 148.

159 *Occidental v. Ecuador, supra* note 93.

160 *Azurix v. Argentina, supra* note 144.

161 *Ibid.*, paras. 316–22.

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between the public policy objective pursued by a measure and the impact of such measure on the property of the investor; and (iv) the interference of the measure with reasonable and investment-backed expectations.

Investment tribunals, instead of focusing exclusively on the "sole effect" on the owner, have also often taken into account the purpose and proportionality of the governmental measures to determine whether compensation was due. Thus, a number of cases were determined on the basis of recognition that governments have the right to protect, *inter alia*, the environment, human health and safety, market integrity, and social policies through nondiscriminatory actions without providing compensation for any incidental deprivation of foreign-owned property.

Up to now, only a handful of international agreements have articulated this difference. A new generation of investment agreements, including investment chapters of free trade agreements, have introduced specific language and established criteria to assist in determining whether an indirect expropriation requiring compensation has occurred. These criteria are consistent with those emerging from arbitral decisions.

At the same time, prudence requires recognizing that the list of criteria which can be identified today from state practice and existing jurisprudence is not necessarily exhaustive and may evolve. Indeed, new investment agreements are being concluded at a very fast pace, and the number of cases going to arbitration is growing rapidly. Case-by-case consideration of different circumstances in some of these cases may shed additional light.

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Chapter 19

What About This "Umbrella Clause"?

Katia Yannaca-Small

INTRODUCTION

Investor-state arbitration usually has its legal basis in an investment treaty—bilateral (BIT), regional, or multilateral—or in an investor-state contract.[1] Some investment treaties cover only disputes relating to an "obligation under this agreement," i.e., only for claims of treaty violations. Others extend the jurisdiction to "any dispute relating to investments." Some others create an international law obligation that a host State shall "observe any obligation it may have entered into" in respect to investments or "constantly guarantee the observance of the commitments it has entered into" or "observe any obligation it has assumed" in this respect. These and other similar provisions are commonly called *"umbrella clauses,"* although other formulations have also been used: "*mirror effect*," "*elevator*," "*parallel effect*," "*sanctity of contract*," "*respect clause*," and "*pacta sunt servanda*."[2]

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1 The issue of contract/treaty claims and the challenges they pose for investment arbitration has been examined in detail in Chapter 14.

2 For the literature and the debate on the umbrella clause, see A. Sinclair, *The Origins of the Umbrella Clause in the International Law of Investment Protection*, 20(4) ARBITRATION INTERNATIONAL 411–34 (2004); C. Schreuer, *Travelling the BIT Route-of Waiting Period, Umbrella Clauses and Forks in the Road*, 5 J. WORLD INV. & TRADE (2004); S. Alexandrov, *Breaches of Contract and Breaches of Treaty–The Jurisdiction of Treaty-based Arbitration Tribunals to Decide Breach of Contract Claims in SGS v. Pakistan, and SGS v. Philippines*, 5 J. WORLD INV. & TRADE (2004); V. Zolia, *Effect and Purpose of "Umbrella Clauses" in Bilateral Investment Treaties: Unresolved Issues*, 2 TDM (2004); T. Wälde, *The "Umbrella Clause" in Investment Arbitration: A Comment on Original Intentions and Recent Cases*, 6 J. WORLD INV. & TRADE (2005); T. Wälde, *Contract Claims under the Energy Charter's Umbrella Clause: Original Intentions versus Emerging Jurisprudence*, *in* INVESTMENT ARBITRATION AND THE ENERGY CHARTER TREATY (C. Ribeiro ed., 2006); W. Ben Hamida, *La clause relative au respect des engagements dans les traités d'investissements*, *in* NOUVEAUX DEVELOPPEMENTS DANS LE

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Clauses of this kind have been put into treaties to provide additional protection to investors and are directed at covering investment agreements that host countries frequently conclude with foreign investors. Inclusion of umbrella clauses in investment treaties provides a mechanism to make host States' promises "enforceable" and comes as an additional protection of investor-state contracts.[3]

The umbrella clause has been known since the 1950s, and its effects have been discussed in literature and doctrine.[4] The first ICSID case where the umbrella clause was addressed arose in 1998: in *Fedax NV v. Republic of Venezuela*, based on the BIT between the Netherlands and the Republic of Venezuela.[5] In this case, the tribunal was unaware that there was an umbrella clause and did not carry out any in-depth examination of the clause or its application. It simply applied the "plain meaning" of the provision, that commitments should be observed under the BIT, with respect to the promissory note contractual document.[6,7] However, it was not until the two *Société Générale de Surveillance SA (SGS)* cases that it started to be tested.

The umbrella clause frequently figures in modern investment treaties but not always with the same language, so it is of no surprise that arbitral tribunals have given it different interpretations and reached different conclusions.

For a better understanding of the clause, this chapter (i) gives an overview of its history, (ii) briefly discusses the significance of the language included in a number of BITs, and (iii) looks at the effect, scope and conditions of application of the umbrella clause as interpreted by arbitral tribunals.

Contentieux Arbitral Transnational Relatif a l'Investissement International (Charles Leben ed., 2006); H. J. Schramke, *The Interpretation of Umbrella Clauses in Bilateral Investment Treaties*, TDM (May 2007); K. Yannaca-Small, *Interpretation of the Umbrella Clause in International Investment Agreements*, *in* International Investment Law, Understanding Concepts and Tracking Innovations (OECD 2008); S. Schill, *Enabling Private Ordering-Function, Scope and Effect of Umbrella Clauses in International Investment Treaties*, IILJ Working Paper 2008/9, Institute for International Law and Justice, N.Y. University School of Law (2008); C. Miles, *Where's my Umbrella? An "Ordinary Meaning" Approach to Answering Three Key Questions That Have Emerged from the "Umbrella Clause" Debate*, *in* Investment Treaty Arbitration and International Law (T.J. Grierson Weiler ed., JurisNet, LLC 2008); L. Halonen, *Containing the Scope of the Umbrella Clause, in* Investment Treaty Arbitration and International Law (T.J. Grierson Weiler ed., JurisNet, LLC 2008); Honlet and Borg, *The Decision of the ICSID Ad Hoc Committee in CMS v. Argentina Regarding the Conditions of Application of an Umbrella Clause: SGS v. Philippines revisited*, *in* 7(1) The Law and Practice of International Courts and Tribunals 1–32 (2008).

3 *See* S. Schill, *supra* note 2.

4 As Thomas Wälde noted: "The question of whether an international arbitration tribunal had jurisdiction over contractual counter-claims was never fully examined, nor was the question of whether contractual jurisdiction clauses should oust—or precede—the jurisdiction of treaty-based tribunals" *see supra* note 2.

5 Fedax NV v. Republic of Venezuela, Award March 9, 1998, 37 ILM 1391 (1998).

6 It found that Venezuela was under the obligation to: ". . . honor precisely the terms and conditions governing such investment, laid down mainly in Article 3 of the Agreement, as well as to honor the specific payments established in the promissory notes issued."

7 The merits of the case were partially settled by the parties.

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HISTORY OF THE UMBRELLA CLAUSE AND STATE PRACTICE

The first occurrence of the "umbrella clause"[8] as a distinct investment protection provision can be traced to the *1956–59 Abs Draft International Convention for the Mutual Protection of Private Property Rights in Foreign Countries* (the Abs draft) (Article 4)[9]:

> In so far as better treatment is promised to non-nationals than to nationals either under intergovernmental or other agreements or by administrative decrees of one of the High contracting Parties, including most-favoured nation clauses, such promises shall prevail.

This approach was reformulated in the *1959 Abs-Shawcross Draft Convention on Foreign Investment* (Article II)[10]:

> Each Party shall at all times ensure the observance of any undertakings which it may have given in relation to investments made by nationals of any other party.

The clause appeared shortly afterward in the first *BIT between Germany and Pakistan* in 1959 (Article 7):

> Either Party shall observe any other obligation it may have entered into with regard to investments by nationals or companies of the other party"

The clause was also one of the core substantive rules of the *1967 OECD draft Convention on the Protection of Foreign Property* (Article 2),[11] which provided that:

> Each Party shall at all times ensure the observance of undertakings given by it in relation to property of nationals of any other Party.

The Notes and Commentaries accompanying the draft Convention describe this article as "an application of the general principle of *pacta sunt servanda* in favor of the property of nationals of another party, and their lawful successors in title, unless the undertaking expressly excludes such succession." According to the Commentaries, "property" includes, but is not limited to, investments which are defined in Article 9 as "all property, rights and interests whether held directly or indirectly, including the interest which a member of a company is deemed to have in the property of the company." Property is to be understood "in the widest sense." However, the commentary limits

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8 For a complete history of the umbrella clause, see A.C. Sinclair, *supra* note 2. Sinclair's research suggests that the origins can be traced to the advice provided by Sir Elihu Lauterpacht in 1953–54 to the Anglo-Iranian Oil Company in connection with the settlement of the Iranian oil nationalization dispute. The so-called "umbrella" or "parallel protection" treaty was again proposed in Lauterpacht's advice given in 1956–57 to a group of oil companies contemplating a trunk pipeline from Iraq in the Persian Gulf through Syria and Turkey to the Eastern Mediterranean.

9 *See* H.J. Abs, *Proposals for Improving the Protection of Private Foreign Investments*, *in* Institut International d'Etudes Bancaires (Rotterdam, 1958), as cited by A. Sinclair, *supra* note 2.

10 The text of the Abs-Shawcross Draft is *reprinted in* UNCTAD, *International Investment Instruments: A Compendium, in* V United Nations 395 (New York 2000).

11 Draft Convention on the Protection of Foreign Property and Resolution of the Council of the OECD on the Draft Convention, OECD Publication No 23081, November 1967.

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the scope of Article 2 by insisting that undertakings "must relate to the property concerned; it is not sufficient if the link is incidental." These undertakings may include "consensual" bargains as well as "unilateral engagements" by the host State.

The understanding of commentators and drafters on the umbrella clause provision at the time of the draft OECD Convention was that, while the clause probably did cover international obligations, its focus was contractual obligations accepted by the host State with regard to foreign property.[12]

Commenting on the same provision, Brower[13] raised the possibility that the article's scope *ratione materiae* may have been limited so as only "to apply specifically to large-scale investment and concession contracts—in the making of which the state is deliberately 'exercising its sovereignty'—and thus it might be argued that the ordinary commercial contracts are an implied exception to the general rule set forth in Article 2."

Wälde noted that contracts related to investment—at that time seen narrowly as "foreign direct investment"—did by their very nature always involve a governmental dimension. Treaties at that time also only provided for state-to-state arbitration which was a screening mechanism against exorbitant and gratuitous use of treaties by private commercial operators.[14]

The *Energy Charter Treaty*[15] takes a qualified approach to this. In the final sentence of Article 10(1), it requires that:

> Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.[16]

This is, however, accompanied by derogation provisions in Articles 26(3)(c) and 27(2) which allow the contracting parties to opt out of binding investor-state and state-to-state dispute settlement regarding the final sentence of Article 10(1) by listing

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12 *See* A. Sinclair, *supra* note 2.

13 C.N. Brower, *The Future of Foreign Investment—Recent Developments in the International Law of Expropriation and Compensation*, *in* PRIVATE INVESTORS ABROAD: PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1975, at 93, 105 n. 27 (V.S. Cameron ed., Southwestern Legal Foundation Symposium Series, Private Investors Abroad, Matthew Bender, New York, 1976), as cited by A. Sinclair, *supra* note 2. According to Sinclair, "there is nothing to indicate such a limitation *ratione materiae* in the text of either the OECD or Abs-Shawcross Drafts**.** It is true however, that the pressing general concern of the 1950s had been to protect the integrity of large concessions contracts from nationalization and abuse of governmental power and to ensure compensation for their expropriation."

14 T. Wälde, *The 'Umbrella' (or Sanctity of Contract/Pacta Sunt Servanda) Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases*, 1(4) TRANSNATIONAL DISPUTE MANAGEMENT, October 2004.

15 The Energy Charter Treaty was signed on December 17, 1994 and is available at http://www.encharter.org.

16 The accompanying Secretariat document defines the scope of the provision as follows: "Article 10(1) has the important effect that a breach of an individual investment contract by the host state country becomes a violation of the ECT. As a result, a foreign investor and its home country may invoke the dispute settlement mechanism of the Treaty," *The Energy Charter Treaty: A Reader's Guide*, June 2002, p. 26.

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themselves in Annex IA. Four ECT contracting parties have chosen to apply this derogation: Australia, Canada, Hungary, and Norway.

It is estimated that, of the approximately 2700 BITs currently in existence, about 40 percent contain an umbrella clause.[17] Treaty practice of States does not point to a uniform approach to these clauses. While Switzerland, the Netherlands, the United Kingdom, and Germany[18] often include umbrella clauses in their BITs, France, Australia, and Japan include umbrella clauses in only a minority of their BITs. The treaty practice of the United States has changed with the 2004 model BIT. While the majority of the U.S. BITs based on the former Model contained a broadly worded umbrella clause, the 2004 Model BIT does not but rather provides in its Article 24 (1) for the submission to dispute settlement of disputes arising from specific investment protection articles of the treaty as well as from an investment authorization or investment agreement but not from other contractual obligations. Further, in its Article 26, it requires that an investor opting for such arbitration waive "any right to initiate or continue before any administrative tribunal or court under the law of either Party or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 24 . . . ."

SIGNIFICANCE OF THE LANGUAGE OF THE UMBRELLA CLAUSE IN TREATIES

Although umbrella clauses have common features, there is a certain disparity in language leading to the question of the scope and effect of each particular clause, which must be interpreted according to its own terms. As James Crawford noted, there is no such thing such as "the" umbrella clause,[19] although when such clauses are identical or nearly identical, they should arguably be given similar meanings. As Crawford put it, arbitral tribunals' positions—particularly on the question of umbrella clauses—reflect a level of dissent that one may regard as disturbing: "the carpet looks very much as if different people have started from different ends without many common threads—a crazy quilt rather than a Persian rug."[20]

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17 *See* K. Yannaca-Small, *supra* note 2. Figure cited in Gill, Gearing and Birt, *Contractual Claims and Bilateral Investment Treaties: A Comparative Review of the SGS Cases* (2004), 21(5) J. Int. Arb. 397 n. 31.

18 The Model BIT, in its Article 1, provides for a detailed definition of an investment agreement:

> "[I]nvestment agreement" means a written agreement that takes effect on or after the date of entry into force of this Treaty between a national authority of a Party and a covered investment or an investor of the other Party that grants the covered investment or investor rights:
>
> (a) with respect to natural resources or other assets that a national authority controls; and
>
> (b) upon which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself.

19 *See* James Crawford, *Treaty and Contract in Investment Arbitration*, 24 Arb. Int'l (2008).

20 *Ibid.*

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In most of the BITs which contain an umbrella clause, the language is clear, straightforward, and unambiguous: "*shall observe"* or *"shall respect any obligation.*" An analysis of the ordinary meaning of a "proper" umbrella clause according to Article 31(1) of the Vienna Convention on the Law of Treaties[21] was given elucidation in the partial award rendered in *Eureko v. Poland*. The tribunal stated:

> 'The plain meaning—the 'ordinary meaning'—of a provision prescribing that a State 'shall observe any obligations it may have entered into' with regard to certain foreign investments is not obscure. The phrase 'shall observe' is imperative and categorical. 'Any' obligations is capacious; it means not only obligations of a certain type, but 'any'—that is to say, all—obligations entered into with regard to investments of investors of the other Contracting Party.[22]

In some other BITs, the language is, arguably, more ambiguous and may leave room for different interpretations. This is the case for instance with regard to the Switzerland-Pakistan BIT (the basis for the *SGS v. Pakistan* case), where each contracting Party "*shall constantly guarantee the observance of the commitments*," or the Italy-Jordan BIT, which was the basis for the *Salini v. Jordan* case, which provides that "[e]ach contracting Party *shall create and maintain in its territory a legal framework apt to guarantee to investors the continuity of legal treatment, including the compliance, in good faith, of all undertakings assumed with regard to each specific investor."* (emphasis added)

In *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*,[23] the claimant requested the tribunal to recognize that Article 2(4) of the Italy-Jordan BIT contained a commitment to observe obligations from investor-state contracts. The tribunal did not agree and found that the only obligation Jordan had was to "create and maintain a legal framework apt to guarantee the compliance of undertakings":

> . . . under Article 2(4), each Contracting Party did not commit itself to 'observe' any 'obligation' it had previously assumed with regard to specific investments of investors of the other contracting Party as did the Philippines. It did not even guarantee the observance of commitments it had entered into with respect to the investments of the investors of the other Contracting Parties as did Pakistan. It only committed itself to create and maintain a legal framework apt to guarantee the compliance of all undertakings assumed with regard to each specific investor.

Certain BITs provide greater specificity as to their scope of application by identifying more precisely the types of obligations covered by the clause, e.g., by referring to *"written obligations."*[24] Article 2 of the Austria-Chile BIT 1997 refers to *"contractual obligations."* The majority of BITs concluded by Mexico that contain an umbrella

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21 Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (1969), art. 31(1).

22 Eureko B.V. v. Poland, Partial Award, August 19, 2005, at para. 246.

23 Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kindgom of Jordan, ICSID Case No. ARB/02/13, Decision on Jurisdiction, November 29, 2004.

24 Australian BITs concluded with Chile, China, Papua New Guinea, and Poland.

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clause appear to qualify its scope of application, stating that *"disputes arising from such obligations shall be settled under the terms of the contract underlying the obligation."*[25]

Another element which was given some importance by some tribunals to limit the scope of the umbrella clause—but was dismissed or not referred to by others—is the placement of the umbrella clause within the framework of the bilateral investment treaty.[26] The tribunal in *SGS v Pakistan*[27] was of the opinion that the placement of the clause near the end of the Swiss-Pakistan BIT, in the same manner as the Swiss Model BIT, was indicative of an intention on the part of the Contracting Parties not to provide a substantive obligation. The tribunal considered that had the Contracting Parties intended to create a substantive obligation through the umbrella clause, it would logically have been placed alongside the other so-called "first order" obligations. The tribunal in *Joy Mining Machinery Limited v. The Arabic Republic of Egypt*[28] was of the same view on this point and stated that:

> . . . [i]n this context, it could not be held that an umbrella clause inserted in the treaty, and not very prominently, could have the effect of transforming all contract disputes into investment disputes under the Treaty . . .[29]

By contrast, the tribunal in *SGS v. Philippines*[30] opined that while the placement of the clause may be "entitled to some weight," it did not consider this factor as decisive. In this respect, the tribunal stated that "it is difficult to accept that the same language in other Philippines BITs is legally operative, but that it is legally inoperative in the Switzerland-Philippines BIT merely because of its location."[31]

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25 For instance, the Austria-Mexico BIT (1998).

26 The Netherlands Model BIT places the umbrella clause within an article detailing the substantive protections provided under the Treaty. This structure can also been seen in a number of BITs, including those concluded by the United Kingdom, New Zealand, Japan, Sweden, and the United States. By contrast, the Swiss Model BIT places the umbrella clause in a provision entitled "other commitments" and separates it from the substantive provisions by two dispute resolution clauses and a subrogation clause. The majority of BITs concluded by Switzerland follow this format; a notable exception, however, is the Switzerland-Kuwait BIT 1998, which places the umbrella clause in Article 3 on protection of investments. The Swiss Model BIT format is also found in the Finnish and Greek Model BITs and BITs concluded by Mexico. A third variant is to place the umbrella clause in a separate provision from the substantive protections but before the dispute resolution clauses. This structure can be seen in the German Model BITs, which place the umbrella clause in Article 8.

27 Société Générale de Surveillance S.A. v. Pakistan, ICSID Case No. ARB/01/13, Decision on Jurisdiction, August 6, 2003.

28 Joy Mining Machinery Limited v. The Arabic Republic of Egypt, Decision on Jurisdiction, ICSID Case No ARB/03/11, August 6, 2004.

29 *Ibid.*, para. 81.

30 SGS Société Générale de Surveillance SA v. The Republic of the Philippines, ICSID Case No. ARB/02/6, Decision on Jurisdiction, January 29, 2004.

31 *Ibid.*, para. 124.

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EFFECTS AND SCOPE OF THE UMBRELLA CLAUSE

As noted, the wording of the umbrella clauses is not always the same and such differences understandably lead to different interpretations. But even when the wording is the same, the lack of any textual and interpretative guidance in investment treaties on the function, effect, and scope of the umbrella clauses can allow for differences of interpretation. In the aftermath of the *SGS v. Pakistan* award, whose interpretation the Swiss government considered too narrow, the Swiss authorities issued a statement on their intent in including such a clause in the Switzerland-Pakistan BIT. It will no doubt provide guidance for future claims based on this particular BIT.[32] It remains, though, an isolated act, and no other government has as yet followed the Swiss example.

In the first discussions among scholars on the umbrella clause and also in the period which followed the two *SGS* decisions, the debate was essentially concentrated on the effects of the clause, in particular the questions of whether the clause elevates breaches of contract to breaches of treaty under international law or if it overrides a choice of forum in the agreement between an investor and the host State. More recently, it seems that the discussion is shifting to the scope, i.e., the conditions of application of the clause and in particular around the nature of obligations covered (*ratione materiae*) and the persons bound by the obligations triggering the umbrella clause (*ratione personae)*.

There seem to be two lines of jurisprudence with respect to both the effect and the conditions of application of the umbrella clause: the narrow interpretation, which restricts the function of the clause only to the breach of a certain type of obligations implicating sovereign conduct of the host State, and the broad interpretation, which

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32 After the publication of the decision, the Swiss authorities explained in a letter their intention when entering into the Switzerland-Pakistan BIT, as follows:

> ". . . the Swiss authorities are alarmed about the very narrow interpretation given to the meaning of Article 11 by the Tribunal, which not only runs counter to the intention of Switzerland when concluding the Treaty but is quite evidently neither supported by the meaning of similar articles in BITs concluded by other countries nor by academic comments on such provisions. . . .With regard to the meaning behind provisions such as Article 11 the following can be said: . . .They are intended to cover commitments that a host State has entered into with regard to specific investments of an investor, or investments of a specific investor, which played a significant role in the investor's decision to invest or to substantially change an existing investment, i.e. commitments which were of such a nature that the investor could rely on them . . . . It is furthermore the view of the Swiss authorities that a violation of a commitment of the kind described above should be subject to the dispute settlement procedures of the BIT."

Note on the Interpretation of Article 11 of the Bilateral Investment Treaty between Switzerland and Pakistan in the light of the Decision of the Tribunal on Objections to Jurisdiction of ICSID in this case, attached to the letter of the Swiss Secretariat for Economic Affairs to the ICSID Deputy Secretary General dated October 1, 2003, published in 19 MEALEY'S: INT'L ARB. REP. E3, February 2004, as referred to by E. Gaillard in *Investment Treaty Arbitration and Jurisdiction Over Contract Claims—the SGS Cases Considered*, *in* INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW (Todd Weiler ed., 2005), and *in* K. Yannaca-Small, OECD, *supra* note 2.

allows foreign investors to claim under the treaty for any breach of the host State's obligation, independent of the nature of the obligations and the nature of the breach.

The Effects of the Umbrella Clause

The main effects of the umbrella clause are its influence on the substantive obligations of the parties to an investment contract as well as on the forum selection clauses included in such an agreement. Although scholars have taken a somewhat similar approach, the tribunals have disagreed on these points.

According to A. Sinclair,[33] Elihu Lauterpacht was the first to mention the possibility "that a treaty can be used effectively to elevate a contract between an investor and a host state to the level of an interstate obligation." He held that: ". . . as proposed, the umbrella treaty would have two objects. The first would have been to ensure that *the settlement was lifted out of the domain of the Iranian legal system so that it would not be governed exclusively by Iranian law and therefore vulnerable to unilateral variation* . . . .[emphasis added].

In his Hague lecture, Prosper Weil presented the idea that an investment treaty would transform a mere contractual obligation between state and investor into an international law obligation, particularly if the treaty included a clause obliging the state to respect such contract.[34]

F. Mann also was of the view that the umbrella clause in the BITs protects the investor against a mere breach of contract:

> This is a provision of particular importance in that it protects the investor against any interference with his contractual rights, whether it results from a mere breach of contract or a legislative or administrative act, and independently of the question whether or not such interference amounts to expropriation. The variation of the terms of a contract or license by legislative measures, the termination of the contract or the failure to perform any of its terms, for instance, by non-payment, the dissolution of the local company with which the investor may have contracted and the transfer of its assets (with or without the liabilities)—these and similar acts the treaties render wrongful.[35]

33 *See* A. Sinclair, *supra* note 2.

34 « Il y a en effet, pas de difficultés particulières [en ce qui concerne la mise en jeu de la responsabilité contractuelle de l'Etat] lorsqu' il existe entre l'Etat contractant et l'Etat national du co-contractant un traité de ''couverture'' qui fait de l'obligation d'exécuter le contrat une obligation internationale à la charge de l'Etat contractant envers l'Etat national du cocontractant. L'intervention du traité de couverture transforme les obligations contractuelles en obligations internationales et assure ainsi, comme on l'a dit, ''l'intangibilité du contrat sous peine de violer le traité''; toute inexécution du contrat, serait-elle même régulière au regard du droit interne de l'Etat contractant, engage dès lors la responsabilité internationale de ce dernier envers l'Etat national du cocontractant » Recueil des Cours III 1969 pp. 132 et seq.

35 F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, 52 British Yearbook of International Law 241 (1981), St P. 246.

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I. Shihata, former Secretary-General of ICSID, also recognized that "treaties may furthermore elevate contractual undertakings into international law obligations, by stipulating that breach by one State of a contract with a private party from the other State will also constitute a breach of the treaty between the two States."[36]

Dolzer and Stevens along the same lines state that:

> these provisions seek to ensure that each Party to the treaty will respect specific undertakings towards nationals of the other Party. The provision is of particular importance because it protects the investor's contractual rights against any interference which might be caused by either a simple breach of contract or by administrative or legislative acts and because it is not entirely clear under general international law whether such measures constitute breaches of an international obligation.[37]

E. Gaillard notes that a historical examination of the origins of observance of undertakings clauses—"clauses with a mirror effect"—shows "in the clearest manner" that the intention of States negotiating and drafting such clauses is to permit a breach of contract to be effectively characterized as the breach of an international treaty obligation by the host State.[38] The effect of the clause is to reflect at the level of international law what is analyzed at the level of applicable private law as a simple contractual violation.[39]

C. Schreuer states that:

> Umbrella clauses have been added to some BITs to provide additional protection to investors beyond the traditional international standards. They are often referred to as 'umbrella clauses' because they put contractual commitments under the BIT's protective umbrella. They add the compliance with investment contracts, or other undertakings of the host State, to the BIT's substantive standards. In this way, a violation of such a contract becomes a violation of the BIT.[40]

A different view is expressed by P. Mayer, who maintains that the nature of the *inter pares* relationship remains unchanged and is subject to the *lex contractus* and that only the interstate relationship is subject to international law.[41]

A narrow interpretation. The first time an arbitral tribunal evaluated the effect of an umbrella clause was in the *SGS Société Générale de Surveillance, S.A. v. Pakistan*

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36 I. Shihata, *Applicable Law in International Arbitration: Specific Aspects in Case of the Involvement of State Parties*, *in* II The World Bank in a Changing World: Selected Essays and Lectures 601 (I.F.I. Shihata and J.D. Wolfensohn eds., Leiden, Netherlands, Brill Academic Publishers 1995).

37 R. Dolzer & M. Stevens, Bilateral Investment Treaties 81–82 (Kluwer Law 1995).

38 For a detailed discussion on all recent ICSID cases dealing with the umbrella clause, see E. Gaillard, Journal du Droit International 326–50, Clunet No. 1/2006 (Janvier-Février-Mars 2006)

39 E. Gaillard, *L'arbitrage sur le fondement des traités de protection des investissements*, Revue de l'Arbitrage 868 n.43.

40 C. Schreuer, *supra* note 2, pp. 231–56.

41 P. Mayer, « *La neutralisation du pouvoir normatif de l'Etat en matière de contrats d'Etat* », JDI 36–37, 1986.

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case,[42] based on the Pakistan-Switzerland BIT. The tribunal rejected SGS's contention that this clause elevated breaches of a contract to breaches of the treaty:

> The text itself of Article 11 does not purport to state that breaches of contract alleged by an investor in relation to a contract it has concluded with a State (widely considered to be a matter of municipal rather than international law) are automatically 'elevated' to the level of breaches of international treaty law.[43]

The tribunal added that "the legal consequences were so far-reaching in scope and so burdensome in their potential impact on the State" that "clear and convincing evidence of such an intention of the parties" would have to be proved. Such proof was not brought forward according to the tribunal.[44] It also argued that the Claimant's interpretation "would amount to incorporating by reference an unlimited number of state contracts" the violation of which "would be treated as a breach of the treaty."[45]

The tribunal in *Joy Mining Machinery Limited v. The Arabic Republic of Egypt*[46] interpreted the "umbrella clause" in a way similar to the *SGS v. Pakistan* tribunal, i.e., that the disputes at issue, which related to the release of bank guarantees, were commercial and contractual disputes to be settled through the mechanism set forth by contract. It held that:

> [i]n this context, it could not be held that an umbrella clause inserted in the treaty, and not very prominently, could have the effect of transforming all contract disputes into investment disputes under the Treaty, unless of course there would be a clear violation of Treaty rights and obligations or a violation of contract rights of such a magnitude as to trigger the Treaty protection, which is not the case. The connection between the Contract and the Treaty is the missing link that prevents any such effect. This might be perfectly different in other cases where that link is found to exist, but certainly it is not the case here.[47]

In *El Paso Energy International Company v. The Argentine Republic*,[48] the tribunal rejected the arguments advanced by the U.S.- based energy firm El Paso, which would

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

43 *Ibid.*, para. 166.

44 *Ibid.*, paras. 167 and 173.

45 *Ibid.*, para. 168.

46 *Joy Mining, supra* note 28. Joy Mining, a company incorporated under the laws of the United Kingdom, initiated an ICSID arbitration pursuant to the UK-Egypt BIT. The dispute concerned a "Contract for the Provision of Longwall Mining Systems and Supporting Equipment for the Abu Tartur Phosphate Mining Project", executed in April 1998 between Joy Mining and the General Organization for Industrial Projects of the Arab Republic of Egypt. The parties' disagreement related to performance tests of the equipment and to the release of guarantees. The Tribunal addressed the issue of whether bank guarantees may be considered to be an investment under the BIT. Noting that bank guarantees are simply contingent liabilities, the Tribunal concluded that they could not constitute assets under the BIT and were not protected investments.

47 *Ibid.*, para. 81.

48 El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, Decision on Jurisdiction, April 27, 2006.

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have permitted contractual breaches to be considered as breaches of the U.S.-Argentina BIT under the treaty's wide "proper" umbrella clause provision that "each Party shall observe any obligation it may have entered into with regard to investments."

The tribunal took issue with earlier arbitral tribunals and in particular the *SGS v. Philippines* one, which had held that ambiguities in investment treaty terms should be resolved in favor of foreign investors. Instead, the *El Paso* tribunal called for a balanced approach to investment treaty interpretation, one which takes into account "both State sovereignty and the State's responsibility to create an adapted and evolutionary framework for the development of economic activities, and the necessity to protect foreign investment and its continuing flow."[49] The tribunal went on to say that the broad interpretation of the so-called umbrella clause uses would have "far reaching consequences, quite destructive of the distinction between national legal orders and the international legal order." In addition, it expressed its conviction that the investors "will not use appropriate restraint—why should they? if the ICSID Tribunals offer them unexpected remedies. This responsibility for showing appropriate restraint rests rather in the hands of the ICSID Tribunals."[50]

In the case *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic,*[51] a tribunal presiding over a dispute brought by BP America and several subsidiaries of the energy firm Pan American, followed the approach laid down in the earlier *El Paso* arbitration. The tribunal, which included two of the three arbitrators of the *El Paso* tribunal, held that the contested provision in the U.S.-Argentina BIT could not be considered to be an "umbrella clause" which would transform contract claims into breaches of international law. It observed that:

> It would be strange indeed if the acceptance of a BIT entailed an international liability of the State going far beyond the obligation to respect the standards of protection of foreign investments embodied in the Treaty and rendered it liable for any violation of any commitment in national or international law 'with regard to investments.'[52]

A wide interpretation. Tribunals which opted for a wide interpretation often based their reasoning on the effort to give a useful meaning to the clause, in accordance to the principle *ut res magis valeat quam pereat*, or theory of "effet utile."

At the same time as the SGS brought the claim against Pakistan, it brought another case against the Philippines,[53] based on the Philippines-Switzerland BIT. The tribunal in this case examined the interpretation of the clause in the *SGS v. Pakistan* decision

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49 *Ibid.*, para. 70.

50 *Ibid.*, para. 82.

51 Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic, ICSID Case No. ARB/03/13, and BP America Production Co. and Others v. Argentine Republic, ICSID Case No. ARB/04/8, Decision on Preliminary Objections, July 27, 2006.

52 *Ibid.*, para. 110.

53 *SGS v. Philippines*, *supra* note 30.

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and although it recognized that the language of the clause was not the same, it found the decision unconvincing and highly restrictive[54] and concluded that:

> Article X(2) makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments. But it does not convert the issue of the extent or content of such obligations into an issue of international law.[55] . . . Article X(2) addresses not the scope of the commitments entered into with regard to specific investments but the performance of these obligations, once they are ascertained.[56]

The tribunal in *Sempra Energy International v. Argentina*[57] noted that the dispute arose from "how the violation of contractual commitments with the licensees [Sempra] . . . impacts the rights the investor claims to have in the light of the provisions of the treaty and the guarantees on the basis of which it made the protected investment."[58] It recognized that these contractual claims were also treaty claims and was reinforced in its view because of the fact that:

> the Treaty also includes the specific guarantee of a general 'umbrella clause,' [such as that of Article II(2)(c)], involving the obligation to observe contractual commitments concerning the investment, creates an even closer link between the contract, the context of the investment and the Treaty.[59]

In its partial award, the tribunal in *Eureko v. Poland*[60] pointed to the meaning of the umbrella clause[61] considering the principle of "effet utile":

> . . . It is a cardinal rule of the interpretation of treaties that each and every operative clause of a treaty is to be interpreted as meaningful rather than meaningless. It is equally well established in the jurisprudence of international law . . . that, treaties, and hence their clauses, are to be interpreted so as to render them effective rather than ineffective. It follows that the effect of Article 3.5 (umbrella clause) cannot be overlooked or equated with the Treaty's provisions for fair and equitable treatment, most favored nation treatment, deprivation of investments and full protection and security. On the contrary, Article 3.5 must be interpreted to mean something in itself.[62]

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54 *Ibid.*, paras. 119 and 120.

55 *Ibid.*, para. 128.

56 In both cases, see the analysis by E. Gaillard, *supra* note 32, C. Schreuer, T. Wälde and S. Alexandrov, *supra* note 2.

57 Sempra Energy International v. Republic of Argentina, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction, May 11,2005.

58 *Ibid.*, para. 100.

59 *Ibid.*, para. 101.

60 Eureko B.V. v. Poland, Partial Award, August 19, 2005.

61 The decision was taken by the majority of two arbitrators with the third arbitrator dissenting. In his dissenting opinion, Professor Jerzy Rajski, the third member of the arbitral tribunal, declared that the majority's jurisdictional reasoning—including its analysis of the umbrella clause—might "*lead to a privileged class of foreign parties to commercial contract who may easily transform their contractual disputes with State-owned companies into BIT disputes.*" Dissenting Opinion, para. 11.

62 *Ibid.*, paras. 248, 249.

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One analytical point in dispute before the tribunal in *Noble Ventures, Inc v. Romania*[63] was the question of whether contractual obligations also amounted to international obligations by virtue of the "umbrella clause" in the U.S.-Romania BIT. The tribunal, in a thorough discussion on this clause, in which it expressed its view on all previous decisions on this matter, found that Article II(2)(c) of the BIT intended to create obligations and "obviously obligations beyond those specified in other provisions of the BIT itself" and by doing so it referred clearly to investment contracts. It also noted that such an interpretation was also supported by the object and purpose rule:

> Considering, . . . that any other interpretation would deprive Article II(2)(c) of practical content, reference has necessarily to be made to the principle of effectiveness . . . An interpretation to the contrary would deprive the investor of any internationally secured legal remedy in respect of investment contracts that it has entered into with the host State. While it is not the purpose of investment treaties per se to remedy such problems, a clause that is readily capable of being interpreted in this way and which would otherwise be deprived of practical applicability is naturally to be understood as protecting investors also with regard to contracts with the host State generally in so far as the contract was entered into with regard to an investment.[64]

It added that, by the negotiation of a bilateral investment treaty, two States may create an exception to the general separation of States' obligations under municipal and under international law:

> [. . .] in the interest of achieving the objects and goals of the treaty, the host state may incur international responsibility by reason of a breach of its contractual obligation . . . the breach of contract being thus 'internationalized,' i.e. assimilated to a breach of a treaty. The "umbrella clause" introduces this exception.[65]

The tribunal in *LG&E v. Argentina*[66] was also called to examine the umbrella clause included in the U.S.-Argentine BIT. It characterized the umbrella clause as one which

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63 Noble Ventures, Inc v. Romania, ICSID Case No ARB/ 01/11, Award, October 12, 2005. The decision concerns a dispute between a U.S. company, Noble Ventures, Inc. (the claimant) and Romania arising out of a privatization agreement concerning the acquisition, management and operation of a Romanian steel mill, Combinatul Siderugic Resita (CSR) and other associated assets. The privatization agreement was entered into between the claimant and the Romanian State Ownership Fund (SOF). Noble Ventures paid SOF the initial installment of the purchase price and SOF transferred to Noble Ventures its shares of CSR, comprising almost all of CSR's equity share capital. Noble Ventures alleged, *inter alia*, that Romania failed to honor the terms of several agreements related to the control of CSR, that Romania misrepresented CSR's assets in the tender book prepared for the privatization, that Romania failed to carry out its obligation to negotiate debt rescheduling with state budgetary creditors in good faith, that Romania failed to provide full protection and security to its investment during a period of labor unrest in 2001, and that Romania's initiation of insolvency proceedings were in bad faith, in violation of fair and equitable treatment and tantamount to expropriation.

64 *Ibid.*, para. 52.

65 *Ibid.*

66 LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. The Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, October 3, 2006, paras. 169–75.

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"creates a requirement by the host State to meet its obligations towards foreign investors, including those that derive from a contract; hence such obligations receive extra protection by virtue of their consideration under the bilateral treaty."[67]

The tribunal in *Continental Casualty v. Argentina*[68] agreed with this statement and added that "the Parties provided in the BIT . . . for an additional guarantee to their investors, that is, 'to observe any obligation' that they have assumed specifically with regard to investments, irrespective of the law applicable to them."[69]

Two tribunals, although not confronted with an umbrella clause, expressed their views on the meaning of such a clause. In *Waste Management v. United Mexican States*,[70] the NAFTA tribunal expressed its view on the "umbrella clause" although NAFTA Chapter 11 does not contain such a clause. It observed that "NAFTA Chapter 11—unlike many bilateral and regional investment treaties, does not provide jurisdiction in respect of breaches of investment contracts such as [the Concession Agreement]. Nor does it contain an 'umbrella clause' committing the host state to comply with its contractual commitments."[71]

Along the same lines, the tribunal in *Consorzio Groupement L.E.S.I.-DIPENTA v. Republic of Algeria*,[72] although it acknowledged that the BIT between Italy and Algeria did not contain an umbrella clause, stated that "the effect of such clauses is to transform the violations of the State's contractual commitments into violations of the treaty umbrella clause and by this to give jurisdiction to the tribunal over the matter . . ."[73] [translation by the author].

Umbrella Clause and Forum Selection Clause

Although the *SGS v. Philippines* tribunal took a wider reading of the scope of the umbrella clause than the *SGS v. Pakistan* tribunal and found that it had jurisdiction over all claims, it decided that the contractual claim was not admissible. It held that, since the contract vested exclusive jurisdiction over disputes arising under its terms in another tribunal (domestic court or a contractual arbitral tribunal), that tribunal had the primary jurisdiction. The tribunal decided to suspend the proceedings indefinitely until

67 *Ibid.*, para. 170.

68 Continental Casualty v. The Argentine Republic, ICSID Case No. ARB/03/9, Award, September 5, 2008.

69 *Ibid.*, para. 299.

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

71 *Ibid.*, para. 73.

72 Consorzio Groupement L.E.S.I.-DIPENTA c. République algérienne démocratique et populaire, ICSID Case No. ARB/03/08, Award, January 10, 2005.

73 *Ibid.*, para. 25(ii). ". . .«Cette interprétation est confirmée *a contrario* par la rédaction que l'on trouve dans d'autres traités. Certains traités contiennent en effet ce qu'il est convenu d'appeler des clauses de respect des engagements ou '*umbrella clauses.*' Ces clauses ont pour effet de transformer les violations des engagements contractuels de l'Etat en violations de cette disposition du traité et, par là même, de donner compétence au tribunal arbitral mis en place en application du traité pour en connaître. ».

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the claimant got a judgment from the domestic courts and then return to it if he considered that such judgment was not satisfactory.

> In the Tribunal's view, the principle is one concerning the admissibility of the claim, not jurisdiction in the strict sense . . . .Thus the question is not whether the Tribunal has jurisdiction: unless otherwise expressly provided, treaty jurisdiction is not abrogated by contract. The question is whether a party should be allowed to rely on a contract as the basis of its claim when the contract itself refers that claim exclusively to another forum. In the Tribunal's view the answer is that it should not be allowed to do so, unless there are good reasons, such as force majeure, preventing the claimant from complying with its contract . . .[74]

The tribunal in *Toto v. Lebanon*[75] held the view that "umbrella clauses may form the basis for treaty claims, without transforming contractual claims into treaty claims" and citing Prof. Crawford's analysis on the different views surrounding an umbrella clause, agreed with the following[76]:

> Finally, there is the view that an umbrella clause is operative and may form the basis for a substantive treaty claim, but that it does not convert a contractual claim into a treaty claim. On the one hand it provides, or at least may provide, a basis for a treaty claim even if the BIT in question contains not generic claims clause; on the other hand, the umbrella clause does not change the proper law of the contract or its legal incidents, including provisions for dispute settlement.[77]

It finally concluded that:

> Although Article 9.2 of the Treaty [the observance of obligations clause] may be used as a mechanism for the enforcement of claims, it does not elevate pure contractual claims into treaty claims. The contractual claims remain based upon the contract; they are governed by the law of the contract and may be affected by the other provisions of the contract. In the case at hand that implies that they remain subject to the contractual jurisdiction clause and have to be submitted exclusively to the Lebanese courts for settlement. Because of this jurisdiction clause in favor of Lebanese courts, the Tribunal has no jurisdiction over the contractual claims arising from the contract referring disputes to Lebanese courts.[78]

Other tribunals have not followed the same approach. In *Eureko v. Poland*, for instance, the tribunal accepted its jurisdiction based on an umbrella clause for a dispute

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74 *SGS v. Philippines*, Decision on Jurisdiction, para. 154. This decision generated a dissenting opinion by a member of the tribunal, Prof. Crivellaro: ". . . SGS's claim seemed to me fully admissible before our Tribunal, without first being processed before the domestic courts as to *quantum* matters. If our jurisdiction derives from (also) Article X(2) as unanimously admitted, I see no reason why our Tribunal could not deal with and decide on the merits of the payment claim, including *quantum*, after proper examination of either party's future arguments and defenses." Paras. 178 and following.

75 Toto Costruzioni Generali S.p.A. v. Republic of Lebanon, ICSID Case No. ARB/07/12, Decision on Jurisdiction, September 11, 2009.

76 *Ibid.*, para. 200.

77 *See* Prof. Crawford, *supra* note 19, pp. 351–74.

78 *Toto v. Lebanon*, para. 202.

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about the breach of an investor-state agreement relating to the privatization of a state-owned insurance company, although the agreement contained a forum selection clause in favor of Polish courts. It reasoned that, since the violation of the umbrella clause constituted a cause of action based on a treaty, the forum selection in a contract could not exclude treaty-based arbitration.[79] Also, in *Noble Ventures v. Romania*, despite the existence of a forum selection clause, the tribunal accepted jurisdiction over the alleged breach of an investment agreement.

The Scope of the Umbrella Clause or the Conditions of its Application

The main elements of the discussion of the scope of the umbrella clause among scholars and in the decisions of the arbitral tribunals are the character of the government behavior, the nature of obligations covered, and the persons bound by the obligations triggering the umbrella clause.

Jure imperii v. jure gestionis. Different views have been expressed about the character of government behavior covered by an umbrella clause: breaches which are conduct based on the role of the state as sovereign (*jure imperii)* v. breaches of purely commercial conduct (*jure gestionis*).

Wälde expressed the view that the principle of international law would only protect breaches and interference with contracts made with government or subject to government powers, if the government exercised its particular sovereign prerogatives to escape from its contractual commitments or to interfere in a substantial way with such commitments. This would apply as well to contracts concluded only with private parties in the host State if such contracts are destroyed by government powers. ". . . If the core or centre of gravity of a dispute is not about the exercise of governmental powers . . . but about "normal" contract disputes, then the BIT and the umbrella clause has no role."[80]

This distinction, however, generally does not appear in the text of umbrella clauses. It has been made by certain tribunals in an effort to diminish the potentially broad effects of the clause and avoid an abuse of investment arbitration for the purpose of enforcing mere contract claims—"even the most minor ones," as the tribunal in *El Paso v. Argentina* put it. That tribunal explained its view as follows:

> In view of the necessity to distinguish the State as a merchant, especially when it acts through instrumentalities, from the States as a sovereign, the Tribunal considers that the "umbrella clause" in the Argentine-US BIT . . . can be interpreted in the light of Article VII(1) which clearly includes among the investment disputes under the Treaty all disputes resulting from a violation of a commitment given by the State as a sovereign State, either through an agreement, an authorization, or the BIT . . . .Interpreted this way, the umbrella clause read in conjunction with

79 *Eureko v. Poland*, paras. 92–114, 250.

80 *See* T. Wälde, *supra* note 14, notes 1 and 19.

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> Article VII, will not extend the Treaty protection to breaches of an ordinary commercial contract entered into by the State or a State-owned entity, but will cover additional investment protections contractually agreed by the State as a sovereign—such as a stabilization clause—inserted in an investment agreement.[81]

Along the same lines, the tribunal in *Sempra Energy v. Argentina*[82] was of the view that:

> the decisions dealing with the issue of the umbrella clause and the role of contracts in a Treaty context have all distinguished breaches of contract from Treaty breaches on the basis of whether the breach has arisen from the conduct of an ordinary contract party, or rather involves a kind of conduct that only a sovereign State function or power could effect.[83]

The tribunal in *CMS Gas Transmission Company v. Republic of Argentina*,[84] in its final award, found Argentina internationally responsible pursuant to the umbrella clause contained in the Article II(2)(c) of the U.S.-Argentina BIT. It expressed, however, the view that the application of this "proper" umbrella clause was restricted to contracts concluded between an investor and the State acting as sovereign:

> The standard of protection of the treaty will be engaged only when there is a specific breach of treaty rights and obligations or a violation of contract rights protected under the treaty. Purely commercial aspects of a contract might not be protected by the treaty in some situations, but the protection is likely to be available when there is significant interference by governments or public agencies with the rights of the investor.[85]

These findings were criticized by commentators and other tribunals because they have been seen to disregard the fact that the substantive rights included in the treaty (fair and equitable treatment, expropriation, nondiscrimination) already concern obligations of the host State which are not otherwise dealt with in investor-state contracts. In this case, if the umbrella clause were to apply only to sovereign conduct, it would have been superfluous. In addition, a broad interpretation of umbrella clauses that allows bringing "every commercial dispute under investment arbitration" does not likely seem to apply since not all commercial disputes of an investor or investment will themselves be related to investment, as umbrella clauses generally require. Moreover, the scope of applicability of the investment treaty is limited under the ICSID Convention to investment-related contracts.

Several tribunals rejected this distinction and, although most cases involved sovereign conduct, this was not considered an imperative requirement. The tribunal in

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81 *El Paso Energy International Company v. Argentina*, para. 81.

82 Sempra Energy International v. Republic of Argentina, ICSID Case No. ARB/02/16, Award, September 28, 2007.

83 *Ibid.*, para. 310.

84 CMS Gas Transmission Company v. Republic of Argentina, ICSID Case No. ARB/01/8, Award, May 12, 2005.

85 *Ibid.*, para. 299.

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Eureko v. Poland asserted that international law does not recognize the distinction between State action and commercial activity engaged in by an organ of the State.[86] The tribunals in *Noble Ventures v. Romania, Duke Energy Partners* and *Electroquil S.A. v. Republic of Ecuador*, equally did not agree that a distinction should be made between governmental acts and commercial acts of the host State with respect to the application of the umbrella clause.

Contractual Commitments v. Legislative and Administrative Acts Textual differences can be seen between umbrella clauses that refer to "*commitments*"[87] or "*any obligation.*"[88] While some umbrella clauses refer to obligations "*entered into*"[89] by a State, others refer to obligations "*assumed*"[90] by the State. These variations raise the question whether the obligation referred to is a contractual obligation between the State and the investor or whether it could extend to unilateral obligations undertaken by the State through, *inter alia*, promises, legislative acts, or administrative measures. It has been suggested that the words "*obligations entered into*" may be interpreted as confining the obligations in question to those undertaken *vis-à-vis* the other Contracting Party.[91] However, the tribunal in *SGS v Pakistan* found the language "*commitments entered into*" broad enough to encompass unilateral obligations, including municipal acts and administrative measures.[92]

There is sufficient authority in support of the position that the plain text of the umbrella clause—"any obligation" and "commitments"—does not restrict its application to contractual undertakings and may encompass specific promises that the host State made, in its national legislation, for instance. It is argued that, as long as the administrative or legislative promise was the main reason the investment was made and intended to induce such investment, it should be qualified as commitment for the application of the umbrella clause and that the commitment should be specific enough[93] to serve as a "functional substitute" for an investor-state contract.[94]

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86 *Eureko v. Poland*, para. 130. On this point it quoted Professor J. Crawford as Special Rapporteur on State Responsibility of the International Law Commission: "It is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as 'commercial' or as 'act jure gestionis.'"

87 Article 7(2) of Belgium/Luxembourg-Saudi Arabia BIT (2002).

88 Article 11(2) of the Greek Model BIT (2001).

89 Article 2 of the UK Model BIT.

90 UK-Lebanon BIT 1999, Article 10, Other obligations.

91 *See* W. Ben Hamida, *supra* note 2.

92 *SGS v. Pakistan*, paras. 163–66.

93 *See* F.A. Mann, *supra* note 35: "the provision only covers an obligation arising from a particular commitment either of the Contracting Parties may have entered into . . . Such obligations may arise from contract with the State or from the terms of the license granted by it. It may be express or implied, it may be in writing or oral. But it must clearly be ascertainable as an obligation of the State itself arising from its own commitments." It follows therefore that "where the contract is made with a private person, then the provision only applies if and in so far as an obligation of the State arising from its own particular commitment (as opposed to existing general legislation) may be discerned."

94 *See* S. Schill, *supra* note 2.

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Along these lines, the tribunal in *SGS v. Philippines* held that:

> For [the umbrella clause] to be applicable, the host State must have assumed a legal obligation, and it must have been assumed vis-à-vis the specific investment—not as a matter of the application of some legal obligation of a general character.[95]

Similarly, according to the *ad hoc* Committee in *CMS v. Argentina*, the umbrella clause covers only consensual and specific obligations:

> In speaking of 'any obligations it may have *entered into* with regard to investments' it seems clear that [the umbrella clause] is concerned with consensual obligations arising independently from the BIT itself (i.e. under the law of the host State or possibly international law). Further, they must be specific obligations concerning the investment. They do not cover general requirements imposed by the law of the host State.[96]

The *Eureko v. Poland* tribunal was of the view that even legislative undertakings would be covered by the umbrella clause. Similarly, the *Enron v. Argentina* tribunal stated:

> Under its ordinary meaning the phrase 'any obligation' refers to obligations regardless of their nature. Tribunals interpreting this expression have found it to cover both contractual obligations such as payment as well as obligations assumed through law or regulation.[97]

The tribunal in *LG&E v. Argentina* went even further in considering the failure to observe undertakings of a unilateral nature as a violation of the umbrella clause. It had to decide whether the abrogation of the guarantees under the statutory framework (Gas Law)—calculation of the tariffs in dollars before conversion to pesos, semiannual tariff adjustments and no price controls without indemnification—violated Argentina's obligations to LG&E's investments. It concluded in the positive, expressing the view that the provisions of the Gas Law obligations were not legal obligations of a general nature but were very specific in relation to LG&E's investment in Argentina. It stated that:

> Argentina made these specific obligations to foreign investors, such as LG&E, by enacting the Gas Law and other regulations, and then advertising these guarantees in the Offering Memorandum to induce the entry of foreign capital to fund the privatization program in its public service sector. These laws and regulations became obligations within the meaning of Article II(2)(c), by virtue of targeting foreign investors and applying specifically to their investments, that gave rise to liability under the Umbrella Clause.[98]

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95 *SGS v. Philippines*, para. 121.

96 CMS Gas Transmission Company v. The Argentine Republic, ICSID Case No. ARB/01/8, Annulment Decision, September 25, 2007, para. 95 (a).

97 *Enron v. Argentina*, para. 274.

98 *LG&E v. Argentina*, paras. 174–75.

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Along the same lines, in *Sempra Energy v. Argentina*, the tribunal considered that:

> . . . specific obligations undertaken not to freeze the tariffs or subject them to price controls, to compensate for any resulting differences if such actions were in fact taken, and not to amend the License without the licensee's consent are among the obligations that typically come under the protection of the umbrella clause.[99]

Does the Umbrella Clause Apply if the Party to the Investment Contract Is an Entity Distinct from the Host State?. If there is a provision in the treaty which specifically makes it an obligation for the sub-State entities to respect the obligations of the host State, such as the Energy Charter Treaty Article 22(1),[100] then a breach by these entities of their obligations *vis-à-vis* foreign investments may engage the State itself. However, in *Amto v. Ukraine*,[101] where the contractual obligations *vis-à-vis Amto* were undertaken by a separate state entity, wholly owned by Ukraine but not Ukraine itself, the tribunal decided that the umbrella clause had no application.[102] In considering the possible application of the umbrella clause in conjunction with Article 22(1), it held that:

> Article 22 does not go so far as to impose liability on the State in the event that a state-owned legal entity does not discharge its contractual obligations in relation to an 'Investment', i.e. a subsidiary of the foreign investor. Rather, it imposes on the state a general obligation to 'ensure' that state-owned entities conduct activities which, in general terms of governance, management and organization, make them capable of observing the obligations specified under Part III of the ECT. It does not constitute an obligation of the state to assume liability for any failing of a state-owned legal entity to discharge a commercial debt in a given instance.[103]

If there is no such a specific wording in the text of the investment agreement, it would be more difficult for a tribunal to retain jurisdiction. This was the case in *Impregilo v. Pakistan*.[104] Impregilo started arbitration based on the Italy-Pakistan BIT, which did not include an umbrella clause but by applying the MFN clause sought to import the umbrella clause from the Switzerland-Pakistan BIT. The tribunal held that a precondition for invoking an umbrella clause in order to raise contract claims in a treaty arbitration is that the host State itself be a contracting party to the contract at stake. In that case, it was a separate entity (the Pakistan Water and Power Development

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99 *Sempra Energy v. Argentina*, para. 313.

100 Article 22(1) of the ECT provides: Each Contracting Party shall ensure that any state enterprise which it maintains or establishes shall conduct its activities in relation to the sale or provision of goods and services in its Area in a manner consistent with the Contracting Party's obligations under Part III of this Treaty.

101 Limited Liability Company Amto v. Ukraine, SCC Case No. 080/2005, Final Award, March 26, 2008.

102 *Ibid.*, para. 110.

103 *Ibid.*, paras. 111, 112.

104 Impregilo S.p.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/3, Decision on Jurisdiction, April 22, 2005.

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Authority), not the State, which had entered into an agreement with the investor. The tribunal stated:

> In the Tribunal's view, given that the contracts were conducted by Impregilo with WPDA, and not with Pakistan, Impregilo's reliance upon Article 3 of the BIT takes the matter no further. Even assuming *arguendo* that Pakistan, through the MFN clause and the Swiss-Pakistan BIT has guaranteed the observance of the contractual commitments into which it has entered together with Italian investors, such a guarantee would not cover the present Contracts—since these are agreements into which it has not entered. On the contrary, the contracts were concluded by a separate and distinct entity.[105]

The same approach was taken in *Azurix v. Argentina.*[106] The case concerned a local subsidiary of the U.S. investor, Azurix, ABA, which had been entered into a concession for the distribution of water in the Province of Buenos Aires. Azurix brought a claim under the U.S.-Argentina BIT because of measures taken by the Province and claimed that the umbrella clause has been breached by Argentina itself. The tribunal found that:

> . . . . none of the contractual claims as such refer to a contract between the parties to these proceedings; neither the Province nor ABA are parties to them. While Azurix may submit a claim under the BIT for breaches by Argentina there is no undertaking to be honored by Argentina to Azurix other than the obligations under the BIT. Even if for argument's sake it would be possible under [the umbrella clause] to hold Argentina responsible for the alleged breaches of the Concession Agreement by the Province, it was ABA and not Azurix which was party to the Agreement.[107]

A different approach was followed by the tribunal in *Noble Ventures v. Romania*. In this case, Noble Ventures, a U.S. investor, entered into an agreement between two Romanian agencies, with separate personality from the State. The tribunal examined the question of attribution in order to determine whether, *inter alia*, the umbrella clause could be invoked in the case where agencies of the State and not the State itself entered into an investment agreement:

> . . . Both entities were clearly charged with representing the Respondents in the process of privatizing State-owned companies and, for that purpose, entering into privatization agreements and related contracts on behalf of the Respondent. Therefore, the Tribunal cannot do otherwise than conclude that the respective contracts, in particular the SPA, were concluded on behalf of the Respondent and are therefore attributable to the Respondent for the purposes of [the umbrella clause].[108]

105 *Ibid.*, para. 223.

106 Azurix v. Argentine Republic, ICSID Case No. ARB/01/12, Award, July 14, 2006.

107 *Ibid.*, para. 384.

108 *Noble Ventures v. Romania*, para. 86.

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Rights of Shareholders and Parent Companies to Claim Breaches of the Umbrella Clause for Obligations Concerning Their Subsidiaries. The Energy Charter Treaty's Reader's Guide gives guidance on the application of the umbrella clause to contracts entered into by a subsidiary of the foreign investor and remains to date the only interpretation as to the extent of the umbrella clause's application with respect to this aspect of *ratione personae*. It states:

> According to Article 10(1), last sentence, each [Contracting Party] shall observe any obligations it has entered into with an investor or an investment of any other [Contracting Party]. This provision covers any contract that a host country has concluded with a subsidiary of the foreign investor in the host country, or a contract between the host country and the parent company of the subsidiary.[109]

However, divergent views come out of jurisprudence emanating from BITs. Two tribunals, *Azurix v. Argentina* and *Siemens v. Argentina*, decided that contract-based claims under umbrella clauses belong only to the contracting party, and the clause does not confer the same rights to shareholders or parent companies.

In *Azurix v. Argentina*, where it was not Azurix itself but its subsidiary, ABA, which had entered a concession agreement with the Province of Buenos Aires, the tribunal held that:

> Even if for argument's sake it would be possible under [the umbrella clause] to hold Argentina responsible for the alleged breaches of the Concession Agreement by the Province, it was ABA and not Azurix which was party to the Agreement.[110]

In *Siemens v. Argentina*, the tribunal agreed with the *Azurix* tribunal that a parent company cannot claim under the umbrella clause for the breach of a contractual obligation owed to its subsidiary:

> Whether an arbitral tribunal is the tribunal which has jurisdiction to consider that breach [of the umbrella clause] or whether it should be considered by tribunals of the host State of the investor is a matter that this Tribunal does not need to enter. The Claimant is not a party to the Contract and SITS is not a party to these proceedings.[111]

Other tribunals took a different view and based their reasoning on the fact that the umbrella clause of the BITs in question applied to "investments" and not to "investors." Of course, the importance of the language in the treaty is crucial in this regard.

In *CMS v. Argentina*, the tribunal held that CMS could base its claim on the application of the umbrella clause despite the fact that CMS was not a party to the license but rather an indirect minority shareholder of the Argentine company that signed the license. This interpretation, however, was not upheld by the CMS *ad hoc* Committee and constituted the basis for partial annulment of the award. The *ad hoc* Committee suggested "major difficulties" with any holding that the umbrella clause protected CMS from alteration of legal provisions affecting TCN (its subsidiary) but to which

109 *The Energy Charter Treaty, A Reader's Guide*, p. 26.

110 *Azurix v. Argentina*, para. 384.

111 Siemens v. Argentina, ICSID Case No. ARB/02/8, Award, February 6, 2007, para. 204.

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CMS was not a party. In its view, the umbrella clause covered only obligations between the State and the Claimant:

> (b) Consensual obligations are not entered into *erga omnes* but with regard to particular persons. Similarly, the performance of such obligations or requirements occurs with regard to, and as between, obligor and obligee.
>
> (c) The effect of the umbrella clause is not to transform the obligation which is relied on into something else; the content of the obligation is unaffected, as its proper law. If this is so, it would appear that the parties to the obligation (i.e., the persons bound by it and entitled to rely on it) are likewise not changed by reason of the umbrella clause.[112]

The tribunal in *Continental Casualty v. Argentina* agreed with the *CMS* tribunal but also with the *LG&E* and *Enron* tribunals and held that:

> The covered obligations must have been entered 'with regard to' investments. Thus they must concern one or more investments and, moreover, must address them with some degree of specificity. They are not limited to obligations based on a contract. Finally, provided that these obligations have been entered "with regard" to investments, they may have been entered with persons or entities other than foreign investors themselves, so that an undertaking by the host State with a subsidiary such as CNA is not in principle excluded.[113]

CONCLUSION

The umbrella clause has been a feature of investment agreements since the 1950s. It has been a regular, although not omnipresent, feature of bilateral investment treaties. For a number of years, it had only retained the attention of scholars who, in their majority, considered it as a clause elevating contractual obligations to treaty obligations. No arbitral tribunal considered the issue until the *SGS v. Pakistan* and *SGS v. Philippines* cases. Since then, it has attracted considerable discussions by both arbitral tribunals and scholars.

There is diversity in the way the umbrella clause is formulated in investment agreements. Because of this diversity, the proper interpretation of the clause depends on the specific wording of the particular treaty, its ordinary meaning, its context, and the object and purpose of the treaty, as well on negotiating history or other indications of the parties' intent. The review of the language of this clause included in a representative sample of treaties indicates that, although there are some disparities, the ordinary meaning of "*shall observe*" "*any commitments/obligations*" seems to point toward an inclusive, wide interpretation which would cover all obligations assumed/entered into by the contracting States, including contracts, unless otherwise stated. A different wording such as "*shall guarantee the observance*" or "*shall maintain a legal framework apt to guarantee the continuity of legal treatment*" might lead to a narrower interpretation.

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112 *CMS v. Argentina*, Decision on Annulment, para. 95.

113 *Continental Casualty v. Argentina*, para. 297.

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In the first discussions among scholars on the umbrella clause and also in the period which followed the two *SGS* decisions, the debate was essentially concentrated on the effects of the clause, in particular the questions of whether the clause elevates breaches of contract to breaches of treaty under international law or if it overrides a choice of forum in the agreement between an investor and the host State. More recently, the discussion has been shifting to the scope, i.e., conditions of applications of the clause and in particular the nature of obligations covered (*ratione materiae*) and the persons bound by the obligations triggering the umbrella clause (*ratione personae)*.

In addition to the discussions among scholars, arbitral tribunals have been called to decide on whether or not and under what circumstances an investor may refer a dispute to investment arbitration by relying on an umbrella clause in a BIT. They have reached different conclusions in particular with respect to the effect of the umbrella clause and its scope, i.e., does it transform all or only certain kinds of contract claims into treaty claims; does it cover obligations only undertaken by the state or also by other entities under state control; and does it cover only specific obligations concerning the investment or include general requirements imposed by law? The results vary, and prudence requires recognition that no general conclusions can be drawn. The jurisprudence on the interpretation of the clause is constantly evolving and case-by-case consideration which may shed additional light will continue to be called for.

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PART V

Remedies

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Chapter 20

Interim Relief in International Investment Agreements

*Gabrielle Kaufmann-Kohler and Aurélia Antonietti**

Arbitration rules applicable in the context of investor-state disputes usually provide that arbitral tribunals may grant interim relief under certain conditions. This chapter will review the requirements for a party to obtain interim relief from an arbitral tribunal, the measures that can be ordered, their nature, and effects. It will also consider whether the parties to the dispute can seek interim relief from domestic courts rather than from the arbitral tribunal.

A vast majority of investor-state arbitrations are initiated today on the basis of an investment arbitration agreement (IAA), either a bilateral investment treaty (BIT) or a multilateral investment treaty (MIT), such as the North American Free Trade Agreement (NAFTA). These arbitrations are most often governed by the Arbitration Rules of ICSID, the ICSID Additional Facility, or UNCITRAL. Some BITs or MITs also refer to arbitration under the auspices of the Stockholm Chamber of Commerce (SCC) or the International Chamber of Commerce (ICC). This chapter will exclusively focus on interim measures in the context of proceedings governed by the ICSID Arbitration Rules, the ICSID Additional Facility Arbitration Rules (both referred to as the ICSID system), and the UNCITRAL Arbitration Rules, because these are the arbitration rules most commonly used in the context of investor-state disputes.[1]

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* Gabrielle Kaufmann-Kohler is a professor at Geneva University and a partner at Lévy Kaufmann-Kohler. Aurélia Antonietti was an associate at Lévy Kaufmann-Kohler and is a former ICSID Counsel.

1 The majority of the decisions on interim relief in the context of investor-state disputes that have been made public are Iran-U.S. Claims Tribunal decisions or ICSID decisions, other decisions rarely being in the public domain. Unless otherwise stated, all the ICSID decisions or orders quoted in this chapter are available on the ICSID Website or on the ITA Website.

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THE POWER TO GRANT INTERIM RELIEF

The power of an arbitral tribunal to grant interim relief[2] is to be sought in the legal rules that govern each proceeding.

Interim Relief in the ICSID System

ICSID Convention cases. For proceedings that are governed by the ICSID Convention, provisions on interim relief are to be found both in the ICSID Convention and in the ICSID Arbitration Rules.

Article 47 of the ICSID Convention allows an arbitral tribunal to recommend provisional measures. It reads:

> Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.

This Article, said to have been directly inspired by Article 41 of the Statute of the International Court of Justice (ICJ),[3] makes clear that the parties can agree not to allow the tribunal the power to grant interim relief or can restrict such power (see below for an example under NAFTA).

More details are found in ICSID Arbitration Rule 39 on Provisional Measures, which reads:

> (1) At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.

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2 This chapter will refer to interim relief as a general expression encompassing both the "provisional measures" of the ICSID system and the "interim measures" of the UNCITRAL Rules. When addressing each particular set of rules, the chapter will refer to the designated terms.

3 Christoph Schreuer with Loretta Malintoppi, August Reinisch and Anthony Sinclair, The ICSID Convention: A Commentary, Article 47, para. 1 (Cambridge 2nd ed. 2009) [hereinafter Schreuer et al.]. See also Victor Pey Casado and Presidente Allende Foundation v. Republic of Chile, ICSID Case No ARB/98/2, Decision on Provisional Measures, September 25, 2001, para. 2, French and Spanish original, English translation in 6 ICSID Reports 2004, p. 375 [hereinafter *Pey Casado*]. Article 41 of the Statute of the Court reads: "1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party. 2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council." Article 41 is completed by Articles 73 to 78 of the 1978 Rules of Court. See generally The Statute of the International Court of Justice, A Commentary, Article 41, p. 923ff. (A. Zimmermann, C. Tomuschat, K. Oellers-Frahm eds., OUP 2006) [hereinafter Zimmermann et al.] and Shabtai Rosenne, Provisional Measures in International Law, The International Court of Justice and the International Tribunal for the Law of the Sea (OUP 2005) [hereinafter S. Rosenne].

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(2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).

(3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.

(4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.

(5) If a party makes a request pursuant to paragraph (1) before the constitution of the Tribunal, the Secretary-General shall, on the application of either party, fix time limits for the parties to present observations on the request, so that the request and observations may be considered by the Tribunal promptly upon its constitution.

(6) Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests.

Arbitration Rule 39 was last modified in April 2006 with the introduction of paragraph 5.[4] It had previously been amended in 1984 when the current paragraph 6 (formerly Article 39(5)) was added.

Additional Facility cases. Cases which fall outside of the scope of the ICSID Convention can be administered by the Centre under the Additional Facility (AF) Rules under certain conditions set forth in Article 4 of those rules. Interim relief in AF proceedings is governed by Article 46 of the AF Arbitration Rules, which contains a provision similar but not identical to ICSID Arbitration Rule 39. Article 46 reads:

(1) Unless the arbitration agreement otherwise provides, either party may at any time during the proceeding request that provisional measures for the preservation of its rights be ordered by the Tribunal. The Tribunal shall give priority to the consideration of such a request.

(2) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.

(3) The Tribunal shall order or recommend provisional measures, or any modification or revocation thereof, only after giving each party an opportunity of presenting its observations.

(4) The parties may apply to any competent judicial authority for interim or conservatory measures. By doing so they shall not be held to infringe the agreement to arbitrate or to affect the powers of the Tribunal.

The tribunal's power under the AF Arbitration Rules is also subject to potential restrictions agreed by the parties. Generally speaking and except for differences that will specifically be mentioned in the following discussion, the regime of interim relief

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4 Aurélia Antonietti, *The 2006 Amendments of the ICSID Rules and Regulations*, 21 ICSID Rev.–FILJ (2006).

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under the AF Arbitration Rules follows the regime of the ICSID Arbitration Rules. For example, in the case of *Metalclad v. Mexico*, governed by the AF Rules and AF Arbitration Rules, the tribunal considered that the reasoning applicable under Article 47 of the ICSID Convention was relevant in the context of these AF proceedings and, more particularly, said that it was "no less applicable to the wording of Article 1134 of the NAFTA."[5]

The powers of a tribunal under the AF Rules are subject to mandatory rules of the law of the seat of arbitration since the AF Arbitration Rules, pursuant to their Article 1, will not apply when "in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate."

Interim Relief Under the UNCITRAL Arbitration Rules

The original 1976 UNCITRAL Arbitration Rules are currently undergoing a significant revision, following the 2006 revision of the 1985 UNCITRAL Model Law. The 2006 revision replaced former Article 17 on interim measures with a new Chapter IV bis, establishing a comprehensive legal regime on interim measures in support of arbitration. The UNCITRAL Working Group on Arbitration and Conciliation had drafted a revised version of the interim measures provision of the UNCITRAL Arbitration Rules, Article 26.[6] At the time of the finalization of this chapter, the Working Group had not adopted the second version of Article 26.[7] The present chapter

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5 Metalclad Corporation v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Decision on a request by the respondent for an order prohibiting the claimant from revealing information regarding ICSID Case No. ARB(AF)/97/1, October 27, 1997, para. 8, http://www.economia.gob.mx/work/snci/negociaciones/Controversias/Casos_Mexico/Metalclad/decision/decision_interlocutoria.pdf [hereinafter *Metalclad*].

6 The Working Group considered that the UNCITRAL Arbitration Rules were to be harmonized with the corresponding provisions of the Model Law only where appropriate and not as a matter of course (Report of Working Group II (Arbitration and Conciliation) on the work of its 45th Session, September 11–15, 2006, Vienna, A/CN.9/614, para. 104). Although it was generally of the view that a revision of Article 26 was needed to take into account the new provisions of the Model Law, the view was also expressed that the controversial provisions of Chapter IV should not be included in the Arbitration Rules, in order not to endanger their acceptability (*ibid.*). Subsequently, the Working Group met in New York in February 2007, in Vienna in September 2007, in New York in February 2008 for its 48th Session (see Report A/CN.9/646), in Vienna on September 15–19, 2008 for its 49th Session where it considered the revised version of Articles 1 to 17 (see Note A/CN.9/WG.II/WP.151,Note A/CN.9/WG.II/WP.151/Add.1, Note A/CN.9/WG.II/WP.154 and Report A/CN.9/665) and in New York on February 9–13, 2009 for its 50th Session where it considered the second reading of the draft version of Articles 18 to 26 (see Report A/CN.9/669). It then met in Vienna from September 14–18, 2009 for its 51th Session for the second reading of the draft version of Articles 27 to 39 (annotated provisional agenda, A/CN.9/WG.II/WP.155, Report A/CN.9/684). The final review and adoption of the revised Rules should take place at the 42nd Session of the Commission in 2010 (see Report A/CN.9/684, para. 10). All the Working Group's documents are available at http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html.

7 See Report of the Working Group on the work of its 47th Session, A/CN.9/641, pp. 10–12; Note by the Secretariat, 46th Session, New York, February 5–9, 2007, A/CN.9/WG.II/WP.145/

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examines the draft revised Article 26 as it stood in September 2009, since it represents a significant departure from the original UNCITRAL Rules. The new Rules, if and when adopted, will be applicable to arbitration agreements concluded after the date of adoption of the revised version of the Rules[8]; whereas the 1976 Arbitration Rules will continue to apply to pending cases and, if the parties so wish, to cases initiated after the entry into force of the new Rules.[9] The two sets of Rules will be applicable to investor-state proceedings as long as no new set of rules specifically designed for this type of arbitration is elaborated.[10]

The 1976 UNCITRAL Rules. Article 26 of the 1976 UNCITRAL Arbitration Rules, entitled "Interim Measures of Protection," reads:

> 1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.
>
> 2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.
>
> 3. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

While the 1976 version of Article 26 does not mention it, parties to UNCITRAL proceedings can limit the scope of the tribunal's power if they so wish. Article 26 was adopted by the Iran-U.S. Claims Tribunal without modification. Hence, the jurisprudence of the Iran-U.S. Claims Tribunal is an important benchmark when analyzing the power of an arbitral tribunal to grant interim relief under the 1976 UNCITRAL Rules and provides good guidance in the application of the Rules.[11]

Add.1, p. 12; Note by the Secretariat, 48th Session, New York, February 4–8, 2008, A/CN.9/WG.II/WP.149, p. 8; Note by the Secretariat, 51th Session, Vienna, September 14–18, 2009, A/CN.9/WG.II/WP.154/Add.1, pp. 7–10. For an alternative drafting proposal made by the Government of Switzerland, see Note by the Secretariat of September 9, 2008, A/CN.9/WG.II/WP.152 and Report on the work of its 50th Session, A/CN.9/669, pp. 19–20. See also the alternative proposals suggested by Jan Paulsson and Georgios Petrochilos in "Revision of the UNCITRAL Rules" presented at the ICCA in Dublin in June 2008, pp. 110–11.

8 See draft Article 1, Note by the Secretariat of August 6, 2008, A/CN.9/WG.II/WP.151.

9 *Ibid.*

10 See the conclusions reached by the UNCITRAL Working Group at its 48th Session, during which it was decided that no specific provisions would be inserted in the revised Rules for treaty-based arbitration and that the Working Group would "seek guidance from the Commission on whether, after completion of its current work on the Rules, the Working Group should consider in further depth the specificity of treaty-based arbitration and, if so, which form that work should take" (Report of the 48th Session, A/CN.9/646, para. 69). Also in Report of the 50th Session, A/CN.9/669, para. 8.

11 Although the Iran-U.S. Claims Tribunal applied Article 26, it must be noted that it placed great emphasis on its inherent power to issue interim measures "as may be necessary to conserve the respective rights of the Parties and to ensure that the tribunal's jurisdiction and authority are made fully effective." For example, when the tribunal first addressed a request for interim

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The draft UNCITRAL Rules. The 2009 draft of Article 26 reads as follows[12]:

1. The arbitral tribunal may, at the request of a party, grant interim measures.

2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to, including without limitation:

(a) Maintain or restore the status quo pending determination of the dispute;

(b) Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself;

(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

3. The party requesting an interim measure under paragraph 2 (a), (b) and (c) shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

4. With regard to a request for an interim measure under paragraph 2 (d), the requirements in paragraph 3 (a) and (b) shall apply only to the extent the arbitral tribunal considers appropriate.

5. Nothing in these Rules shall have the effect of creating a right, or of limiting any right which may exist outside these Rules, of a party to apply to the arbitral tribunal for, and any power of the arbitral tribunal to issue, in either case without prior notice to a party, a preliminary order that the party not frustrate the purpose of a requested interim measure.

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relief, it based the measures it ordered not on Article 26 but on its inherent power. See George H. Aldrich, The Jurisprudence of the Iran-United States Claims Tribunal 137–38 (Clarendon Press 1996) [hereinafter G. Aldrich]. Also Rockwell International Systems Inc. and The Islamic Republic of Iran, Ministry of Defence, Award No. ITM20-430-1 (June 6, 1983) at 4–5, *reprinted in* 2 Iran-USCTR 369, 371 (1983-I); RCA Global Communications Disc, Inc. and The Islamic Republic of Iran, Award No. ITM 30-160-1 (October 31, 1983) at 5, *reprinted in* 4 Iran-USCTR 9, 11–12 (1983-II). For a discussion on the inherent power of the Iran-US Claims Tribunal, see also David Caron, The Iran-United States Claims Tribunal and the International Arbitral Process 216–23 (Leiden 1990) [hereinafter D. Caron, Leiden].

12 Note by the Secretariat, 48th Session, New York, February 4–8, 2008, A/CN.9/WG.II/WP.149, pp. 7–8. Note by the Secretariat, 49th Session, Vienna, September 15–19, 2008, A/CN.9/WG.II/WP.151/Add.1, pp. 8–9. At the 50th Session, it was suggested to place draft article 26 before the provisions on evidence, hearings and experts (Note A/CN.9/WG.II/WP.154.Add.1, para. 23).

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> 6. The arbitral tribunal may modify, suspend or terminate an interim measure it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.
>
> 7. The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure or the order.
>
> 8. The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the interim measure was requested or granted.
>
> 9. The party requesting an interim measure shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.
>
> 10. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

Paragraphs 1 to 4 and 6 to 9 of draft Article 26 mirror the revised wording of the Model Law. Paragraph 5, on temporary orders, contains a different wording and is subject to strong controversy.[13] Paragraph 10 corresponds to the original text of Article 26(3), which the Working Group agreed to retain.

Finally, the authority of a tribunal to order interim relief under the UNCITRAL Rules is subject to any mandatory rules of the national law applicable to the arbitration. The submission to the relevant national law is confirmed by Article 1(2) of the 1976 UNCITRAL Rules and of the draft Rules, which provides:

> These rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

Thus, the power of a tribunal to grant interim relief depends on the *lex arbitri*. It is worth noting that some jurisdictions, such as Italy and Greece, reserve this power to domestic courts.

Other Relevant Provisions

In addition to the preceding provisions referred to, one must consider the specific provisions that a BIT, a MIT or even a free trade agreement may contain and which

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13 In its 2008 version, para. 5 read: "If the arbitral tribunal determines that disclosure of a request for an interim measure to the party against whom it is directed risks frustrating that measure's purpose, nothing in these Rules prevents the tribunal, when it gives notice of such request to that party, from temporarily ordering that the party not frustrate the purpose of the requested measure. The arbitral tribunal shall give that party the earliest practicable opportunity to present its case and then determine whether to grant the request." See Report A/CN.9/669, paras. 107 to 112 for the reasons underlying the change. Paragraph 5 might be placed immediately before paragraph 10 (See Note A/CN.9/WG.II/WP.154.Add.1, para. 23.)

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may supplement and amend the applicable arbitration rules. For example, Article 1134 of the NAFTA prohibits attachment orders and orders that enjoin the application of the challenged measures in the following terms:

> A Tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction. A Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 [claim by an investor of a party on its own behalf claiming inter alia for a breach of an obligation under section A (investment)] or 1117 [claim by an investor of a party on behalf of an enterprise claiming inter alia for a breach of an obligation under section A (investment)]. For purposes of this paragraph, an order includes a recommendation.

For further examples, one may cite Article 10.20(8) of the United States-Peru Trade Promotion Agreement signed on April 12, 2006, as well as Article 28 of the U.S. Model BIT (2004), both of which contain wording similar to the NAFTA provision just quoted. Another example may be found in the provisions of the Central America Free Trade Agreement (CAFTA), Article 10.20.8.[14]

PURPOSE OF THE MEASURES: PRESERVING THE RESPECTIVE RIGHTS OF THE PARTIES

Interim measures are temporary in nature and are traditionally intended to "preserve the respective rights of the Parties pending the decision"[15] of a tribunal.

ICSID System

Article 47 of the ICSID Convention allows a tribunal to grant provisional measures "if it considers that the circumstances so require [. . .] to preserve the respective rights of either party." Arbitration Rule 39(1) requires that the applicant specify in its request the right(s) to be preserved. The AF Arbitration Rules also refer to the preservation of the parties' rights. Absent any further guidance, it is accepted that provisional measures in the ICSID system are left to the appreciation of each tribunal,[16] provided that they aim at the preservation of a right of a party. This begs the question of what rights

14 See, for an illustration, Railroad Development Corporation v. Guatemala, ICSID Case No. ARB/07/23, Decision on Provisional Measures, October 15, 2008, in which the tribunal denied the claimant's request for interim measures to preserve certain documents.

15 Anglo-Iranian Oil Co. (United Kingdom v. Iran), Interim Protection Order, July 5, 1951, I.C.J. Reports 1951, p. 93.

16 *Pey Casado*, para. 15.

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can be preserved (which will be examined below) and whether the rights to be preserved are limited to the rights in dispute.[17] Few tribunals have addressed this issue.

The tribunal in *Amco v. Indonesia*[18] concurred with Amco that the rights that can be preserved are the rights in dispute. In that case, Indonesia requested that the claimant take no action which "might aggravate the dispute" and abstain from "promoting, stimulating or instigating the publication of propaganda presenting their case selectively outside this tribunal or otherwise calculate[d] to discourage foreign investment to Indonesia" following the publication of an article in a Hong Kong newspaper. The tribunal found that the publication of the article did not do any actual harm nor aggravate or exacerbate the legal dispute. Saying so, the tribunal noted that "no such right [in dispute] could be threatened by the publication of articles like"[19] the one in dispute.

A restrictive approach of the notion of "right to be preserved" was later adopted in *Maffezini.*[20] In this case, the respondent requested that the claimant post a guarantee or bond in the amount of the costs expected to be incurred in the arbitration. The tribunal denied the request for two main reasons: one related to the existence of a right to be preserved, a topic that will be addressed below, and the other was that the request did not relate to the subject matter of the case before the tribunal, i.e., to the investment made in Spain but that it related to separate or extraneous matters.[21]

This restrictive approach has not been confirmed since and could be viewed as too limitative. Indeed, the rights to be preserved ought not to be limited to the rights which form the subject matter of the dispute on the merits. It is admitted that other rights which relate to the dispute can also be protected, such as procedural rights[22] or the more general right to the non aggravation of the dispute. The applicable criterion is thus that the right to be preserved bears a relation with the dispute. This latter approach was adopted by the *Plama* tribunal:

> The rights to be preserved must relate to the requesting party's ability to have its claims and requests for relief in the arbitration fairly considered and decided by the arbitral tribunal and for any arbitral decision which grants to the Claimant the relief

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17 For the ICJ, the rights to be preserved are the rights which are the subject of dispute in the proceedings (see Great Passage Belt Case mentioned below). In the Arbitral Award of July 31, 1989 Case (Guinea-Bissau v. Senegal) which concerned the validity of a previously rendered arbitral award on the determination of a maritime boundary, the Court dismissed a request for provisional measures that the parties refrain from all acts in the disputed maritime territory that was the subject of the arbitral award at stake but not of the ICJ proceedings (1990 I.C.J. Reports, pp. 69–70, Order, March 2, 1990).

18 Amco Asia Corporation and others v. Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Request for Provisional Measures, December 9, 1983, para. 1, ICSID Reports 1993, p. 410 [hereinafter *Amco*].

19 *Amco*, para. 3.

20 Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Request for Provisional Measures, October 28, 1999, para. 10 [hereinafter *Maffezini*].

21 *Maffezini*, para. 23.

22 See Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Procedural Order No. 1, March 31, 2006 [hereinafter *Biwater*], which stated: "The type of rights capable of protection by means of provisional measures are not only substantive rights but also procedural rights," para. 71.

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> it seeks to be effective and able to be carried out. *Thus the rights to be preserved by provisional measures are circumscribed by the requesting party's claims and requests for relief. They may be general rights, such as the rights to due process or the right not to have the dispute aggravated, but those general rights must be related to the specific disputes in arbitration, which, in turn*, are defined by the Claimant's claims and requests for relief to date.[23]

In *Plama*, the rights relating to the dispute were the rights deriving from the Energy Charter Treaty, to wit, Plama's rights to fair, equitable, and nondiscriminatory treatment for its investment. The tribunal observed that Plama's claims and requests for relief were limited to damages under the Energy Charter Treaty. It concluded that "the scope of the 'rights relating to this dispute' which deserve protection by provisional measures is necessarily limited to the damage claims."[24] On that basis, the tribunal did not see how local proceedings, the stay of which was requested, could affect the ICSID arbitration. Whatever the fate of the local proceedings, Plama could still pursue its claims for damages before the ICSID tribunal.

A similar approach was adopted in *Burlington v. Ecuador*[25] in which the tribunal stated:

> In the Tribunal's view, the rights to be preserved by provisional measures are not limited to those which form the subject-matter of the dispute or substantive rights as referred to by the Respondents, but may extend to procedural rights, including the general right to the status quo and to the non-aggravation of the dispute. These latter rights are thus self-standing rights.

The rights to be preserved thus do not need to be the rights in dispute but must relate to the dispute as it is defined by the claims and the relief sought.

NAFTA Proceedings

NAFTA Article 1134, already quoted, provides for interim relief to preserve the rights of a disputing party. However, in contrast to the ICSID system, it makes it clear that the rights in dispute cannot be the subject matter of the provisional measures. The reason for this appears to be that "Articles 1134 and 1135 permit a state to implement and maintain a measure even if it breaches substantive rights contained in Chapter 11A. Thereafter, even if restitution is ordered, a State Party may choose to pay monetary damages instead."[26] In proceedings conducted in accordance with the AF Arbitration Rules as modified by the provisions of NAFTA, Chapter 11, Section B, a tribunal

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23 Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Order, September 6, 2005, para. 40 (emphasis added) [hereinafter *Plama*].

24 *Plama*, para. 41.

25 Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador), ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Oriente's Request for Provisional Measures, June 29, 2009, para. 60 [hereinafter *Burlington*].

26 Henri Alvarez, *Arbitration under the North American Free Trade Agreement*, 16(4) Arb. Int'l 417 (2000).

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rejected a request for ordering the respondent to cease and desist from any interference with the claimant's property whether by embargo or by any other means. The tribunal considered that an order in the terms requested by the claimant would not be consistent with the limitations imposed by Article 1134 "since such an order would entail an injunction of the application of the measures which in this case are alleged to constitute a breach referred to in NAFTA Article 1117."[27]

UNCITRAL Arbitration Rules

The revision on the UNCITRAL Rules will bring significant changes as to the purpose for which a tribunal may grant interim measures.

The 1976 UNCITRAL Rules. The heading of Article 26 of the 1976 UNCITRAL Arbitration Rules reads "Interim Measures of Protection." The text, however, merely relates to "measures [the tribunal] deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods." This text, which elicited discussions over the years, has generally been understood not to restrict the power of the arbitral tribunal to order any type of interim measure it deemed appropriate.[28] According to leading authors, Article 26(1) should not be seen as an exhaustive list and was only meant to give examples.[29] In other words, measures could aim at any type of protection as long as it is necessary.

The practice of the Iran-U.S. Claims Tribunal is of limited interest in this respect, given the commercial nature of many of the cases and the numerous applications to stay duplicative proceedings. In addition to the stay of proceedings, measures ordered have dealt with the conservation of goods,[30] the prohibition of the sale of goods, and the return of goods.[31]

The draft Rules. Article 17(1) of the Model Law was originally drafted against the background of Article 26 of the 1976 UNCITRAL Arbitration Rules. It was modified

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27 Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Procedural Order No. 2 concerning request for provisional measures and the schedule of the proceeding, May 3, 2000, http://www.economia-snci.gob.mx/sphp_pages/importa/sol_contro/consultoria/Casos_Mexico/Marvin/ordenes/Order_2.pdf. Also in Meg N. Kinnear, Andrea K. Bjorklund, John F. G. Hannaford Investment Disputes Under NAFTA, an Annotated Guide to NAFTA Chapter 11, at 8-1134 (Kluwer) [hereinafter M. Kinnear et al.] who also refer to Pope & Talbot Inc. v. Canada (UNCITRAL), Award on Interim Measures Motion, January 7, 2000.

28 UNCITRAL Working Group, Doc. A/CN.9/WG.II/WP.119—Settlement of commercial disputes—Preparation of uniform provisions on interim measures of protection, para. 41.

29 David Caron, Lee Caplan, Matti Pellonpää, the UNCITRAL Arbitration Rules, a commentary 539 (OUP 2006) [hereinafter Caron et al.].

30 E.g., Behring International, Inc. and the Islamic Republic of Iran Air Force et al., Interim Award No. 46-382-3 (February 22, 1985), *reprinted in* 8 Iran-USCTR 44 [hereinafter Behring International].

31 See G. Aldrich, pp. 151–55.

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in 2006 to provide a generic definition of interim measure. Article 17(1) of the Model Law now reads, "[u]nless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures". Observing that the ICC or the AAA Arbitration Rules gave a broader discretion to the arbitrators and did not make any reference to the subject matter of the dispute, the UNCITRAL Working Group deleted such reference expressly in the Model Law and listed the different purposes of a measure, namely, maintaining or restoring the *status quo* pending determination of the dispute; taking action that would prevent; or refraining from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process itself, providing a means of preserving assets out of which a subsequent award may be satisfied or preserving evidence that may be relevant and material to the resolution of the dispute.

Draft Article 26 further confirms this evolution. The heading only reads "Interim Measures," and the text contains the same generic wording as Article 17(1) of the Model Law to the effect that the "tribunal may grant interim measures." Thus, there is no specific limitation set to the general power of a tribunal to grant interim measures awarded under draft Article 26(1) in terms of scope of the measure or rights to be protected. A close look at the various revised drafts shows that draft Article 26(2) could have been construed to contain an exhaustive list of interim measures. In the context of the revision of the Model Law, which contains the same list, the Working Group considered that "to the extent that all the purposes for interim measures were generically covered by the revised list contained in paragraph (2), it was no longer necessary to make that list non-exhaustive."[32] The list contained in Article 17(2) of the Model Law and in draft Article 26(2) of the Rules has been described as "reasonably accurately reflect[ing] reality in that it lists the types of interim measures most commonly requested."[33] However, to avoid any doubt, the terms "including, without limitation" were added in paragraph 2 of draft Article 26 at the Fiftieth Session. This made clear that the list contained therein is non exclusive and that the definition of interim measures is to be construed widely.[34]

TYPES OF MEASURES

In practice, it can be said that measures can be granted in order to (i) preserve the right of a party which is the subject matter of the dispute, (ii) maintain or restore the status quo, (iii) protect the jurisdiction of the tribunal, (iv) preserve evidence, and (v) prevent the frustration of the forthcoming award.[35]

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32 Report of the Working Group on the work of its 39th Session, A/CN.9/545, para. 21.

33 Kaj Hobér, *Interim Measures by Arbitrators*, ICCA Congress series No. 13, International Arbitration 2006: Back to Basics?, p. 734 [hereinafter K. Hobér].

34 Report A/CN.9/669, paras. 92–94, Note A/CN.9/WG.II/WP.154.Add.1, para. 25.

35 For the protection of the confidentiality of ICSID proceedings, see SCHREUER ET AL., paras. 148–51 and Loretta Malintoppi, *Provisional Measures in Recent ICSID Proceedings: What Parties request and What Tribunals Order*, *in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY, ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 170–71 (OUP 2009).

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Preservation of a Right

A party may seek to preserve a right to which it claims to be entitled. In this respect, two closely connected questions of procedure arise, i.e., whether the applicant must prove that the right exists and whether a *prima facie* case on the merits must be shown. The latter question will be discussed below in the more general discussion of the requirements to obtain interim relief. The former one is reviewed in the following paragraphs.

ICSID system. In *Maffezini*, Spain requested the posting of a bond to protect its alleged right to obtain reimbursement of its legal costs in the event that the claimant failed in its case, and the tribunal ordered it to pay the costs. In its analysis, the *Maffezini* tribunal stated that, under Arbitration Rule 39, the "rights must exist at the time of the request, must not be hypothetical, nor are ones to be created in the future."[36] As an example of an existing right, the tribunal cited an interest in a piece of property, the ownership of which is in dispute.[37] It concluded that Spain's alleged right was hypothetical and could thus not be protected. Indeed, "[e]xpectations of success or failure in an arbitration or judicial case are conjectures."[38] Accordingly, protecting a right that did not exist at the time of the order would have prejudged the merits of the case in an undue manner. Similarly in an unreported case, a tribunal, referring to *Maffezini*, observed that ordering the requested provisional measures, namely security for costs, would constitute a prejudgment of the underlying rights and obligations in a case that had not been yet heard, resulting in a denial of justice for the claimants.

Other ICSID tribunals have also sought to clarify this issue. The tribunal in *Pey Casado* elaborated on whether a right must exist to be protected. It noted that the tribunal must reason on the basis of assumptions and that "[i]t results from the very nature of this mechanism that the tribunal cannot require [. . .] *evidence* of the existence, the reality or the present nature of the rights which the measure sought aims to safeguard or preserve."[39] In addition, to demand that the right that one seeks to preserve must be existing would oblige the tribunal to prejudge the substance of the case at a time when it is not in a position to do so.[40] Such prejudgment is not required under the ICSID Convention[41] and is contrary to the very nature of provisional remedies, which by essence can only assess the likelihood of the rights at issue.

This approach was further validated by the *Occidental* tribunal with respect to a request for an order for specific performance.[42] The tribunal held that the right to be

36 *Maffezini*, para. 13.
37 *Ibid.*, para. 14.
38 *Ibid.*, para. 20.
39 *Pey Casado*, para. 46 (italics in the original).
40 *Ibid.*, para. 48, referring to the ICJ case of LaGrand (discussed below) in para. 49.
41 *Ibid.*, para. 45.
42 Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador, ICSID Case No. ARB/06/11, Decision on Provisional Measures, August 17, 2007 [hereinafter *Occidental*]. In this case, a participation contract was entered into by Occidental Exploration Petroleum Company (OEPC), Ecuador and Petroecuador, a State-owned petroleum company in connection with the exclusive exploration and exploitation of oil. After the State's

preserved need not be proven to exist in fact.[43] It is sufficient that it be asserted as "a theoretically existing right," the tribunal only dealing with the nature of the right and not its merits.[44] A theoretically existing right was defined as "an actual right or legally protected interest, by opposition to a simple interest which does not entail legal protection."[45] The tribunal then further found that, at the stage of the request, the claimants had not established that "there exists a right to specific performance where a natural resources concession agreement has been terminated or cancelled by a sovereign State."[46] It thus examined the existence of a right in theory. For that purpose, it reviewed whether a principle of law existed providing for a right to specific performance in petroleum contracts. It concluded that such a right did not exist.

By contrast, the tribunal in *City Oriente* concluded that the claimant had proven the appearance of a right, namely that under Ecuadorian Law, a contractor may demand that the public entity it contracted with be ordered to fulfill its commitments, while making sure it distinguished the facts of the case from the *Occidental* case.[47] In doing so, it observed that "at this stage, the sole decision to be made by the Arbitral Tribunal is whether the party requesting the provisional measures, City Oriente, has been able to prove *fumus boni iuris*, an appearance of a good right."[48] The same finding of an appearance of a contractual right to specific performance under national law was also made in *Burlington*.[49]

It is also worth noting that some ICSID tribunals have taken a stricter approach and refused to grant a relief that would coincide with the final remedy sought. In *TANESCO*,[50] the respondent applied for the payment by the claimant of a sum allegedly due under the disputed contract, i.e., for specific performance. It argued that, absent a payment, there was a risk that its lenders would foreclose on the facility, which could have

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nullification of the contract, OEPC and its mother company (Occidental Petroleum Company) initiated an ICSID proceeding under the U.S.-Ecuador BIT alleging that their exploration rights had been illegally nullified and their assets had been expropriated. The claimants requested that the tribunal order the respondents (i) to invest a minimum amount in the development and operation of the area; (ii) to give a notice prior to entering into a contract with another party to carry out exploration and exploitation activities in the area; (iii) to produce reports regarding production and expenditures and; (iv) to enter into a contract with the claimants for the shipment of a certain amount of barrels of crude oil. The claimants presented their request as necessary to preserve their rights to obtain specific performance and restoration of their rights. The request was rejected.

43 *Occidental*, para. 64.

44 *Occidental*, para. 64.

45 *Occidental*, para. 65.

46 *Ibid.*, para. 86.

47 Among those, was the fact that the claim in *Occidental* was based on a BIT, while City Oriente requested the performance of a contract subject to Ecuadorian law.

48 City Oriente. Limited v. The Republic of Ecuador and Empresa Estatal Petroleos del Ecuador (PetroEcuador), ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures and Other Procedural Matters, May 13, 2008, para. 45 [hereinafter *City Oriente*].

49 *Burlington*, paras. 70–71.

50 Tanzania Electric Supply Company Limited (TANESCO) v. Independent Power Tanzania Limited, ICSID Case No. ARB/98/8, Decision on the Respondent's Request for Provisional Measures (Appendix A to the Award), December 20, 1999.

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resulted in the deprivation of the ownership of the facility. The tribunal noted that the right to be preserved in that case was the right to enjoy the benefit of the agreement. The tribunal observed:

> We do not go as far as to conclude that "provisional measures" under Rule 39 can *never* include recommending the performance of a contract in whole or in part: it is not necessary for us to go that far. But where what is sought, is, in effect, performance of the Agreement, and where the only right said to be preserved thereby is the right to enjoy the benefits of that Agreement, we consider that the application falls outside the scope of Rule 39, and therefore is beyond our jurisdiction to grant.[51]

In the same spirit, the *Phoenix* tribunal recalled that the "[p]rovisional measures are indeed not deemed to give to the party requesting them more rights than it ever possessed and has title to claim."[52] It concluded that "the requested provisional measure concerning the ownership of the land cannot be granted as it is equivalent to the final result sought."[53]

UNCITRAL Rules. A request to preserve a right most often aims at maintaining or restoring the *status quo*. In spite of this, it does not appear that the existence of the right which is the subject matter of the measure has been discussed as such by UNCITRAL tribunals. It probably has been addressed in the more general discussion as to whether a *prima facie* case on the merits is necessary, which will be examined below.

Finally, one should note that the Iran-U.S. Claims Tribunal has been reluctant to grant interim relief tantamount to the final relief requested.[54]

Preservation of the Status Quo /Non aggravation of the Dispute

ICSID system. The *travaux préparatoires* of the ICSID Convention referred to the need "to preserve the *status quo* between the parties pending [the] final decision on

51 Para. 16 (emphasis in the original). The respondent's position was found to be too speculative as the risk of foreclosure was not supported and TANESCO's alleged incapacity to face a possible award for costs was uncertain. For the tribunal, there was "a distinction to be drawn between the protection of rights and the enforcement of rights", para. 13. It further noted that ICSID interim measures should not be recommended "in order, in effect, to give security for the claim", para. 14, referring to *Atlantic Triton v. Guinea*. It found that rather than preserving the *status quo*, the respondent's request was "plainly directed to affect a fundamental change to it", para. 15.

52 Phoenix Action, Ltd. v. Czech Republic, ICSID Case No. ARB/06/5, Decision on Provisional Measures, April 6, 2007, para. 37 [hereinafter *Phoenix*].

53 *Ibid.*

54 See *Behring International*, Where Chamber three stated: "The Tribunal, however, determines that the granting of the full interim relief requested by Respondents, in particular, the transfer to Respondents of possession, custody and control of the warehoused goods (Respondent's title to which is not disputed by Claimant), would be tantamount to awarding Respondents the final relief sought in their counterclaim. The Tribunal decides that, under the circumstances of this particular case, it cannot award such relief prior to determining as a final matter that is has jurisdiction." para. 3.

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the merits." This expression has not been widely embraced by ICSID tribunals which, rather, refer to the non aggravation of the dispute. This is a principle of international law well embedded since the case of the *Electricity Company of Sofia and Bulgaria*.[55] The commentary of the 1968 edition of the ICSID Arbitration Rules stated that the non aggravation of the dispute was a valid concern. It explained that Article 47 of the Convention "is based on the principle that once a dispute is submitted to arbitration the parties should not take steps that might aggravate or extend their dispute or prejudice the execution of the award."[56]

The principle was first affirmed in the first ICSID case *Holiday Inns v. Morocco*[57] and reiterated in *Amco v. Indonesia*. In the latter case, the tribunal acknowledged "the good and fair practical rule, according to which both Parties to a legal dispute should refrain, in their own interest, to do anything that could aggravate or exacerbate the same, thus rendering its solution possibly more difficult."[58]

It was reaffirmed in *Pey Casado*. The tribunal had to decide whether there existed a risk of aggravation or extension of the dispute "or of a development likely to make the execution of an eventual judgment more difficult (in the hypothesis, again, that the tribunal recognises itself as having jurisdiction) and in consequence a compromise of the rights recognised therein for one or other of the Parties."[59] The tribunal acknowledged that there were tensions between the parties and thus invited them, under the heading of a provisional measure, to take into account the various possible hypotheses and each to ensure—to reproduce the expression used by the International Court of Justice in the *Anglo-Iranian Oil Company Case*—"that no action is taken which might prejudice the rights of the other Party in respect of the carrying out of [the judgment] which the [Arbitration Tribunal] may subsequently render" and "that no action of any kind is taken which might aggravate or extend the dispute."[60]

The *Plama* tribunal adopted a somewhat more limited approach. While acknowledging that the local proceedings which the claimant sought to discontinue could aggravate the dispute between the parties, it considered,

> that the right to non-aggravation of the dispute refers to actions which would make resolution of the dispute by the Tribunal more difficult. It is a right to maintenance of the status quo, when a change of circumstances threatens the ability of the Arbitral Tribunal to grant the relief which a party seeks and the capability of giving effect to the relief.[61]

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55 Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria), Judgment of December 5, 1939, P.C.I.J. series A/B, No 79, p. 199. See also LaGrand Case (Germany v. United States), Judgment of June 27, 2001, para. 103, I.C.J. Reports 2001, p. 466 [hereinafter *LaGrand Case*].

56 1 ICSID Reports 99.

57 Holiday Inns S.A. and others v. Kingdom of Morocco, ICSID Case No. ARB/72/1, Order of July 2, 1972, not public but commented in Pierre Lalive, *The First "World Bank" Arbitration (Holiday Inns v. Morocco–Some Legal Problems*, BYIL 1980 [hereinafter P. Lalive].

58 *Amco*, p. 412.

59 *Pey Casado*, para. 73.

60 *Ibid.*, para. 77.

61 *Plama*, para. 45.

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In that case, as already mentioned, the resolution of the dispute was to be effected through monetary relief. In other words, the resolution was not rendered more difficult by the alleged action of the respondent. This approach of the non aggravation of the dispute mirrors the tribunal's vision of the rights to be preserved examined above. On that basis, an aggravation of a dispute, the consequences of which could be compensated by an award of monetary damages, might not be deemed a sufficient ground for granting interim relief. This aspect will be discussed further below in the context of the requirement of irreparable harm.

The *Occidental* tribunal appears to have confirmed this approach. It recalled that when granted, provisional measures have always been directed at the behavior of the parties to the dispute and that "[p]rovisional measures are not designed to merely mitigate the final amount of damages."[62] The tribunal held that the measures requested aimed at the non aggravation of the monetary damages but not of the dispute *per se*.[63] The *Burlington* tribunal adopted a somewhat different approach. It considered that the continuation of the seizures was bound to aggravate the dispute, because there was "a risk that the relationship between the foreign investor and Ecuador may come to an end."[64] In other words, it held that the continuation of the contractual cooperation between the parties represented the *status quo* to be protected.[65]

UNCITRAL Rules. It is clear that the non aggravation of the dispute can be a ground to obtain interim relief under the 1976 UNCITRAL Rules. The maintenance or restoration of the *status quo* also appears in draft Article 26(2)(a) as an explicit ground for granting interim relief.

It is interesting to note that the Iran-U.S. Claims Tribunal does not appear to have relied on the concept of non aggravation of the dispute when assessing requests for interim relief. However, references to maintaining the *status quo* can be found in concurring opinions.[66]

Protection of the Tribunal's Jurisdiction

The ICSID Convention, the ICSID, AF, and UNCITRAL Arbitration Rules are silent as to whether interim relief can be used for the purpose of protecting the tribunal's

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62 *Occidental*, para. 97. In addition, the *Occidental* tribunal observed "[I]n any situation resulting from an illegal act, the mere passage of time aggravates the damages that can be ultimately granted and it is well known that this is not a sufficient basis for ordering provisional measures," para. 97.

63 *Ibid.*, para. 98.

64 *Burlington*, para. 65. In that case, PetroEcuador initiated local proceedings to collect amounts allegedly due under an amendment to the Hydrocarbon Act, which the claimants considered to unilaterally modify their rights under two production sharing contracts for the exploration and exploitation of oil fields in the Amazon Region.

65 *Ibid.*, para. 67.

66 See concurring opinion of Judge Holtzmann and Judge Mosk to the interim award rendered in E-systems v. The Islamic Republic of Iran and Bank Melli (February 4, 1983), *reprinted in* 2 Iran-USCTR 51 [hereinafter *E-systems*].

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jurisdiction, while NAFTA 1134, for example, specifically mentions this purpose as a reason for interim relief. This said, it is accepted that this is one of the purposes of interim relief.

ICSID Convention cases. Article 26 of the ICSID Convention provides that ICSID proceedings are of an exclusive nature.[67] On that basis, tribunals have been asked to enjoin parties from seeking interim relief in domestic courts or continuing proceedings on the merits in another forum.

In *Atlantic Triton*, the ICSID tribunal was reluctant to affirm that, pursuant to Article 26 of the ICSID Convention, the parties should refrain from preserving their rights by filing action in domestic courts.[68] By contrast, the tribunal in *MINE v. Guinea* recommended that Guinea terminate any proceedings in connection with the dispute and any provisional measures pending in national courts. [69]

In *SGS Société Générale de Surveillance v. Pakistan*, the tribunal was presented with a request for provisional measures, including the stay of a concurrent arbitration proceeding in Pakistan. The tribunal first found that SGS had "a *prima facie* right to seek access to international adjudication under the ICSID Convention."[70] It considered that it was its duty to protect this right of access. It thus recommended that Pakistan inform all the relevant domestic courts of the current standing of the ICSID arbitration and ensure that no action be taken to hold SGS in contempt of court. In parallel, the tribunal also recommended that local arbitration proceedings be stayed until the tribunal decided on its jurisdiction.[71] By contrast, it rejected a broad request aiming at an injunction refraining from commencing or participating in proceedings relating in any manner to the ICSID arbitration. This request was deemed to restrain the ordinary exercise of Pakistan's normal process of justice.[72]

In *Tokios Tokeles*, the tribunal also addressed Article 26 of the ICSID Convention in the context of provisional measures. It stated that "[a]mong the rights that may be protected by provisional measures is the right guaranteed by Article 26 to have the

67 See Charles N. Brower & Ronald E.M. Goodman, *Provisional Measures and the Protection of ICSID Jurisdictional Exclusivity against Municipal Proceedings*, 6 ICSID Rev.–FILJ (1991) [hereinafter C. Brower and R. Goodman].

68 Atlantic Triton Company Limited v. People's Revolutionary Republic of Guinea, ICSID Case No. ARB/84/1, decision unreported, [hereinafter *Atlantic Triton*] *cited in* Paul Friedland, *Provisional Measures and ICSID Arbitration*, 2(4) Arb. Int'l 347 (1986) [hereinafter P. Friedland].

69 Maritime International Nominees Establishment (MINE) v. Republic of Guinea, ICSID Case No. ARB/84/4, Decision on Provisional Measures, December 4, 1985 [hereinafter *MINE*]. For an analysis of *Atlantic Triton* and *MINE*, see P. Friedland, pp. 335–57 and also in *ICSID and Court-Ordered Provisional Measures Remedies: An Update*, 4(2) Arb. Int'l 161–65 (1988); see also Antonio R. Parra, *The Practices and Experience of the ICSID*, *in* ICC Bulletin 37, 1993, No. 519, [hereinafter A. Parra], and C. Brower and R. Goodman.

70 SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Procedural Order No 2, October 16, 2002, 18 ICSID Rev.–FILJ (2003), p. 299 [hereinafter *SGS v. Pakistan*].

71 *Ibid.*, p. 304.

72 *Ibid.*, p. 301.

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ICSID Arbitration be the exclusive remedy for the dispute to the exclusion of any other remedy [. . .]."[73] On that basis, the tribunal had already decided in relation to an earlier application that once the parties had consented to ICSID arbitration, they were under a duty to refrain from initiating or pursuing proceedings in any other forum in respect of the subject matter of the dispute before ICSID. Accordingly, the tribunal recommended in its first procedural order that both parties refrain from, suspend, or discontinue any judicial or other domestic proceedings concerning Tokios Tokeles or its investment in Ukraine which may affect the issuance or enforcement of a future award or aggravate the dispute.[74]

In *CSOB v. Slovak Republic*, the tribunal also recommended that the local bankruptcy proceedings be suspended as they could have included determinations on issues at stake in the ICSID arbitration.[75] Similarly, the *Holiday Inns* tribunal[76] considered that the Moroccan courts were to refrain from making decisions until it had itself decided the questions in dispute, although no interim measure was recommended as such.

More recently, the *Perenco* tribunal recommended that Ecuador refrain from pursuing any actions before local courts.[77] In its words,

> [u]nless and until the Tribunal rules that it has no jurisdiction to entertain this dispute, if its jurisdiction is hereafter challenged, or the Tribunal delivers a final award on the merits, none of the parties may resort to the domestic courts of Ecuador to enforce or resist any claim or right which forms part of the subject matter of this arbitration.[78]

AF cases. In cases governed by the AF Rules, Article 26 of the Convention does not apply. Nevertheless, an AF tribunal could very well consider that there is a necessity to protect its jurisdiction under the circumstances. This is certainly beyond doubt in AF NAFTA proceedings since NAFTA Article 1134 expressly provides for interim relief to preserve the tribunal's jurisdiction.

UNCITRAL Rules. Most of the interim relief granted by the Iran-U.S. Claims Tribunal concerned stays of proceedings brought in other fora pending the tribunal's determination. In doing so, the tribunal sought to ensure that its jurisdiction and authority were

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73 Tokios Tokeles v. Ukraine, ICSID Case No. ARB/02/18 [hereinafter *Tokios Tokeles*], Procedural Order No. 3, January 18, 2005, para. 7. For a similar position, see *Burlington*, para. 57.

74 *Ibid.*, Procedural Order No. 1, July 1, 2003.

75 Československa Obchodní Banka a.s. v. Slovak Republic, ICSID Case No. ARB/97/4, Orders No. 4 and No. 5, January 11, 1999 and March 1, 2000. See also *Plama*, where the tribunal dismissed the claimant's request to discontinue local proceedings and noted that, at least with regard to local bankruptcy proceedings, the parties were not the same since the proceedings were brought by private parties and not by the state, see *infra*.

76 Holiday Inns v. Kingdom of Morocco, ICSID Case No. ARB/72/1, Order of July 2, 1972, quoted in *Pey Casado*, para. 54

77 Perenco Ecuador Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador), ICSID Case No. ARB/08/16, Decision on Provisional Measures, May 8, 2009, para. 62 [hereinafter *Perenco*]. That case arose under the same factual circumstances as *Burlington,* i.e., the amendment by Ecuador of its Hydrocarbon Act.

78 *Ibid.*, para. 61.

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fully effective,[79] notwithstanding the silence of the 1976 UNCITRAL Arbitration Rules.

The Claims Settlement Declaration provided in Article VII (2) that the claims referred to the Iran-U.S. Claims Tribunal were excluded from the jurisdiction of the courts of Iran, of the United States, or any other courts. Stays decided by the tribunal were contingent upon a showing that the parties were identical or closely related in both proceedings and that the same subject matter was involved.[80] The latter requirement was interpreted as implying that the two proceedings presented common issues of law and facts currently or in the future without requiring an identity of claims, the main concern of the tribunal being to avoid inconsistent decisions. However, the mere exclusive jurisdiction of the tribunal was not deemed a sufficient ground for preventing a similar claim from being filed in another forum.[81] Indeed, the tribunal was cautious to preserve rights which might otherwise have been time-barred.

Draft Article 26(2)(b) also allows interim measures to prevent a party from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process itself. This wording was meant to encompass preserving the jurisdiction of the tribunal through anti-suit injunctions. However, because they infringe upon the principle of the competence-competence of courts and tribunals, which is a general principle of procedure, anti-suit (and anti-arbitration) injunctions by an arbitral tribunal should only be granted to prevent grossly abusive conduct.[82] The same should hold true for anti-arbitration injunctions issued by courts.

Preserving Evidence

Interim relief can aim at preserving evidence. The same purpose could in reality also be achieved in reliance on the general procedural powers of a tribunal, for example under Article 44 of the ICSID Convention.

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79 See, for example, E-Systems; Rockwell International Systems Inc. and The Islamic Republic of Iran, Ministry of Defence, Interim Award No. 20-430-1, June 6, 1983, *reprinted in* 2 Iran-USCTR 369.

80 Charles N. Brower & Jason D. Brueschke, the Iran-United States Claims Tribunal 231–32 (Martinus Nijhoff Publishers 1998) [hereinafter C. Brower]. See, e.g., RCA Global Communications Disc., Inc. and the Islamic Republic of Iran, Interim Award No. 30-160-1, October 31, 1983, *reprinted in* 4 Iran-USCTR 9.

81 C. Brower, p. 234. Also Fluor Corporation and The Islamic Republic of Iran, Interim Award No. I62-333-1, para. 6 (August 6, 1986), *reprinted in* 11 Iran-USCTR 296, wherein the request to enjoin claimant from instituting an ICC proceedings was denied especially since substantial questions as to the jurisdiction of the tribunal existed and given the fact that the "filing elsewhere might be necessary to preserve rights which might otherwise be time-barred" (at 297). The claimant had also undertaken to commence the arbitration but not to pursue it. For a detailed analysis of the stay of proceedings granted by the Iran-U.S. Claims Tribunal, see G. Aldrich, pp. 142–49.

82 Nottebohm Case (Liechtenstein v. Guatemala), Preliminary Objections, Judgement of November 18, 1953, I.C.J. Reports 1953, pp. 119–20.

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ICSID system. ICSID tribunals have granted measures aiming at the protection of evidence. The *Biwater* tribunal, for example, recommended that the respondent preserve certain documents and make an inventory of given categories of documents.[83] In a previous case, *Agip v. Congo*,[84] the tribunal had granted the claimant's request for measures requiring the government to collect all the documents that had been kept at Agip's local office, furnish a complete list of these documents to the tribunal, and keep them available for presentation to the tribunal at Agip's request. In another case, *Vacuum Salt v. Ghana*,[85] the claimant sought an order to preserve its corporate records. The government gave a voluntary undertaking that it would not deny the claimant's access to its records, which was acknowledged by the tribunal.

UNCITRAL Rules. The need to protect evidence that is relevant and material to the resolution of the dispute is one of the grounds on which an UNCITRAL tribunal may grant interim measures under draft Article 26(2)(d). The draft requirements for an interim measure aimed at preserving evidence are less stringent than those for interim relief with other purposes, which will be discussed. Indeed, the tribunal would appreciate in its discretion to what extent the applicant needs to show a reasonable likelihood of success on the merits. Similarly, it is only if the tribunal would consider it appropriate that the applicant would need to show that "harm not adequately reparable by an award of damages" would be likely to result if the measure is not ordered.

Non-Frustration of the Award

Can interim measures be used to preserve assets out of which a subsequent award may be satisfied or to guarantee the payment of an award?

ICSID system. ICSID tribunals have been reluctant to acknowledge that the avoidance of the frustration of the award can be a valid purpose of provisional measures. This purpose has mainly been discussed in the context of requests for security to cover

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83 *Biwater*, paras. 84 to 98. The applicant was also seeking the production of various categories of documents. The *Biwater* tribunal noted that "actual production is catered for by other rules (in particular Article 43 of the ICSID Convention and Rule 34 of the ICSID Arbitration Rules)", para. 100. It concluded "[a]lthough there may be instances in which document production could be ordered pursuant to Article 47, this would in the Arbitral Tribunal's view be exceptional", para. 101. In that particular instance, it found that the requirements of Article 47 were not established and that there was no right threatened, but went on to examine the request pursuant to Article 43 of the Convention. The *Phoenix* tribunal also declined to grant a provisional measure related to the opening of secret services archives under Article 47 of the Convention as the request appeared overly broad and unspecific and could be dealt with under Article 43 if needed, see para. 46.

84 Agip SpA v. People's Republic of Congo, ICSID Case No. ARB/77/1, Decision, January 18, 1979, reported in the Award of November 30, 1979, 1 ICSID Reports 310 [hereinafter *Agip v. Congo*].

85 Vacuum Salt Products Limited v. Government of the Republic of Ghana, ICSID Case No. ARB/92/1, Decision No. 3 on request for recommendation of provisional measures, June 14, 1993, 4 ICSID Reports 323.

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the amount in dispute or the legal costs. In *Atlantic Triton*, it was decided that such a request for security for the amount of the claim fell within the ambit of Article 47 of the Convention.[86] The tribunal, however, rejected the request on the grounds that "there is no reason to suppose that the Government of Guinea would not perform any obligations for which the final award might hold it responsible."[87]

All other requests for security for costs presented to ICSID tribunals appear to have been denied or granted upon stringent conditions. In *Maffezini v. Spain*, the tribunal dismissed the request for security for the two main reasons already explained, i.e., the non existence of a right to be preserved and the fact that the request was not linked to the subject matter of the case. In *Pey Casado*, the respondent applied for a guarantee of the payment of the costs. The tribunal considered that granting a *cautio judicatum solvi* for the payment of costs was not an ordinary measure[88] and that the circumstances did not justify an extraordinary one. It noted that such a measure was not mentioned in the ICSID texts, which entailed "a certain presumption that such a measure is not authorized or included,"[89] and deduced that the drafters of the Convention appeared to have evaluated and accepted the risk of non payment of a party's allocated costs.[90]

It is submitted that an order for security for costs in favor of the respondent should only be granted if the claimant's case appears abusive, frivolous, or extravagant.

UNCITRAL Rules. It has been argued that Article 26 in its 1976 version did not allow orders for security for costs because such orders were not made in respect of the subject matter of the dispute.[91] This opinion is too restrictive and, in any event, appears obsolete in view of the deletion of the subject matter requirement in draft Article 26(2)(c). Draft Article 26(2)(c) specifically envisages the need for an interim measure to preserve assets out of which a subsequent award may be satisfied. Security for costs is encompassed by the words "preserving assets"[92] as costs that can be awarded in the award.

REQUIREMENTS FOR INTERIM RELIEF

It is accepted that "[t]he imposition of provisional measures is an extraordinary measure which should not be granted lightly by the Arbitral Tribunal."[93] Specific circumstances

86 *Atlantic Triton*, *cited in* P. Friedland, p. 347 and *in* Schreuer et al., pp. 785–86; also *cited in Pey Casado*, para. 88.

87 *Cited in* P. Friedland, p. 347.

88 *Pey Casado*, para. 86.

89 *Ibid.,* para. 86.

90 See also, Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Decision on Jurisdiction, November 14, 2005, para. 46.

91 Noah Rubins, *In God we trust, all others pay cash: Security for costs in international commercial arbitration*, 11 Am. Rev. Int'l Arb. 343–44.

92 Report of the Working Group on the work of its 47th Session, Vienna, September 10–14, 2007, A/CN.9/641, para. 48.

93 See, e.g., *Maffezini*, para. 10. Also *Plama*, para. 38.

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must prevail under which the measure(s) cannot await the tribunal's determination on the merits. This being said, tribunals have not necessarily articulated a uniform test when dealing with requests for interim relief, and the approaches adopted tend to vary with the facts of the case. Amongst the tribunals that have articulated a clear test, one can refer to the *Occidental* tribunal, for which "the circumstances under which provisional measures are required under Article 47 of the ICSID Convention are those in which the measures are *necessary* to preserve a party's right and where the need is *urgent* in order *to avoid irreparable harm.*"[94]

In the view of the *Encana* tribunal, "three conditions ought in principle to be met before interim measures are established whether under Article XIII(8) of the BIT or Article 26 of the UNCITRAL Rules. First, there must be an apparent basis of jurisdiction. Second, the measure sought must be urgent. Third, the basis for establishing provisional measures must be that otherwise irreparable damage could be caused to the requesting party."[95]

This section will review (i) the initiative to request interim relief, (ii) whether the tribunal must have jurisdiction, (iii) whether there must be a *prima facie* case on the merits, (iv) whether the measure must be urgent, and (v) whether it must be necessary for a tribunal to grant interim relief.

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94 *Occidental*, para. 59, emphasis in the original. See for another ICSID illustration in *City Oriente*: "[t]he requirements that the tribunal can take into consideration in ordering provisional measures are (A) that the adoption of such measures be necessary to preserve petitioner's rights, (B) that their ordering be urgent, and (C) that each party has been afforded an opportunity to raise observations.", Decision on Provisional Measures, November 19, 2007, para. 54. See also *Burlington*: "provisional measures can only be granted under the relevant rules and standard if rights to be protected do exist (C below), and the measures are urgent (D below) and necessary (E below), this last requirement implying an assessment of the risk of harm to be avoided by the measures", para. 51.

95 Encana Corporation v. Republic of Ecuador, Interim Award of January 31, 2004 [hereinafter *Encana*], para. 13. This case was brought under the 1996 Canada-Ecuador BIT, which contains, in Article XIII(8) specific provisions on interim measures. Encana sought measures to prevent freezing of assets of Encana's subsidiaries and of its legal representative pending resolution of the dispute by the tribunal. The tribunal rejected the request for provisional measures. In passing, the tribunal stated that, as a specific provision, Article XIII (8) of the BIT was to prevail over the general power in Article 26 of the UNCITRAL Rules. Nonetheless for the sake of the present section, the findings of the tribunal are useful to shed some light on Article 26.

See also Sergei Paushok, CJSC Golden East Company, CJSC Vostokneftegaz Company v. Mongolia [hereinafter *Paushok*], Order on Interim Measures, September 2, 2008, an UNCITRAL case under the Russian-Mongolian BIT in which the tribunal granted the claimants' request. Doing so, the tribunal noted that Article 26(1) of the UNCITRAL Rules left it a wider discretion than under the ICSID Convention (para. 36). It set forth the following requirements: "(1) prima facie jurisdiction, (2) prima facie establishment of the case, (3) urgency, (4) imminent danger of serious prejudice (necessity) and (5) proportionality" (para. 45). For an analysis of this case, see Joe Matthews and Karen Stewart, *Time to Evaluate the Standards for Issuance of Interim Measures of Protection in International Investment Arbitration*, 25(4) ARB. INT'L 529–52 (2009).

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The Initiative to Request Interim Relief

ICSID system. ICSID Arbitration Rule 39(1) and Article 46(1) of the AF Arbitration Rules start from the premise that either party may present a request to the tribunal, at any time during the proceedings. In addition, Arbitration Rule 39(3) allows a tribunal to "recommend" provisional measures "on its own initiative" or to recommend measures "other than those specified in a request." Article 46(1) of the AF Arbitration Rules contains the same rule, although it allows a tribunal to "*order*" rather than "*recommend*" provisional measures. This leaves the tribunal with a wide discretion.[96] There is no information publicly available on any measures recommended by ICSID tribunals *proprio motu*. Indeed, this would appear as an extremely rare occurrence in practice.

Under the applicable rules, a tribunal is also free to recommend a different measure than the one requested. An illustration can be found in *Holiday Inns*, in which the tribunal declined to recommend a series of measures sought in the request and chose to recommend instead that both parties "abstain from any measure incompatible with the upholding of the contract."[97]

UNCITRAL Rules. Article 26(1) of the UNCITRAL Arbitration Rules provides that measures may be granted at the request of either party. Accordingly, on the face of Article 26(1) and of the *travaux préparatoires*,[98] an UNCITRAL tribunal would not be empowered to order interim measures of its own motion.[99] The same applies under the draft Rules that provide that the measures can be granted upon the request of a party.

Jurisdiction of the Tribunal?

It is accepted that a tribunal does not need to assess that it has jurisdiction prior to ruling on a request for interim relief. By its very nature, interim relief requires a prompt determination that cannot await a full and final determination on jurisdiction. It is thus sufficient for a tribunal to be satisfied that it has a *prima facie* jurisdiction. Investor-state tribunals consistently rely on decisions of the International Court of Justice to support this view.[100] Since the case of *Military and Paramilitary Activities in and*

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96 *Pey Casado*, paras. 15–16.

97 P. Lalive, p. 137.

98 Report of the Secretary-General on the Revised Draft Set of Arbitration, UNCITRAL, 9th Session, Addendum 1 (Commentary), UN Doc A/CN.9/112/Add.1 (1975), http://www.uncitral.org/uncitral/en/commission/sessions/9th.html, p. 176 under art. 23.

99 See in this sense, D. Caron et al., pp. 533–34. See also C. Brower in footnote 1029.

100 This question elicited strong controversy over the years in the ICJ's jurisprudence. See for example for supporters of a jurisdiction clearly established, the dissenting opinion of Judge Forster in the Nuclear Tests (Australia v. France/New Zealand v. France), Order of June 22, 1973, I.C.J. Reports 1973, p. 173, or Judge Morozov in his separate opinion in the Aegean Sea Continental Shelf (Greece v. Turkey), Order of September 11, 1976, I.C.J. Reports 1976, p. 22 [hereinafter *Aegean Sea Continental Shelf Case*].

against Nicaragua (Nicaragua v. United States of America),[101] the ICJ has adopted a consistent line of reasoning according to which it need not finally satisfy itself that it has jurisdiction over the dispute, but its *prima facie* jurisdiction must be established.

ICSID practice. ICSID tribunals have also accepted that measures can be recommended before the tribunal has ruled on all the objections to jurisdiction or on the admissibility of the claims.[102] An argument to this effect was found in the text of Arbitration Rule 39, which mentions that a request may be made at any time. However, the practice is not consistent as to whether and how *prima facie* jurisdiction ought to be established. Older decisions either overlooked this issue or brushed it away. The tribunal in *Tokios Tokeles*[103] simply mentioned that a determination on interim relief did not prejudge jurisdiction:

> It is finally to be recalled that, as ICSID tribunals have repeatedly stated, the 'recommendation' of provisional measures does not in any way prejudge the question of jurisdiction. It is, therefore, independently of the present Order on provisional measures that this Tribunal will have to rule on the jurisdictional objections raised by the Respondent.

The majority of the tribunals appear now to resort to the *prima facie* test in line with the jurisprudence of the ICJ, as recently illustrated by the *Occidental* tribunal. The latter stated that it would "not order such measures unless there is, *prima facie*, a basis upon which the tribunal's jurisdiction might be established."[104]

How can a tribunal be satisfied that it has *prima facie* jurisdiction? It has been suggested that the determination made by the Secretary-General of the Centre when registering the request for arbitration pursuant to Article 36 of the ICSID Convention (i.e., unless the Secretary-General finds that the dispute is manifestly outside of the jurisdiction of the Centre) was sufficient for the purpose of establishing

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101 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Provisional Measures, Order of May 10, 1984, I.C.J. Reports 1984, p. 169, para. 24. S. Rosenne defines jurisdiction in this context as "jurisdiction both *ratione personae* and *ratione materiae* over the merits of the claim, as well as jurisdiction to determine whether the provisional measures requested are compatible with the principal claim and do not change the nature of the claim as advanced in the application instituting the proceedings", p. 92 (footnotes omitted, italics in the original).

The ICJ's position can also be illustrated by the Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), in which the Court stated: "57. Whereas in dealing with a request for provisional measures, the Court need not finally satisfy itself that it has jurisdiction on the merits of the case, but will not indicate such measures unless the provisions invoked by the applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be established (see Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Provisional Measures, Order of July 10, 2002, I.C.J. Reports 2002, p. 241, para. 58)", Order of July 13, 2006, also reiterated in Order of January 23, 2007, para. 24 [hereinafter *Pulp Mills on the River Uruguay*].

102 See, e.g., *Pey Casado*, para. 5.

103 *Tokios Tokeles*, Order No. 1, July 1, 2003.

104 *Occidental*, para. 55.

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prima facie jurisdiction.[105] Certain authors have indeed put forward that "although the tribunal is, of course, in no way bound by this preliminary examination of jurisdiction [made by the Secretary General], it provides a useful basis for its power to recommend provisional measures."[106]

Most of the tribunals do not limit themselves to referring to the Secretary-General's positive assessment but carry out their own review. In practice, tribunals either examine whether there is no manifest reason for excluding their jurisdiction (the "unless approach" leaving the benefit of the doubt to the claimant) or whether a provision confers *prima facie* jurisdiction upon them. The *Occidental* tribunal, for example, reviewed the grounds invoked for its jurisdiction and concluded that *prima facie* there was a basis for jurisdiction.[107] Some tribunals have proceeded to a more thorough *prima facie* analysis than others. For instance, in an unpublished decision, an ICSID tribunal not only reviewed the grounds invoked for jurisdiction but also satisfied itself that the conditions of Article 25 of the ICSID Convention were *prima facie* met.

In any event, the tribunal's *prima facie* determination does not prejudge its later decision on jurisdiction. Neither does it preclude any jurisdictional objections raised within the relevant period of time.

UNCITRAL practice. The UNCITRAL Arbitration Rules are silent as to whether the jurisdiction of the tribunal needs to be established for purposes of an order for interim relief. The early decisions of the Iran-U.S. Claims Tribunal did not consistently require an express finding of *prima facie* jurisdiction.[108] However, following the ICJ's reasoning in the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* mentioned earlier, the tribunal also required that *prima facie* jurisdiction over the merits be shown.[109] The *Encana* tribunal referred to "an apparent basis of jurisdiction,"[110] although it did not need to enter into that discussion, having found that there was no necessity for the measures.

105 See C. Brower & R. Goodman, p. 455. It was also noted in *Pey Casado* that the criterion under Article 36 of the ICSID Convention (unless the Secretary-General finds that the dispute is manifestly outside the jurisdiction of the Centre) resembles to a certain extent to the *prima facie* test of the ICJ (para. 8). This said, one must keep in mind that the determination of the Secretary General under Article 36 of the ICSID Convention is only made on the basis of the information contained in the request for arbitration, without having heard the other party.

106 Schreuer et al., para. 48 and P. Friedland.

107 *Occidental*, para. 55. See also SGS v. Pakistan, p. 299.

108 C. Brower, p. 218.

109 C. Brower, p. 220; see Ford Aerospace and Communications Corporation and the Air Force of the Islamic Republic of Iran, Interim Award No. 39-159-3, June 4, 1984, *reprinted in* 6 Iran-USCTR 104, which discussed jurisdiction over counterclaims. Also Bendone—Derossi International and the Government of the Islamic Republic of Iran, Interim Award No. 40-375-1, June 7, 1984, *reprinted in* 6 Iran–USCTR 130.

110 *Encana*, para. 13.

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Prima Facie Case on the Merits?

Showing a *prima facie* case on the merits is generally required in commercial arbitration where tribunals are allowed to make an overall assessment of the merits of the case to establish whether the party's case is "sufficiently strong to merit protection."[111] Whether the applicant must establish that it has a *prima facie* case on the merits in an investor-state arbitration in order to obtain interim relief is debatable. As observed by authors,

> [a]lthough the likelihood of success on the merits of the underlying claim is required for injunctive relief in many municipal systems, it rarely is articulated in public international arbitration as a factor to be considered in the granting of interim measures. It is a factor nonetheless, albeit *sotto voce*. It certainly is appropriate that when a case manifestly lacks merit, necessarily costly and disruptive interim measures to protect such dubious rights should not be granted. A tribunal must determine *prima facie* not only whether it possesses jurisdiction but also whether the question presented by the case is frivolous. The reluctance of tribunals to openly voice their consideration of this factor probably reflects in large part a desire to avoid embarrassment to a *sovereign* state party to the arbitration or accusations of pre-judging the case.[112]

UNCITRAL Rules. Under the 1976 UNCITRAL Rules, doubt was permitted on the need to establish a *prima facie* case. However, and in line with the general practice in commercial arbitration, it has been suggested that under the 1976 UNCITRAL Rules, "[a]lthough at the interim measures stage an arbitral tribunal should not be overly concerned with the merits of the case, a party whose case is clearly without merit should not be granted a request for interim measures. There can be no prejudice if there is little or no prospect that the alleged right threatened will be recognized as a right."[113] Draft Article 26(3)(b) makes it clear and requires "a reasonable possibility that the requesting party will succeed on the merits of the claim," except in relation with requests for preservation of evidence.

The tribunal in the *Paushok* case made the *prima facie* establishment of the case one of the requirements to be met to grant interim relief. Doing so, it noted that:

> . . . the Tribunal need not go beyond whether a reasonable case has been made, which, if the facts alleged are proven, might possibly lead the Tribunal to the conclusion that an award could be made in favour of Claimants. Essentially, the Tribunal needs to decide only that the claims made are not, on their face, frivolous or obviously outside the competence of the Tribunal. To do otherwise would require the Tribunal to proceed to a determination of the facts and, in practice, to a hearing

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111 See Ali Yeşilirmak, Provisional Measures in International Commercial Arbitration 5–29 (Kluwer 2005); see also K. Hobér, p. 735. It is also a common feature in the jurisprudence of the Court of Justice of the European Communities under the *fumus boni juris* doctrine.

112 D. Caron, Leiden, pp. 237–38 (footnotes omitted, emphasis in the original).

113 D. Caron et al., p. 537.

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on the merits of the case, a lengthy and complicated process which would defeat the very purpose of interim measures.[114]

ICSID system. Showing a *prima facie* case is not an express requirement under the ICSID Convention, in line with the ICJ's practice.[115] This said, depending on the nature of the request, an ICSID tribunal examines the *prima facie* merits of the case to a certain extent, when it appreciates the rights for which interim protection is requested. Indeed, one can ponder whether the test for asserting a theoretically existing right or showing the appearance of a right as mentioned above, is fundamentally different from a showing of a *prima facie* case on the merits. It is submitted that it is not, provided the *prima facie* test is understood as a demonstration that the applicant's case is not entirely without merit, in other words, not devoid of any chance of prevailing. With this understanding, the tests are not different in essence. Be this as it may, the question appears to be limited to cases where the relief aims at protecting a specific right, such as specific performance. In other cases, such as cases aiming at the preservation of evidence or the protection of the tribunal's jurisdiction, there seems to be no requirement to establish a *prima facie* case on the merits.

Urgency

Beyond the issue of whether urgency is a requirement for the granting of interim relief in investor-state arbitration, which will be examined first, the concept of urgency has a practical impact on the way proceedings are conducted and will be reviewed thereafter.

Is urgency a requirement? Although none of the arbitration rules addressed here expressly mentions urgency, it appears to be one of the requirements for the granting of interim relief. Indeed, unless there is urgency in the situation presented to the tribunal, the relief sought can await the determination on the merits.

ICSID system. A leading author observed that "an attempt to have reference to urgency and imminent danger was defeated" in the preparation of the Convention.[116]

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114 *Paushok*, para. 55, footnote omitted.

115 While Article 41 of the ICJ Statute is silent on this issue and the Court has not set any clear standards in this regard, it has been suggested that "as there must be at least a *prima facie* basis for the substantive jurisdiction, there must also be some prospects of success on the merits of the case, for otherwise there would not be any necessity to indicate provisional measures" (Zimmermann et al., para. 35). "The aspects concerning the prospects of success of the application do not play an important role in the practice of the Court because inter-State disputes are usually complex so that the prospects of success are not easily evaluated (*ibid.*, para. 36); but see *contra* S. Rosenne ("It is arguable that this [if the Court considers that circumstances so require] also can imply some assessment by the Court of the nature of the decision on the merits and the chances of each party on the merits. But speculation of that nature is hardly compatible with the international judicial function" referring to *Maffezini*, op. cit., p. 72).

116 Schreuer et al., para. 63 under Article 47.

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Rather, the criterion is whether "a question cannot await the outcome of the award on the merits."[117] Some tribunals, when dealing with a request for provisional measures, have not discussed the matter of urgency at all.[118] Others have found guidance in the test applied by the ICJ[119] and have characterized urgency as one of the requirements for interim relief. The tribunal in *Pey Casado* stated that it is "in the very nature of the institution of provisional measures that they are not only provisional, but also and above all urgent, that is to say that they must be or be able to be decided quickly."[120] For its part, the *Plama* tribunal declared "[t]he need for provisional measures must be urgent and necessary to preserve the status quo or avoid the occurrence of irreparable harm or damage."[121] The latter part of the requirement is examined later in this section. The *Occidental* tribunal recalled that "[i]t is also well established that provisional measures should only be granted in situations of necessity and urgency in order to protect rights that could, absent such measures, be definitely lost."[122] Or, in the words of the *Perenco* tribunal, "[p]rovisional measures may only be granted where they are urgent, because they cannot be necessary if, for the time being, there is no demonstrable need for them."[123]

UNCITRAL Rules. There is no requirement of urgency in the Rules or in the draft Rules. The Iran-U.S. Claims Tribunal does not seem to have referred to it as a necessary requirement either. It must be said however that the Iran-U.S. Claims Tribunal focused instead on the notion of irreparable harm, which will be examined shortly. By contrast, the *Encana* and *Paushok* tribunals emphasized that urgency was an important requirement in the context of investor-state arbitration.[124]

What is urgency? Urgency is usually considered on a case-by-case basis, depending on the facts of the case and on the rights to be protected. According to the ICJ, "[a] measure is urgent where 'action prejudicial to the rights of either party is likely to be

117 *Ibid.*

118 See, for example, *Maffezini* and *Tokios Tokeles*.

119 In the words of the ICJ, "Whereas the power of the Court to indicate provisional measures will be exercised only if there is urgency in the sense that there is a real risk that action prejudicial to the rights of either party might be taken before the Court has given its final decision (see, for example, Passage through the Great Belt (Finland v. Denmark), Provisional Measures, Order of July 29, 1991, I.C.J. Reports 1991, p. 17, para. 23. Certain Criminal Proceedings in France (Republic of the Congo v. France), Provisional Measure, Order of June 17, 2003, I.C.J. Reports 2003, p. 107, para. 22; Pulp Mills on the River Uruguay (Argentina v. Uruguay), Preliminary Objections, Order of January 23, 2007, p. 11, para. 32); and whereas the Court thus has to consider whether in the current proceedings such urgency exists.", Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Order of October 15, 2008, para. 129 [hereinafter *Case Concerning Application of the Convention on the Elimination of Discrimination*].

120 *Pey Casado*, para. 5.

121 *Plama*, para. 38.

122 *Occidental*, para. 59.

123 *Perenco*, para. 43.

124 *Encana*, para. 13; *Paushok*, para. 45.

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taken before [a] final decision is given.'"[125] Few tribunals, however, have elaborated on the notion of urgency and on the level of urgency required. The *Biwater* tribunal noted that "whilst it was a common ground that this is a requirement, for its own part the Arbitral Tribunal considers that the requirement needs more elaboration."[126] It then observed that the notion of urgency can vary:

> In the Arbitral Tribunal's view, the degree of 'urgency' which is required depends on the circumstances, including the requested provisional measures, and may be satisfied where a party can prove that there is a need to obtain the requested measure at a certain point in the procedure before the issuance of an award. In most situations, this will equate to "urgency" in the traditional sense (i.e. a need for a measure in a short space of time). In some cases, however, the only time constraint is that the measure be granted before an award – even if the grant is to be some time hence. The Arbitral Tribunal also considers that the level of urgency required depends on the type of measure which is requested.[127]

The tribunal in *City Oriente* made the following assessment on the issue of urgency:

> In the Tribunal's opinion, the passing of the provisional measures is indeed urgent, precisely to keep the enforced collection or termination proceedings from being started, as this operates as a pressuring mechanism, aggravates and extends the dispute and, by itself, impairs the rights which Claimant seeks to protect through this arbitration. Furthermore, where, as is the case here, the issue is to protect the jurisdictional powers of the Tribunal and the integrity of the arbitration and the final award, then the urgency requirement is met by the very nature of the issue.[128]

The circumstances of the case are thus critical in assessing the level of urgency of a request. For example in *Burlington*, the tribunal found that urgency lied with the non-aggravation of the dispute[129]: "[. . .] when the measures are intended to protect against the aggravation of the dispute during the proceedings, the urgency requirement is fulfilled by definition"[130] or by the very nature of the objective sought.

As a general proposition, it appears reasonable to consider that the urgency requirement is met as soon as the decision over the provisional measures cannot wait until the

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125 *Passage Trough the Great Belt Case*, in which Finland submitted that the rights of passage through the Great Belt of ships, including drill ships and oil rigs, to and from Finnish ports and shipyards was threatened by the construction of a fixed bridge over the Great Belt by Denmark. The ICJ considered that there was no need to indicate Denmark to freeze construction work of the East Channel Bridge since the Passage was only to be hindered with the installation of cable works not before the end of 1994, by which time the Court would have disposed of the case (Order of July 29, 1991, I.C.J. Reports 1991, p. 12). Cited in *Occidental*, para. 59. See also, *Case Concerning Application of the Convention on the Elimination of Racial Discrimination*, para. 129.

126 *Biwater*, para. 76.

127 *Biwater*, para. 76.

128 *City Oriente*, Decision on Provisional Measures, para. 69.

129 *Burlington*, para. 74

130 *Ibid.*, with a reference to *City Oriente.*

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final award. This said, the degree of urgency can also be higher and may influence when and how a tribunal will deal with an application for provisional measures.

Urgency and the procedural aspects of an ICSID or AF case. Pursuant to ICSID Arbitration Rule 39(2) and Article 46(1) of the AF Arbitration Rules, the tribunal must give priority to the consideration of the request for interim relief, thus reflecting the urgency of the matter. To expedite the process, Arbitration Rule 39(5) was introduced in April 2006 in order to allow the presentation of a request whilst the tribunal is being constituted.[131]

Tribunals can prioritize the request in different ways. In practice, tribunals can convene a hearing or take a decision by correspondence. Before making a decision, they must give both parties the opportunity of presenting their observations. Unlike other arbitration regimes, the ICSID system contains no provisions on *ex parte* measures. If a party does not avail itself of the opportunity to present its observations, this failure will of course not be viewed as an obstacle to the issuance of an order.[132]

To what extent should the parties be offered the opportunity to present their observations when there is a matter of urgency?

In *City Oriente v. Ecuador*, the claimant requested that the respondents refrain from collecting on a claim of over US$28 million that was in dispute before the ICSID tribunal but had already been enforced locally. It also asked that the respondents refrain from initiating proceedings seeking a declaration of termination of the concession on the ground of nonpayment as well as criminal complaints. In other words, the claimant requested the maintenance of the *status quo* as a matter of urgency. In a letter to the parties, the tribunal ordered the respondents to refrain *inter alia* from instituting or prosecuting any judicial action and from demanding payment pending the tribunal's determination on provisional measures, which was in effect equivalent to granting *ex parte* measures. It then called a hearing one month after the filing of the request. The respondents requested a three-month postponement to select outside counsel. The tribunal accepted to defer the hearing, provided that Ecuador undertook to neither initiate or procure judicial action nor to demand payment. Ecuador having failed to do so by the required date, the tribunal held the hearing on the date initially scheduled. It in particular noted that the respondents had in-house counsel with sufficient knowledge to adequately defend their interests.[133] Emphasizing the urgency of the measures, the tribunal granted the claimant's request within two months of its presentation.

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131 This amendment although modest is considered to represent "an important contribution to the availability of prompt provisional measures," Carolyn B. Lamm, Hansel T. Pham and Chiara Giorgetti, *Interim Measures and Dismissal Under the 2006 ICSID Rules*, *in* The Future of Investment Arbitration 106 (OUP 2009). A similar provision was not deemed necessary in the AF Arbitration Rules since the parties can resort to domestic courts if urgency requires it.

132 *City Oriente*, Decision on Provisional Measures, para. 70. The tribunal underlined the need for affording both parties the opportunity to provide their observations. It concluded that when this had been done, and even if one of the parties has failed to provide its observations, a measure can be recommended.

133 *City Oriente*, Decision on Provisional Measures, para. 81.

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Similarly, the *Perenco* tribunal requested the parties not to alter the *status quo* until "it had an opportunity to further hear from the parties on the question of provisional measures."[134] It later added that such request had the same authority as a recommendation. [135] It also noted in its Decision on Provisional Measures that it had not issued the request without having received submissions from both parties.

Urgency and the administration of an UNCITRAL case. Article 26 of the UNCITRAL Arbitration Rules contains no provisions specifically addressing the procedure to be followed in connection with a request for provisional measures. This being so, Article 15(1) stipulates generally that the parties must be treated with equality and given a "full opportunity" to present their case at any stage of the proceedings.

There have been instances, though, in which the Iran-U.S. Claims Tribunal issued orders without first hearing the opposing party. These orders were given pending further determination of the request for interim measures. They were rendered because there was an urgent compelling need to stay local proceedings[136] or to prevent the sale of goods.[137] Whether the power to issue such *ex parte* orders is an inherent procedural power of the tribunal or is encompassed in the 1976 version of Article 26(1) has been discussed, with a preference being expressed for the latter solution.[138]

The question whether an UNCITRAL tribunal can issue a temporary order upon request of a party without notice of the request to the other party was subject to extensive discussion during the revision of the UNCITRAL Model Law.[139] Article 17B and C of the Model Law now provides for "preliminary orders" granted *ex parte* for a maximum duration of 21 days when it is likely that harm not adequately reparable by an award on damages would occur if the order is not granted. Article 17E of the Model Law further considers the provision of a security by the applicant. Draft Article 26(5) of the Arbitration Rules also envisages the possibility of a "temporary order" without prior notice to the other party when prior disclosure of the request for interim measures to the party against whom it is made would risk frustrating the purpose of the measure in question. This power would be conditional upon a prohibition contained in the *lex arbitri.*[140] Indeed, the 2009 version of draft Article 26(5) makes it clear that the admissibility of preliminary orders is governed by the law applicable to the arbitration proceedings.[141]

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134 *Perenco*, para. 28.

135 *Perenco*, para. 76.

136 Teledyne Industries Incorporated and the Islamic Republic of Iran, Order, September 9, 1983, Case No. 10812, Chamber Two, *reprinted in* 3 Iran-USCTR 336.

137 Shipside Packing Company, Incorporated and the Islamic Republic of Iran, Interim Award No. 27-11875-1, September 6, 1983, *reprinted in* 3 Iran-USCTR 331.

138 D. Caron, Leiden, p. 228.

139 Gabrielle Kaufmann-Kohler, *Mesures ex parte et injonctions préliminaires*, *in* Les Mesures Provisoires Dans L'arbitrage Commercial International, Évolutions et Innovations, Débats et Colloques, No. 14 (LexisNexis 2007).

140 Report of the Working Group on the work of its 47th Session, Vienna, September 10–14, 2007, A/CN.9/641, para. 59.

141 Note A/CN.9/WG.II/WP.154.Add.1, para. 28.

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The Working Group reported that this provision elicited concerns especially in the context of investor-state disputes,[142] although it gave no reasons for such concerns in its report.

Urgency usually interrelates with other factors that call for the necessity of the measures.

Necessity or Risk of Irreparable Harm

Article 26 of the 1976 UNCITRAL Rules refers to any measures that the tribunal deems necessary. The word "necessary" does not appear in the new draft Rules. It is not mentioned in the ICSID provisions either. Necessity appears nonetheless to be an indispensable feature. The need to grant a measure is assessed by balancing the degree of harm suffered by the applicant but for the measure. In other words, on a "balance of convenience" basis, the necessity of a measure is assessed against the consequence for the applicant of the absence of the measure. Tribunals have routinely assessed these consequences in light of the irreparable harm the applicant would suffer if the measure were not granted.

International precedents. The International Court of Justice consistently conditions the indication of provisional measures upon a showing of "irreparable prejudice." It is commonly said that the notion of irreparable harm or prejudice derives from the common-law concept of irreparable injury. This said, the exact meaning of the "irreparable harm" standard of international law appears uncertain. Irreparable harm or prejudice was first defined by the Permanent Court of International Justice as one that cannot be compensated by way of damages or restitution in some other material form.[143] This narrow test has been abandoned in the ICJ's subsequent practice,[144] except for the *Aegean Sea Continental Shelf Case.*[145]

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142 Report of the Working Group on the work of its 47th Session, Vienna, September 10–14, 2007, A/CN.9/641, para. 55. Report of the Working Group on the work of its 50th Session, New York, February 9–13, 2009, A/CN.9/669, para. 104.

143 Denunciation of the Treaty of 2 November 1865 between China and Belgium (Belgium v. China), also known as the Sino Belgian Treaty Case, 1927 P.C.I.J. Series A, No. 8, p. 7 (Order of February 21, 1927).

144 The ICJ's order on provisional measures rendered in the Pulp Mills on the River Uruguay case illustrates the Court's recent practice. The Court stated in its Order of July 13, 2006: "62. Whereas the power of the Court to indicate provisional measures to maintain the respective rights of the parties is to be exercised only if there is an urgent need to prevent irreparable prejudice to the rights that are the subject of the dispute before the Court has had an opportunity to render its decision (see Passage through the Great Belt (Finland v. Denmark), provisional Measures, Order of July 29, 1991, I.C.J. Reports 1991, p. 17, para. 23; Certain Criminal Proceedings in France (Republic of the Congo v. France), Provisional Measure, Order of June 17, 2003, I.C.J. Reports 2003, p. 107, para. 22)."

145 *Aegean Sea Continental Shelf Case*, para. 33."Whereas, in the present instance, the alleged breach by Turkey of the exclusivity of the right claimed by Greece to acquire information concerning the natural resources of areas of continental shelf, if it were established, is one that

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ICSID system. ICSID practice refers routinely to ICJ precedents and to the notion of irreparable harm. The *Tokios Tokeles* tribunal considered that, under Article 47, a provisional measure had to be urgent and necessary and that it was necessary if "there is a threat or possibility of irreparable harm to the rights invoked."[146] Similarly, the *Occidental* tribunal recalled that, according to the ICJ, "a provisional measure is necessary where the actions of a party 'are capable of causing or of threatening irreparable prejudice to the rights invoked.'"[147] The tribunal assessed irreparable harm in light of the existence of a monetary relief. The *Occidental* tribunal found that there was no irreparable harm since the claimants' harm, if any, could be compensated by a monetary award.[148]

In the same vein, the *Plama* tribunal mentioned that it accepted the respondent's argument that the harm was not irreparable if it could be compensated by damages[149] but did not discuss the matter further. Similarly, the tribunal in *Metalclad v. Mexico* denied the request and underlined that the measures must be required to protect the applicant's rights from "an injury that cannot be made good by subsequent payment of damages."[150]

By contrast, the *City Oriente* tribunal favored the urgency requirement over the need for irreparable harm. It considered that the *Tokios Tokeles* decision was isolated[151] and had adopted too strict an approach to Article 47 of the ICSID Convention. Turning to the existence of irreparable harm, the *City Oriente* tribunal distinguished its case from investment cases where the sole relief sought by the claimants is damages, while *City Oriente* was seeking contract performance.[152] The tribunal recalled in its decision not to revoke the measures granted that it had verified that neither Article 47 of the ICSID Convention nor Arbitration Rule 39 "require that provisional measures be ordered only as means to prevent irreparable harm."[153]

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might be capable of reparation by appropriate means; and whereas it follows that the Court is unable to find in that alleged breach of Greece's rights such a risk of irreparable prejudice to rights in issue before the Court as might require the exercise of its power under Article 41 of the Statute to indicate interim measures for their preservation". The test was criticized by Judge Elias in his Separate Opinion in which he stated "It means that the State which has the ability to pay can under this principle commit wrongs against another State with impunity, since it discounts the fact that the injury by itself might be sufficient to cause irreparable harm to the national susceptibilities of the offended State. The rightness or wrongness of the action itself does not seem to matter. This is a principle upon which, contemporary international law should frown: might should no longer be right in today's inter-State relations." p. 30

146 *Tokios Tokeles*, Procedural Order 3, para. 8.

147 *Occidental*, para. 59, quoting President Jiménez de Aréchaga in the *Aegean Sea Continental Shelf Case*.

148 *Occidental*, para. 92.

149 *Plama*, para. 46.

150 *Metalclad*, para. 8.

151 *City Oriente*, Decision on Revocation, para. 82.

152 *Ibid.*, para. 86.

153 *Ibid.*, para. 70.

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The *Burlington* tribunal for its part referred to the standard of "harm not adequately reparable by an award of damages" used by the UNCITRAL Model Law[154] (see below). It stressed that its decision sought to avoid "the destruction of an ongoing investment and of its revenue producing potential which benefits both the investor and the State."[155] Unlike *Occidental*, it was not a case of avoidance of the increase of existing damage due to the passage of time; it was a case of avoidance of a different damage.

Be this as it may, tribunals established under the ICSID Convention or the AF Rules have generally adopted a rather strict approach to the definition of irreparable harm, which departs from the ICJ's current practice. One could think of explaining this difference by the fact that in an investor-state dispute, the claimants usually seek monetary relief, while in State-to-State disputes the relief sought can differ considerably.[156] This would not be a convincing explanation. In commercial arbitrations, the claimants most often seek monetary relief, and the harm standard is more relaxed (see UNCITRAL Rules below). In reality, one should rather ask whether investment tribunals may not over time adopt a less strict standard under the influence of the practice of the ICJ and commercial arbitration.

Irreparable harm does not only concern the applicant. The *Occidental* tribunal recalled that the risk of harm must be assessed with respect to the rights of either party. Specifically, it stated that "provisional measures may not be awarded for the protection of the rights of one party where such provisional measures would cause irreparable harm to the rights of the other party, in this case, the rights of a sovereign State,"[157] namely its sovereign rights to dispose freely of its lawfully held property. In the same spirit, the *City Oriente* tribunal stressed the need to weigh the interests at stake against each other. Referring to Article 17A(1)(c) of the UNCITRAL Model Law, it emphasized the balance of interests that needed to be struck, stating:

> It is not so essential that provisional measures be necessary to prevent irreparable harm, but that the harm spared the petitioner by such measures must be significant and that it exceed greatly the damage caused to the party affected thereby.[158]

UNCITRAL Rules. It has been debated whether the 1976 UNCITRAL Arbitration Rules required the applicant to show a risk of irreparable harm. One author has submitted that

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154 *Burlington*, para. 82.

155 *Burlington*, para. 83.

156 Indeed, one must take into account the nature of the cases brought before the ICJ and the risk of irreparable harm to persons which may motivate provisional measures. See, e.g., the *LaGrand* Case, wherein the ICJ observed "[w]hereas the execution of Walter LaGrand is ordered for March 3, 1999; and whereas such an execution would cause irreparable harm to the rights claimed by Germany in this particular case", LaGrand, Provisional Measures, Order of March 3, 1999, para. 24, I.C.J. Reports 1999, p. 9.

157 *Occidental*, para. 93.

158 *City Oriente*, Decision on Revocation, para. 72. A similar approach was followed by the *Burlington* tribunal, para. 82. That tribunal noted that "provisional measures are in the interest of both sides if they are adequately structured", para. 85. In order to preserve each party's right, it ordered the establishment of an escrow account.

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no such requirement was implied and that it was sufficient that the act to be enjoined would substantially prejudice the rights in dispute. To wit,

> [t]hat article 26 does not require irreparable prejudice is evident from the example in that article of an appropriate interim measure: 'the sale of perishable goods.' Surely the loss of goods, the sale price of which is ascertainable, is not irreparable.[159]

This said, the Iran-U.S. Claims Tribunal has largely endorsed the requirement of irreparable harm. The notion of irreparable harm was discussed for the first time in 1984 in the case of *Boeing and the Islamic Republic of Iran*.[160] In this case, Chamber One denied a stay of execution since it was not necessary to protect a party from irreparable harm. In passing, it observed that "monetary damages are not irreparable harm" and that the tribunal had the power to compensate any harm caused by the execution. Faced with a subsequent application in the same case, Judge Holtzmann noted in a concurring opinion that showing that the execution of a judgment would cause grave or irreparable monetary harm to Iran could not be the only test, as "[t]he loss of a treaty right to be free of litigation in another forum may itself be irreparable."[161] A subsequent case embraced a more flexible approach. In *Behring International*, the tribunal considered that the concept of irreparable prejudice in international law is broader than the Anglo-American law concept of irreparable injury and that the availability of monetary remedy was not a bar to granting interim relief.[162] Nonetheless, the review of the decisions of the Iran-U.S. Claims Tribunal shows that the admission of irreparable harm is closely linked to the nonexistence of monetary relief. Indeed,

> . . . [o]n balance, it has been the practice of the Tribunal to conclude that, except where unique property is involved, irreparable prejudice is difficult to establish

159 D. Caron, Leiden, pp. 241–42.

160 Boeing et al. and the Islamic Republic of Iran, Interim Award No. 34-222-1 at 4, February 17, 1984, *reprinted in* 5 IRAN-USCTR 152.

161 Concurring Opinion of Judge Holtzmann dated August 27, 1984, attached to the Interim Award No. 38-222-1, May 25, 1984, *reprinted in* 6 IRAN-USCTR 43.

162 Behring International, where the tribunal stated: "A definition of 'irreparable prejudice' is elusive; however, the concept of irreparable prejudice in international law arguably is broader than the Anglo-American law concept of irreparable injury. While the latter formulation requires a showing that the injury complained of is not remediable by an award of damages (i.e., where there is no certain pecuniary standard for the measure of damages, 43 C.J.S. Injunctions § 23), the former does not necessarily so require. See Anglo-Iranian Oil Co. Case (U.K. v. Iran), 1951 I.C.J. 89, 94 (Interim Protection Order of July 5) (ordering, *inter alia*, joint control of contested oil company with profits to be deposited in escrow account. Arguably, rights sought to be protected susceptible to reparation by award of damages); Fisheries Jurisdiction Case (U.K. v. Ice.), 1972 I.C.J. 12, 13 (Interim Protection Order of 17 Aug.) (ordering Iceland not to enforce extension of exclusive fishing zone beyond pre-existing 12 mile limit. Arguably, any damage to U.K. fishing industry reparable by damages); Goldsworthy, Interim Measures of Protection in the International Court of Justice, 68 AM. J. INT'L L. 258, 269 (1974) ('the [I.C.J.] test is not whether adequate compensation can ultimately be provided but whether "irreparable prejudice" would be occasioned to the rights of the applicant if interim protection is refused')."

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> since monetary damages generally are considered adequate to compensate the requesting party for any actual damages.[163]

The tribunal in the UNCITRAL case of *Paushok v. Mongolia* took a different approach. Distinguishing itself from the *Plama*, *Occidental*, and *City Oriente* ICSID tribunals[164] and relying on the *Behring* case, it concluded that "'irreparable harm' in international law has a flexible meaning."[165] It also referred to Article 17A of the UNCITRAL Model Law, which only required that "harm not adequately reparable by an award of damages is likely to result if the measures are not ordered."[166] It found that the claimants faced substantial prejudice, namely possible insolvency and bankruptcy of one of the claimants, and the complete loss of their investment. The tribunal concluded "[w]hile it is true that Claimants would still have a recourse in damages and that other arbitral tribunals have indicated that debt aggravation [in *City Oriente*] was not sufficient to award interim measures, the unique circumstances of this case justify a different conclusion."[167] The tribunal further weighed the balance of inconvenience in the imposition of interim measures and found that it was in the interest of both parties to issue an order.[168] It is submitted that the risk of bankruptcy present in this case certainly constituted a risk of harm not compensable by monetary damages.

A different approach has also been adopted in draft Article 26(3), which provides that the requesting party shall satisfy the arbitral tribunal that if the measure is not ordered, the likely result is a "harm not adequately reparable by an award of damages." In its discussion of the Model Law, the UNCITRAL Working Group adopted a similar wording. The words "harm not adequately reparable by an award of damages" were seen as not presenting a threshold as high as the "irreparable harm" test and leaving some discretion to the tribunal in deciding upon the issuance of an interim measure.[169] The concept of "not adequately reparable" is indeed less demanding than the requirement

163 C. Brower, p. 229.

164 The *Paushok* tribunal stated: "The Tribunal is aware of preceding awards concluding that even the possible aggravation of a debt of a claimant did not ('generally' says the *City Oriente* case cited below) open the door to interim measures when, as in this case, the damages suffered could be the subject of monetary compensation, on the basis that no irreparable harm would have been caused [referring to *Plama*, *Occidental* and *City Oriente* in its decision on revocation]. And, were it not for the specific characteristics of this case, the Tribunal might have reached the same conclusion, although it might have expressed reservations about the concept that the possibility of monetary compensation is always sufficient to bar any request for interim measures under the UNCITRAL Rules," para. 62.

165 *Paushok*, paras. 68–69.

166 *Ibid.*, para. 69.

167 *Ibid.*, para. 78.

168 *Paushok*, para. 84. The tribunal found that the respondent had an interest that its second largest gold producer continued its operations (para. 83). On that basis, the tribunal ordered inter alia the suspension of the payment of the windfall profit tax (the validity of which under the BIT was the subject matter of the dispute) owing by one of the claimants and that claimants provide a security of US$ 2 million, either through an escrow account or through a bank guarantee, until a final award is rendered.

169 Note by the Secretariat, 43rd Session, A/CN.9/WGII/WP.138.

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of an "irreparable harm."'"[170] Thus, the draft Arbitration Rules, consistent with Article 17A(1)(c) of the Model Law, have moved away from too strict a test. As already mentioned, in the context of a request for preserving evidence, this requirement would only apply to the extent the tribunal considers it appropriate. It remains to be seen whether this trend toward a less demanding standard in commercial and UNCITRAL investor-state arbitration will influence the practice of tribunals in the ICSID system.

Finally, draft Article 26(3), in line with the Model Law, highlights the need to balance the interests at stake. The likelihood of irreparable harm to the requesting party must "substantially outweigh" the harm which the measures sought are likely to cause to the other party.

AGAINST WHOM CAN THE MEASURES BE ORDERED?

The measures are usually recommended against the other disputing party. One leading author has suggested that an ICSID tribunal could recommend a measure to be carried out by a third party, especially a court of a third State.[171] One has difficulty, however, identifying the source of the tribunal's authority vis-à-vis a non party.

The *Plama* tribunal dismissed the claimant's request to discontinue local proceedings and noted that, at least with regard to local bankruptcy proceedings, the parties are not the same since the proceedings were brought by private parties and not by the state. The tribunal then explained that it was "reluctant to recommend to a State that it order its courts to deny third parties the right to pursue their judicial remedies and [was] not satisfied that if it did so in this case, Respondent would have the power to impose its will on an independent judiciary."[172]

The Iran-U.S. Claims Tribunal also considered that a request for interim relief directed against a non party to the case could not be granted.[173]

EFFECT OF INTERIM MEASURES

While the measures so ordered will lapse upon the issuance of the award, their effect in the meantime is disputed. There are two distinct issues when it comes to the effect of interim measures: to which extent is the recommendation or order binding on the parties and is it enforceable? These issues are linked to the nature of the decision rendered. As a related issue, the conditions upon which an order or recommendation can be modified or terminated will also be discussed below.

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170 As mentioned earlier, this standard was adopted by the ICSID tribunal in *Burlington*, para. 82.

171 Schreuer et al., para. 153.

172 *Plama*, para. 43.

173 Atlantic Richfield Co. and the Islamic Republic of Iran et al., Interim Award No. 50-396-1, May 8, 1985, *reprinted in* 8 IRAN-USCTR 181. In that case, the request was directed at the United States which were not a party to the specific proceedings.

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Nature of the decision. Pursuant to Article 47 of the ICSID Convention and Arbitration Rule 39, unless the parties agree otherwise, a tribunal can only "recommend" provisional measures. The use of the word "recommend" has stirred discussions as to the binding character of the measures. The *travaux préparatoires* show that the drafters first envisaged the word "prescribe," which was ultimately replaced by the term "recommend" in order "to indicate that there was no direct sanction for not following the recommendation of the Tribunal."[174] This decision was adopted in the context of a strong division about the binding nature of the measures and the tribunal's power to impose sanctions for non compliance.

Nonetheless, ICSID tribunals have ruled that the term "to recommend" has the same meaning as the term "to order."[175] The *Maffezini* tribunal considered that the difference is more apparent than real and that the authority of the tribunal to rule on provisional measures "is no less binding than that of a final award."[176] One reason could be that the parties are under an obligation to conduct themselves so as to avoid rendering the award impossible of execution.[177] The *Tokios Tokeles* tribunal further "recalled that, according to a well-established principle laid down by the jurisprudence of the ICSID tribunals, provisional measures 'recommended' by an ICSID tribunal are legally compulsory; they are in effect 'ordered' by the tribunal, and the parties are under a legal obligation to comply with them."[178] This approach was reiterated by the *Perenco* tribunal.[179]

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174 Aron Broches, Chairman of the Legal Committee, II (2) History of the ICSID Convention 813.

175 *Maffezini*, para. 9. In the same vein, Article 41 of the ICJ Statute states that the ICJ indicates measures. The ICJ decided in its judgment *LaGrand Case* in 2001 that its orders have a binding effect, albeit in a different jurisdictional context. The Court stated: "It follows from the object and purpose of the Statute, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court. The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article." Judgment of June 27, 2001, para. 102, I.C.J. Reports 2001, p. 466.

176 *Maffezini*, para. 9.

177 Lawrence Collins, *Provisional and Protective Measures in International Litigation*, 234 Recueil des cours 218 (1992-III) [hereinafter L. Collins].

178 *Tokios Tokeles*, Order No. 1, para. 4.

179 *Perenco*, paras. 67–76 referring to the above cases and to *Occidental*, para. 58, *City Oriente* ("it is the Tribunal's decision that the word '*recommend'* is equal in value to the word '*order.'*" Decision on Provisional Measures, italics in the original, para. 52) and to Spyridon Roussalis v. Romania, ICSID Case No. ARB/06/01, Decision on provisional measures, July 2, 2009, unreported, para. 21 cited in Zannis Mavrogordato and Gabriel Sidere, *The Nature and Enforceability of ICSID Provisional Measures*, (2009) 75 Arbitration 1, p.42. See for a critical approach, Chester Brown, a Common Law of International Adjudication (OUP 2007), who considers that the above mentioned decisions by relying on ICJ's cases "thus represent a dramatic example of how common features in the practice of international courts with respect to

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It is beyond doubt, however, that a recommendation under Arbitration Rule 39 cannot be enforced through the ICSID Convention since it does not qualify as a final award.[180] Section 6 of the ICSID Convention, which deals with recognition and enforcement, indeed only concerns awards as defined by the Convention. Moreover, the beneficiary of the measures is not allowed to seek enforcement of the measure before a domestic court during the course of the proceedings as a result of Article 26 of the ICSID Convention.

Nevertheless, one should not underestimate the authority attached to a recommendation of an ICSID tribunal. It is undoubtedly at least morally binding upon the parties, not to speak of tactical considerations inciting a party not to disregard directions given by persons who will ultimately decide on the merits. In addition, a tribunal can draw adverse inferences from the non compliance with its recommendations.[181] It is indeed beyond cavil that a tribunal can take into account the behavior of the parties and their failure to observe the provisional measures in its final award.[182]

Modification or revocation of the measures. Pursuant to Arbitration Rule 39(4), an ICSID tribunal may at any time modify or revoke the measures, after giving each party an opportunity of presenting observations.[183] Such power reflects the provisional character of the measures. Indeed, by nature, interim relief is temporary but the duration of the validity of the measure can extend over the entire duration of the proceedings. In that respect, one could consider that there is a general duty of the parties to inform the tribunal of any changes in the circumstances that were relevant at the time of the granting of the measures. This duty would be the corollary of the absence of any limitation of the period for which the measure is granted.

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a procedural issue can do more than merely fill a gap or influence the interpretation of an ambiguous provision. Rather, a common practice with respect to a question of procedure can even prevail over a clearly expressed provision in a constitutive instrument, such as that in article 47 of the ICSID Convention." p. 150.

180 In passing, one should note that the ICSID Convention does not recognise the concept of interim award that could be enforced while the proceedings are not terminated yet.

181 See Aron Broches *in* II (I) History of the ICSID Convention 815; Note B to Arbitration Rule of 1968, 1 ICSID Reports 99.

182 *Agip v. Congo*, 311; *MINE*, Decision on Provisional Measures, December 4, 1985. See also *Pey Casado*, para. 24. This principle was also acknowledged by a tribunal constituted under the ASEAN Agreement for the Promotion and Protection of Investments 1987, Yaung Choo Trading v. Myanmar, Procedural Order, February 27, 2002, 8 ICSID Reports 2005, p. 456. The tribunal rejected a request for presentation of evidence but stated "in any event, the Tribunal could draw reference from the nonproduction of evidence."

183 Or in the words of the *Pey Casado* tribunal, "provisional measures, which are provisional by nature and by definition (as the Respondent has observed), can be modified or cancelled at any time by the Tribunal, do not benefit from the force of *res judicata*, will only last for the duration of the proceedings and automatically fall if the Tribunal decides that it lacks jurisdiction to decide the case" (para. 14). See also *SGS v. Pakistan*, Procedural Order No. 2, October 16, 2002. For an example of a request for revocation that was dismissed, see *City Oriente*, Decision on Revocation.

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Additional Facility cases

Nature of the decision. By contrast to ICSID Convention cases, an arbitral tribunal constituted under the AF Rules renders an "order" when it rules on interim relief requested by a party and makes a recommendation when it does so on its own initiative.

The recognition and enforcement of decisions rendered by a tribunal established pursuant to the AF Rules does not follow the regime of the ICSID Convention. AF decisions are enforceable through the regular mechanisms. This said, whether procedural orders may be enforced under the New York Convention is debated. The majority view is that the New York Convention applies only to awards. Enforcement is subject to more favorable provisions of domestic law, such as, for example, Section 1041(2) of the German ZPO or Article 183(2) of the Swiss PIL Act.[184] It follows that an AF order could be enforced by a local court in accordance with the procedural requirements of local law. Doubts may remain about the enforcement of a simple recommendation. However, no AF tribunal appears to have issued a recommendation so far.

Modification or revocation of the measures. Pursuant to Article 46(3) of the AF Arbitration Rules, a tribunal can modify or revoke its order or recommendation after giving each party an opportunity of presenting its observations.

NAFTA Proceedings

In proceedings conducted pursuant to NAFTA Chapter 11, the tribunal may "order" an interim measure. Article 1134 specifies in its last sentence that "[f]or purposes of this paragraph, an order includes a recommendation." This was allegedly meant to ensure "that interim measures have the same effect in NAFTA Chapter 11 proceedings governed by the ICSID Convention as in proceedings governed by the UNCITRAL or ICSID (Additional Facility) Arbitration Rules."[185] Concerns regarding enforcement similar to those just reviewed will arise here as well.

UNCITRAL Rules

Nature of the decision. Pursuant to Article 26(2) of the 1976 version of the UNCITRAL Arbitration Rules, a tribunal may render an order or an interim award.[186] The possibility of issuing an interim award was included in order to attempt to facilitate

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184 Gabrielle Kaufmann-Kohler & Antonio Rigozzi, Arbitrage International: Droit et Pratique à la Lumière de la LDIP 260 (Berne/Zurich 2006) with citations. See generally on this matter, Donald F. Donovan, *Provisional Measures: Proposals for Moving Forward*, ICCA Congress series no. 11, London 2002, pp. 132-149, and Andrea Carlevaris, *Enforcement of Interim Measures in International Arbitration*, *in* 9 Yearbook of Private International Law 503 (2007).

185 M. Kinnear et al., 6-1134.

186 See *Perenco* on how the Iran-U.S. Claims Tribunal also issues requests, instead of orders, in its interim awards, thus imposing provisional measures that it regards as binding (paras. 71–73).

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the enforcement of the measures. Nonetheless, the same question arises here in terms of enforcement as for an order rendered under the AF Rules or NAFTA Article 1134. Indeed, the label on the decision will not modify its true nature, which is decisive for enforcement purposes.

As a consequence, draft Article 26 only refers to orders. Under the draft Rules, an UNCITRAL arbitral tribunal could thus not order interim measures in the form of an award. It was indeed submitted that there was no purpose in issuing interim awards on provisional measures given that the revised version of the UNCITRAL Model Law contained express provisions permitting the enforcement of interim measures regardless of the form in which they are ordered.[187] Indeed, Article 17H of the Model Law provides for the enforcement of an interim measure issued by an arbitral tribunal except if very few limited grounds for refusal of recognition or enforcement are met. In addition, the Working Group noted that "issuing an interim measure in the form of an award could create confusion particularly in light of article 26(5) [preliminary order] which permitted the arbitral tribunal to modify or suspend an interim measure."[188] Be this as it may and pending the adoption of Article 17 of the amended Model Law by national legislators, the enforcement of an order granted by an UNCITRAL tribunal is far from evident and would follow the same regime as an order rendered under the AF Rules or NAFTA Article 1134.

Draft Article 26(9) provides for the applicant's possible liability for costs and damages if the tribunal later determines that the measures should not have been granted. This provision mirrors Article 17G of the UNCITRAL Arbitration Model Law. It was noted that this paragraph "might have the effect that a party requesting an interim measure be liable to pay costs and damages in situations where, for instance, the conditions of draft article 26 had been met but the requesting party lost the arbitration."[189] However, it appears from the discussions at the time of the adoption of Article 17G that the final decision on the merits is not an essential element in determining whether the interim measure should have been granted.[190]

Modification or revocation of the measures. An arbitral tribunal may review or alter the interim relief ordered if the circumstances or the progress of the arbitral proceedings so require. Strictly speaking, given that an UNCITRAL tribunal cannot act *proprio motu*, it is not supposed to modify, suspend, or terminate the measure on its own initiative. The draft Rules modify this and allow a tribunal to act not only upon the request of a party but also on its own initiative "in exceptional circumstances and upon prior notice to the parties." Any modification, suspension, or termination of the measure could be effected by a subsequent order.

If the interim relief had initially been granted not by way of an order but in the form of an interim award as provided in the 1976 version of Article 26(2), any reconsideration

187 Report of the Working Group on the work of its 47th Session, Vienna, September 10–14, 2007, A/CN.9/641, para. 51.

188 *Ibid.*, para. 51.

189 Report of the Working Group on the work of its 50th Session, New York, February 9–13, 2009, A/CN.9/669, para. 116; Note A/CN.9/WG.II/WP.154.Add.1, para. 32

190 Note A/CN.9/WG.II/WP.154.Add.1, para. 32.

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may arguably infringe the principle of *res judicata*. This difficulty will no longer exist under the draft Rules, since the latter only provide for interim relief by way of procedural orders.

CONCURRENT JURISDICTION OF DOMESTIC COURTS

Can a party seek interim relief from domestic courts, for example, if the tribunal is not yet constituted or if it is constituted but has no jurisdiction to grant the requested measures, or when a measure is directed at a third party, or a court-ordered measure is deemed more efficient?

ICSID Convention Proceedings

Interim relief under the ICSID Convention proves to be specific when it comes to the interaction with local courts. As already mentioned, Article 26 of the ICSID Convention provides that, unless otherwise stated, consent to ICSID arbitration is given to the exclusion of any other remedy. It was debated whether this exclusion applied to interim relief.[191] As indicated, the tribunal in *MINE* recommended, in clear contrast to the tribunal in *Atlantic Triton*, that the respondent withdraw and terminate any proceedings in connection with provisional measures pending in national courts.

In 1984, Arbitration Rule 39(6) (formerly Rule 39(5)) was introduced to clarify that, except when otherwise stipulated, the parties waive their right to seek interim measures of protection in domestic courts, whether before or after the institution of the ICSID proceedings. For this rule not to apply, the parties must have stipulated so in the agreement recording their consent, namely in the arbitration clause, be it in a contract[192] or in a treaty. An illustration of such a stipulation in an IAA can be found in NAFTA Article 1121 (see below). Arbitration Rule 39(6) is a further illustration of the insulated nature of ICSID proceedings.

Additional Facility Rules

By contrast, Article 46 of the AF Arbitration Rules expressly authorizes the parties to request assistance from local courts to obtain interim relief. Article 46(4) specifies

191 See A. Parra, p. 37. Some authors suggested that since an ICSID tribunal can only recommend measures, "the Contracting States did not intend to deprive national courts of the power to prescribe provisional measures" in L. Collins, p. 99. See also on this issue C. Brower and R. Goodman, op. cit.

192 The parties can for example insert in their agreement ICSID Model Clause 14, which reads as follows: "Without prejudice to the power of the Arbitral Tribunal to recommend provisional measures, either party hereto may request any judicial or other authority to order any provisional or conservatory measure, including attachment, prior to the institution of the arbitration proceeding, or during the proceeding, for the preservation of its rights and interests."

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that, by doing so, the parties are not infringing upon the agreement to arbitrate or affecting the powers of the tribunal. This feature has been explained by the absence of an insulated mechanism in the AF Rules and the fact that AF arbitration is generally subject to a national legal order.[193]

UNCITRAL Rules

Similarly, Article 26(3) of the 1976 UNCITRAL Arbitration Rules and draft Article 26(10) allow the parties to seek interim relief from domestic courts. Such action is not seen as a breach or waiver of the agreement to arbitrate.

NAFTA Proceedings

Parties to NAFTA proceedings governed by the UNCITRAL Rules or the ICSID AF Rules can seek interim relief from domestic courts. Article 1134 does not contain any specific guidance in this respect. However, Article 1121 (entitled "Conditions Precedent to Submission of a Claim to Arbitration") complements the existing arbitration rules and limits the nature of the relief sought and the courts from which such relief may be requested. It states that, by consenting to arbitration under Chapter 11, a party (an investor on its behalf or on behalf of an enterprise) waives its right to resort to domestic courts "except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party."

CONCLUSION

The scope of the interim relief available in the context of investor-state disputes is broad enough to meet the parties' legitimate needs for temporary protection, subject to limitations which may be found in a relevant treaty, such as the one contained in NAFTA Article 1134, barring attachment or enjoining actions alleged to constitute a breach of NAFTA protections. This said, applicants are faced with a high threshold when seeking to establish that the interim relief requested is urgent and needed. This may explain the reluctance of the vast majority of the tribunals to grant interim relief in the context of investor-state arbitration, whether in the ICSID system or under the UNCITRAL Rules. Indeed, most tribunals seem to have rejected the requested measures with the recent exceptions of *City Oriente, Perenco*, and *Burlington*, as well as *Paushok*. Whether these recent developments signal a change in attitude of tribunals toward more leniency in the assessment of the requirements for interim relief remains to be seen.

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193 A. Parra, p. 40.

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Chapter 21

Damages in Investment Treaty Arbitration

*Meg Kinnear**

INTRODUCTION

The quantum of damages to be awarded in investment treaty arbitration is often the main preoccupation of the investor and of officials in the respondent State. As a result, it is ironic that investment treaties and investment awards give comparatively little guidance concerning the basis upon which damages ought to be awarded. Investment treaties typically confer a broad discretion on tribunals to "make a decision" or to "award damages" for nonexpropriatory breach. In addition, virtually all investment treaties address the compensation standard for expropriation in somewhat greater detail, usually requiring prompt, adequate, and effective compensation (or some proxy therefore).

The failure to address the standard for compensation comprehensively in investment treaties and awards has left the development of this area largely to academic literature and, to a lesser extent, to the few cases that discuss the topic. In the absence of a detailed treaty standard for compensation, tribunals resort to customary international law on damages. The basic principle at customary international law is that the State must make full reparation for internationally wrongful acts. While there is a fair degree of consensus on such general principles, they do not offer detailed direction on

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* Secretary General of the International Centre for Settlement of Investment Disputes (ICSID); former Senior General Counsel, Trade Law Bureau, Departments of Justice and Foreign Affairs & International Trade, Canada. Views expressed in this chapter are solely those of the author and do not represent the official or unofficial position of the Government of Canada, ICSID or the World Bank. The author wishes to thank Andrea Bjorklund for her very helpful suggestions, which significantly improved this chapter.

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how to assess damages. Nor do investment awards usually contain substantial reasons explaining the damages awarded. As a result, it remains difficult to reconcile the amounts awarded and the basis for such awards from case to case.

This chapter reviews the general principles governing damages and other remedies for breach of investment treaty obligations, focusing on the approaches to expropriation and nonexpropriatory damages. It notes valuation methods, the effect of defenses such as necessity or contributory fault of the investor, and current practice on interest and costs. It concludes with some practical strategies for addressing the remedies phase of an arbitration.

GENERAL PRINCIPLES

At customary international law, a State must make full reparation for breach of its obligations. The objective of reparation is to restore the wronged party to the position it would have been in, "but for" the breach.[1] The most often quoted expression of this principle is found in the *Chorzów Factory* case, where the Permanent Court of International Justice stated:

> . . . reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[2]

Reparation may take the form of restitution, compensation, or satisfaction, either alone or in combination.[3] Restitution is the primary obligation of a State insofar as it is possible and does not impose a disproportionate burden on the State.[4] To the extent that restitution cannot be effected, the State must pay compensation for loss caused by its breach of international law. Such compensation covers any "financially assessable

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1 James Crawford, The International Law Commission's Articles on State Responsibility 201–06 (2002). The ILC Articles generally are accepted as a codification of customary international law on the responsibility of States for their wrongful acts, and are frequently cited by tribunals and commentators discussing compensation for breach of investment obligations. *See, for example*, Duke Energy Electroquil Partners v. Republic of Ecuador (ICSID Case No. ARB/04/19), Award of August 18, 2008 at paras. 467–68; Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania (ICSID Case No. ARB/05/22), Award of July 24, 2008 at paras. 773–74 (majority); Abby Cohen Smutny, *Some Observations on the Principles Relating to Compensation in the Investment Treaty Context*, 22 ICSID Rev FILJ 1, at 2–7 (2007).

2 *Case Concerning the Factory at* Chorzów, 1928 P.C.I.J., Series A, No. 17, at 47.

3 Crawford, Article 34 and commentary, *supra* note 1.

4 *Id.*, Article 35 and commentary.

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damage" and may include loss of profit.[5] Monetary compensation (or damages)[6] is normally the only form of reparation requested or awarded in international investment arbitration. There are at least three reasons for this. First, restitution is usually not a practical possibility. In most cases of nonexpropriatory breach and with indirect expropriation, it is rare that an asset has been physically seized, and thus there is no property that could be returned to the investor as restitution. Second, even if there were an asset that might be returned to the investor, the disputing parties may be unable or unwilling to continue their business relationship, and hence neither party may view restitution as an optimal remedy. Third, most investment tribunals lack express treaty authority to order restitution of a physical asset or to award other nonmonetary remedies, and such an award may provoke debate between the disputing parties as to whether the tribunal has jurisdiction to order such relief. Despite these disadvantages, counsel should always consider whether a nonmonetary remedy is available under the applicable treaty and if so, whether it is preferable to either disputing party.[7]

COROLLARY PRINCIPLES

Several corollary principles complement the obligation to make reparation for breach of investment obligations. The main ones are as follows.

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5 *Id.*, Article 36 and commentary. In *Desert Line Products Inc v. Republic of Yemen* (ICSID Case No. ARB/05/17), Award of February 6, 2008, the tribunal noted at paras. 289–91 that while investment treaties usually protect property and economic values, they do not exclude compensation for moral damages in exceptional cases. In that case,the tribunal held that the violation of the BIT was malicious and caused harm to the reputation and physical health of the claimant. It therefore awarded $1,000,000.00 for moral damages. In *Europe Cement Investment & Trade S.A. v. Republic of Turkey* (ICSID Case No. ARB (AF)/07/2), Award of August 13, 2009, the tribunal declined to award moral damages noting the absence of exceptional circumstances such as physical duress.

6 Most authors draw a distinction between "compensation" and "damages." "Compensation" denotes payment for lawful activity such as a legal expropriation, whereas "damages" are payment for illegal activity. However, this distinction is not observed universally. In fact, Article 26 of the ILC Articles on State Responsibility, *supra* note 1, refers to an obligation to compensate for an internationally wrongful act. *See* Cohen Smutny, *supra* note 1, at 4–7; Irmgard Marboe, *Compensation and Damages in International Law: The Limits of "Fair Market Value,"* 7 J.W.I.T. 723, at 725–26 (2006); Charles N. Brower & Michael Ottolenghi, *Damages in Investor-State Arbitration*, 4(6) Transnat'l Dispute Mgmt. 4 (November 2007); LG & E Energy Corp. v. Argentine Republic (ICSID Case No. ARB/02/1), Award of July 25, 2007 at para. 38. In this chapter, the terms "damages" and "compensation" may be used interchangeably for ease of reference only.

7 Thomas W. Wälde & Borzu Sabahi, *Compensation, Damages and Valuation in International Investment Law*, 4(6) Transnat'l Dispute Mgmt. 7–10 (November 2007); CMS Gas Transmission Co. v. Argentine Republic (ICSID Case No. ARB/01/8), Award of May 12, 2005 at paras. 399–401, 406–07, upheld by Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic, September 25, 2007; Christoph Schreuer, *Non-Pecuniary Remedies in ICSID Arbitration*, 20 Arb. Int'l 325 (2004).

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Causation

Reparation is due only for loss that has a sufficient causal connection to the breach found by the tribunal. This basic principle is expressed in various ways, for example, in the requirement that the loss claimed be the proximate cause of the damage, that such loss not be too remote or speculative, or that it be the direct and foreseeable result of the breach. The *S.D. Myers v. Canada* tribunal noted that damages must be the proximate cause of the breach and could be awarded only for "harm that is proved to have a sufficient causal link with the specific NAFTA provision that has been breached."[8] In *Feldman*, damages had to be "adequately connected" to the breach.[9] The *Lauder* tribunal considered whether there had been an "intervening or superseding cause" of the damage, such that it was no longer attributable to the breach complained of by the investor.[10] All of these phrases simply express the requirement that the facts must establish a sufficient causal link between the wrong found and the remedy awarded.[11]

The absence of a causal link was the pivotal consideration in the *Biwater v. Tanzania* award. In that case, the tribunal found breaches of fair and equitable treatment, full protection and security, the prohibition on unreasonable and discriminatory conduct, as well as expropriation. Nonetheless, the investor recovered no damages because the investment was manifestly unprofitable, and the investor failed to prove any loss attributable to treaty breach. The majority and dissenting opinions in *Biwater* differed in their causation analyses, and their reasons are an interesting exposition of the complexity of the subject. For the majority, the question was one of causation in that the "actual, proximate or direct causes of the loss and damage . . . were acts and omissions that had already occurred. . . . [N]one of the Republic's violations . . . caused the loss and damage in question, or broke the chain of causation that was already in place."[12] The dissenting member analysed the question as one of quantum rather than causation. In his view, the breaches found clearly caused injury through their deprivation of the use of property, and hence the causation requirement was satisfied. However, the investor's failure to prove monetary loss attributable to that injury meant that no damages could be awarded. In the circumstances of the *Biwater* case, this difference of views made no difference to the final result. However, as the dissenting member noted,

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8 S. D. Myers Inc. v. Canada (UNCITRAL), Partial Award of November 13, 2000 at paras. 316–22.

9 Marvin Roy Feldman Karpa v. Mexico (ICSID Case No ARB(AF)/99/1), Award of December 16, 2002 at para. 194. *See also* Pope & Talbot Inc. v. Canada (UNCITRAL), Award in Respect of Damages of May 31, 2002 at para. 80.

10 Lauder v. The Czech Republic (UNCITRAL), Final Award of September 3, 2001 at paras. 234–35, 243, 288, 304.

11 Crawford, Article 31(2) and commentary, *supra* note 1, at 201–05. *See also* Cohen Smutny, *supra* note 1, at 3–4; Todd Weiler & Luis Miguel Diaz, *Causation and Damages in NAFTA Investor-State Arbitration*, *in* NAFTA Investment Law And Arbitration: Past Issues, Current Practice, Future Prospects (Todd Weiler ed., 2004); *Myers v. Canada*, *supra* note 8, at paras. 316–22; Metalclad Corp. v. Mexico (ICSID Case No. ARB(AF)/97/1), Award of September 2, 2000 at para. 115, Award on merits concerning minimum standard of treatment set aside in Mexico v. Metalclad Corp., 2001 BCSC 664, May 2, 2001.

12 *Biwater v. Tanzania*, *supra* note 1 (majority opinion) at para. 798 and generally at paras. 779–805.

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the analytical approach selected could well affect the outcome of the case in some situations. He explained:

> . . . an internationally wrongful act results in an obligation to make reparation for "injury," which includes, but is not limited to, an obligation to "compensate for damage." Injury can very readily include matters not entailing monetary damage, and require relief not limited to monetary compensation for damage. Specifically, a state's expropriation or denial of fair and equitable treatment causes injury to the investor by depriving it of property or procedural or legal rights. The fact that this injury does not entail monetary damage in no way implies that there was no injury; on the contrary, an injury can very readily exist even without monetary damage.[13]

This award will certainly stimulate careful consideration of causation and the availability of nonmonetary remedies in pending cases and has already fostered a lively dialogue among practitioners of investment law.

No Double Recovery

An award cannot exceed the amount required to restore the investor to the position it would have occupied absent the breach; hence, there can be no double recovery.[14] There is potential for double recovery in the investment arbitration context whenever the investor recovers on account of more than one head of damage or more than one obligation. Notwithstanding the investor's ability to claim on the basis of more than one treaty obligation, the total amount awarded cannot exceed the investor's actual loss. In awarding damages for breaches of national treatment and the minimum standard of treatment in *S.D. Myers v. Canada*, the tribunal noted the prohibition on double recovery, commenting that "damages for a breach of one NAFTA provision can take into account any damages already awarded under a breach of another NAFTA provision."[15]

Parties to an arbitration should also be alert to the potential for double recovery where different approaches to valuation are proposed to a tribunal or where a hybrid approach is adopted. This frequently arises in the context of claims for lost profit. For example, if an investor recovers its actual costs of making the investment, it cannot also receive lost profit because it would have had to expend such costs to make the profit. In expropriation cases, an investor receiving full compensation will likely have to return the expropriated asset to avoid unjust enrichment. Thus, in *Metalclad v. Mexico*, the tribunal awarded full compensation (less a discount to remediate the

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13 *Id.*, para. 26 (dissenting opinion) and generally at paras. 15–31.

14 Cohen Smutny, *supra* note 1, at 14; Marboe, *supra* note 6, at 746–49; Tecnicas Medioambientales Tecmed S.A. v. Mexico (ICSID Case No. ARB(AF)/00/2), Award of May 29, 2003 at para. 188.

15 *Myers v. Canada*, *supra* note 8, at para. 316. An interesting application of this principle is found in *Duke v. Ecuador*, *supra* note 1, at paras. 470–76, where the tribunal held that damages flowing from breach of the treaty's umbrella clause had already been compensated for in the award for breach respecting municipal obligations and Ecuadorian law, and hence no further recovery was justified.

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expropriated property) but required the investor to relinquish all title to the investment once damages were received.[16] Similar situations may arise in nonexpropriation cases if the tribunal awards a nonmonetary remedy, such as restitution, in addition to compensation.[17]

Duty to Mitigate

The investor has an obligation to take all reasonably available steps to mitigate its loss. If it fails to do so, its claim will be reduced accordingly. What constitutes reasonable mitigation depends on the circumstances of the particular case.[18]

Burden of Proof Rests with the Investor

The investor bears the burden of proving causation, quantum and the recoverability at law of the loss claimed.[19] The *UPS* tribunal commented on this burden in its award, noting that:

> . . . a claimant must not only show that it has persuasive evidence of damage from the actions alleged to constitute breaches of NAFTA obligations but also that the damage occurred as a consequence of the breaching Party's conduct within the specific time period subject to the Tribunal's jurisdiction.[20]

Failure to meet the burden of proof will prevent any recovery.

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16 *Metalclad v. Mexico*, *supra* note 11, at para. 12. *See also* Noah Rubins, *Must the Victorious Investor-Claimant Relinquish Title to Expropriated Property?* 4 J.W.I.T. 481 (2003).

17 Borzu Sabahi, *Recent Developments in Awarding Damages in Investor-State Arbitrations*, *in* 4 (4) Transnat'l Dispute Mgmt. (July 2007); Rubins, *id.;* Louis T. Wells, *Double-Dipping in Arbitration Awards? An Economist Questions Damages Awarded to Karaha Bodas Company in Indonesia*, 19 Arb. Int'l 471 (2003); D. W. Bowett, *Claims Between States and Private Entities: The Twilight Zone of International Law*, 35 Cath. U. L. Rev. 929 (1986); *CMS v. Argentina, supra* note 7, at paras. 465, 468–69, where the investor was awarded damages for its loss arising from shares in the investment but respondent was given a one-year option to buy the shares of the investor in the investment.

18 Crawford, *supra* note 1, at 205; Campbell McLachlan et al., International Investment Arbitration: Substantive Principles 341 (2007); 1 Marjorie M. Whiteman, Damages in International Law 199–216 (1943).

19 Hugo Perezcano Diaz, *Damages in Investor-State Arbitration: Applicable Law and Burden of Proof*, *in* Evaluation of Damages in International Arbitration (Yves Derains & Richard Kreindler eds., 2007); Markham Ball, *Assessing Damages in Claims by Investors Against States*, 16 ICSID Rev.-FILJ. 413, 424 (2001); Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals 328–29 (1987); Whiteman, *id.*, vol. 1, 639, vol. 3, 1798: *Tecmed v. Mexico*, *supra* note 14, at para. 190. Waguih Elie Siag & Clorinda Vecchi v. Arab Republic of Egypt (ICSID Case No. ARB/05/15), Award of June 1, 2009 at para. 562.

20 United Parcel Service of America v. Canada (UNCITRAL), Award on the Merits of May 24, 2007 at para. 38.

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EXPROPRIATION AND NONEXPROPRIATORY DAMAGES

The law respecting damages in investment arbitration developed primarily in the context of expropriation. These legal principles have been borrowed by tribunals called upon to address nonexpropriatory breach. However, cases addressing expropriatory and nonexpropriatory breach have distinctive features that sometimes have led to differences in analysis. As a result, these topics are considered separately.

Expropriation Damages

International law distinguishes between lawful and unlawful expropriation. The conditions required for a lawful expropriation are proof of a taking for a public purpose, on a nondiscriminatory basis, with due process and accompanied by compensation for the deprivation. These conditions for lawful expropriation are usually codified in modern investment treaties. Treaties codifying the requirements for lawful expropriation generally require compensation to be calculated at the fair market value of the investment.[21] Compensation calculated pursuant to the fair market value standard is based on the price a willing buyer would pay a willing seller to purchase the asset in the absence of coercion, where the parties are at arm's length, operate in an open market, and have reasonable knowledge of relevant facts.[22] The fair market value standard is often referred to as the objective standard of compensation because it assesses loss from the perspective of a transaction between a hypothetical buyer and seller, and not from the subjective perspective of the disputing investor that actually suffered the loss.

An unlawful expropriation is a complete or substantial deprivation of the investment that does not meet the conditions for lawful expropriation. The challenge is to identify the correct standard for calculating damages for unlawful expropriation. The vast majority of cases have calculated damages for expropriation (lawful or unlawful) in accordance with fair market value and have ignored the distinction between the two types of expropriation for purposes of assessing compensation. As Brower and Ottolenghi observe, ". . . before the *Siemens* and *ADC* awards, no BIT or multilateral investment treaty had actually applied the *Chorzów* standard in calculating damages due."[23] Despite this practice, there is a debate in investment arbitration about whether the fair market value standard or the *Chorzów* (full restitution) standard should apply to compensation for unlawful expropriation. This debate has revived in recent years.

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21 UNCTAD, Taking of Property, UNCTAD/ITE/IIT/15 (2000) at 12–17.

22 *See, for example, CMS v. Argentina*, *supra* note 7, at paras. 402–05; SEDCO Int'l v. National Iranian Oil Co., 15 Iran-U.S. C.T.R. 35 (1987); INA Corp. v. Iran, 8 Iran-U.S. C.T.R. 373 (1985).

23 Brower & Ottolenghi, *supra* note 6, at 8–9. In *Siag v. Egypt*, *supra* note 19, at paras. 539–42, the tribunal noted that the expropriation was not lawful and that the treaty standard for lawful expropriation was inapplicable. However, the distinction made no practical difference as the claimants were not seeking lost profit. The tribunal assessed loss based on the value of the property immediately before it was expropriated.

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On the one hand, some commentators suggest that treaty codification of expropriation disciplines governs compensation for both lawful and unlawful expropriation. Proponents of this view argue that fair market value is incorporated by treaty as the uniform standard for compensation for any type of expropriation. Others disagree, arguing that investment treaties incorporate fair market value damages only for lawful expropriation, leaving the customary international law rule of full restitution intact for assessment of damages for unlawful expropriation. These commentators argue that compensation for lawful and unlawful expropriation cannot be based on the same standard and that unlawful expropriation must be remedied by full restitution in accordance with the *Chorzów* approach.

There are several practical consequences to accepting a different standard of compensation for lawful and unlawful expropriation.[24] First, if the distinction between compensation for lawful and unlawful expropriation is observed, the primary obligation of restitution of the expropriated investment would apply only to unlawful expropriation. Restitution would not be expected in situations of lawful expropriation.

Second, in some cases, applying the fair market value standard to assess compensation for lawful expropriation will result in a lower value award than would full restitution. This is because fair market value is an objective standard that may not include consequential damages and other loss particular to the disputing investor.[25] By contrast, recovery pursuant to the standard of *Chorzów* seeks to restore the particular investor to the position it would have occupied but for the breach. Such recovery could be greater than fair market value if the evidence establishes that the investor actually suffered loss over and above the fair market value of the asset.

Third, most treaties addressing compensation for expropriation also require fair market value to be assessed immediately before the fact of expropriation became publicly known. If these provisions govern only lawful expropriation, then events occurring after expropriation could be factored into compensation for unlawful, but not lawful, expropriation. In most cases, events occurring after expropriation are unlikely to result in an increase in compensation. However, there may be circumstances where the expropriating State takes a profitable investment and continues to operate it at an enhanced profit. The capacity to account for post-expropriation events in such circumstances might well affect the net recovery.

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24 Helpful articles on the debate concerning the correct standard of compensation for lawful and unlawful expropriation are found in: Wälde & Sabahi, *supra* note 7, at 5–10; Brower & Ottolenghi, *supra* note 6; Martin Valasek, *A "Simple Scheme": Exploring the Meaning of Chorzów Factory for the Valuation of Opportunistic Expropriation in the BIT Generation*, 4(6) TRANSNAT'L DISPUTE MGMT. (November 2007); Audley Sheppard, *The Distinction Between Lawful and Unlawful Expropriation*, *in* INVESTMENT ARBITRATION AND THE ENERGY CHARTER TREATY 169 (Clarisse Ribeiro ed., 2006); Marboe, *supra* note 6, at 726–34; Michael W. Reisman & Robert D. Sloane, *Indirect Expropriation and Its Valuation in the BIT Generation*, 74 B.Y.I.L. 115 (2003); D.W. Bowett, *State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach*, 59 B.Y.I.L. 49 (1988).

25 Compañíia de Aguas del Aconquija S.A. & Vivendi Universal S.A. v. Argentine Republic (ICSID Case No. Arb/97/3), Award of August 20, 2007 at paras. 8.2.2.–8.2.11.

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The debate concerning the effect of the legality of expropriation on compensation was considered in the recent *ADC v. Hungary* case. *ADC* involved two Cypriot investors that were awarded contracts for airport construction by the Hungarian government. The contracts also included the right to manage and participate in the operation of the new airport terminals after they were constructed. However, the government of Hungary transferred operation of the terminals to a State-owned company and evicted the investors' employees soon after construction was completed. Hungary continued to operate the terminals at significant profit. The tribunal found that Hungary had not met any of the conditions for a lawful expropriation and that this was a case of unlawful expropriation.[26] In addressing compensation, the tribunal held that the Hungary-Cyprus BIT stipulated the standard of compensation for lawful expropriation only and did not address the standard for unlawful expropriation. As a result, the default standard of customary international law (the *Chorzów* full reparation standard) applied to the unlawful expropriation found by the tribunal.[27] In turn, the requirement to effect full reparation justified accounting for the increase in value of the investment up to the date of the award. The tribunal found it was not required to assess compensation at the time of taking because the standard for compensation was not dictated by the standard for lawful expropriation in the treaty.[28]

Similarly, the tribunal in *Siemens v. Argentina* noted that the primary difference between the *Chorzów* standard and the treaty standard of compensation for expropriation was that compensation under the *Chorzów* standard had to wipe out all consequences of the illegal act, whereas compensation under the treaty standard was equivalent to the value of the expropriated investment. Further, at customary international law, the investor was not limited to the value of the investment on the date of expropriation, but was also entitled to increases in value gained up to the date of the award, as well as consequential damages.[29]

It is difficult to resolve the debate concerning the proper approach to the standard of compensation for lawful as opposed to unlawful expropriation through a reading of past investment awards. Many awards do not turn expressly on the distinction between lawful and unlawful expropriation, and most awards do not draw a bright-line distinction between fair market value and full restitution. Terminology is inconsistent from one case to the next; hence, it is hard to discern whether a tribunal perceives fair market value and restitution to be equivalent measures of loss. Further, whether a treaty extends fair market valuation to unlawful expropriation likely depends on the drafting of the particular expropriation obligation and therefore might vary from one treaty to the next. The tribunal in *Biwater v. Tanzania* specifically noted the importance of the wording of the BIT in deciding whether compensation for expropriation is

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26 ADC Affiliate Limited v. Republic of Hungary (ICSID Case No. ARB/03/16), Award of the Tribunal dated October 2, 2006 at paras. 429–44.

27 *Id.*, at paras. 479–94.

28 *Id.*, at paras. 495–500.

29 Siemens A.G. v. Argentine Republic (ICSID Case No. ARB/02/8), Award of February 6, 2007, at paras. 352–53.

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governed by the treaty or by customary international law.[30] As a result, the debate about the correct standard of compensation for unlawful expropriation that has been revived by the *ADC* and *Siemens* cases is likely to continue in the next few years.

Nonexpropriatory Damages

The distinction between lawful and unlawful conduct does not occur in the nonexpropriatory context, where every breach of an obligation is unlawful. Care must therefore be taken before applying expropriation standards for compensation to nonexpropriatory situations. As noted in *S.D. Myers v. Canada*,

> [T]he standard of compensation that an arbitral tribunal should apply may in some cases be influenced by the distinction between compensating for a lawful, as opposed to an unlawful, act. Fixing the fair market value of an asset that is diminished in value may not fairly address the harm done to the investor.[31]

At the same time, the basis for awarding damages for nonexpropriatory breach (typically breach of fair and equitable treatment, the minimum standard of treatment, national treatment or most-favoured nation treatment) is not specifically addressed in investment treaties. The *S.D. Myers* tribunal assumed that the failure to include an express treaty standard for compensation for nonexpropriatory breach indicated that:

> . . . the drafters of the NAFTA intended to leave it open to tribunals to determine a measure of compensation appropriate to the specific circumstances of the case, taking into account the principles of both international law and the provisions of the NAFTA.[32]

As a result, in principle the *Chorzów* standard of full reparation applies to such breaches.[33] Further, what is required to effect full reparation in any particular case will be solely within the discretion of the tribunal.[34]

Damages for nonexpropriatory breach have been addressed in several recent cases. While it is early to draw conclusions, several trends seem to be emerging from these awards.[35] First, when tribunals find breach of both expropriation and nonexpropriatory

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30 *Biwater v. Tanzania*, *supra* note 1, at paras. 479–83.

31 *Myers v. Canada*, *supra* note 8, at para. 308. *See also* Saipem S.p.A. v. People's Republic of Bangladesh (ICSID Case No. ARB/05/7), Award of June 30, 2009 at para. 201.

32 *Id.*, at para. 309.

33 *Duke v. Ecuador*, *supra* note 1, at para. 469; *LG & E v. Argentina*, *supra* note 6, at paras. 29–32; MTD Equity Sdn Bhd v. Republic of Chile (ICSID Case No. ARB/01/7), Award of May 25, 2004 at para. 238, upheld by Annulment Committee, Decision on Annulment of March 21, 2007.

34 *LG & E v. Argentina*, *supra* note 6, at para. 40; *Myers v. Canada, supra* note 8; Azurix Corp. v. Argentine Republic (ICSID Case No. ARB/01/12), Award of July 14, 2006 at paras. 421–22.

35 *See generally* Cohen Smutny, *supra* note 1, at 16–19; Wälde & Sabahi, *supra* note 7, at 26–35; Kaj Hobér, *Fair and Equitable Treatment—Determining Compensation*, 4(6) TRANSNAT'L DISPUTE MGMT. (November 2007); IOANA TUDOR, THE FAIR AND EQUITABLE TREATMENT STANDARD IN THE INTERNATIONAL LAW OF FOREIGN INVESTMENT 207–28 (2007); Ioana Tudor, *Balancing the*

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obligations, they tend to award damages based on an expropriation methodology. This is likely because there has been a total deprivation of the investment, and hence valuation reflecting total deprivation by expropriation will usually be an accurate measure of the compensation necessary to make the investor whole, even if the loss was not caused by an expropriation. An example of this approach is in *Metalclad v. Mexico*, where the tribunal found breach of the minimum standard of treatment and expropriation. It quantified damages based on the standard for expropriation damages in the treaty, noting that the quantum of loss caused by breach of any treaty obligation would be identical if the investor had completely lost its investment, and that there had been a total frustration of the undertaking negating any meaningful return on the investment.[36] Similarly, in *Vivendi v. Argentina*, the tribunal acknowledged that damages for expropriation might differ from damages for nonexpropriatory breach and that this difference would usually "turn on whether the investment has merely been impaired or destroyed." In *Vivendi*, the tribunal found that the investment was rendered valueless by the respondent's breaches and assessed loss based on the fair market value of the asset.[37]

Second, tribunals dealing solely with nonexpropriatory breach apply the familiar general principles of law governing compensation. Concepts such as causation, remoteness, and mitigation take on enhanced relevance in the nonexpropriatory context, where there are no treaty standards governing assessment of loss. This focus on first principles in nonexpropriatory cases results in a manifestly case-specific, fact-driven approach to damages for nonexpropriatory breach. As the tribunal in *LG & E* noted:

> . . . the issue that the tribunal has to address is that of the identification of the "actual loss" suffered by the investor as a result of Argentina's conduct. The question is one of "causation": what did the investor lose by reason of the unlawful acts?[38]

Two examples demonstrate how tribunals have assessed damages for nonexpropriatory breach. In *Feldman v. Mexico,*[39] the tribunal focused on the causation requirement and determined that the investor was entitled to loss or damage actually incurred. As a result, it awarded the value of rebates wrongly denied. Similarly, in *Occidental v. Ecuador*, the tribunal found that the investor had been denied a tax refund on the basis of its nationality. The compensation was simply an award of the tax refund denied.[40] In summary, no governing legal standards have been established to assess damages for

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Breach of the FET Standard, 4(6) TRANSNAT'L DISPUTE MGMT. (November 2007); Matthew Weiniger, *The Standard of Compensation for Violation of the Fair and Equitable Treatment Standard*, *in* INVESTMENT TREATY LAW– CURRENT ISSUES II, at 197–203 (Federico Ortino et al., eds., 2006).

36 *Metalclad v. Mexico*, *supra* note 11, at paras. 112–34.

37 *Vivendi v. Argentin*a, *supra* note 25, at paras. 8.2.8–8.2.11. *See also Tecmed v. Mexico*, *supra* note 14, at paras. 183–99.

38 *LG & E v. Argentina*, *supra* note 6, at para. 45.

39 *Feldman v. Mexico*, *supra* note 9, at paras. 194, 198–201. *See also Duke v. Ecuador*, *supra* note 1, at para. 469; *MTD v. Chile, supra* note 33, at para. 238.

40 Occidental Exploration and Production Company v. Ecuador (LCIA Case No. UN 3467), Award of July 1, 2004 at para. 205.

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nonexpropriatory breach. Instead, a very fact-based approach that considers actual loss in the circumstances has been applied.

One potentially emerging trend in assessment of nonexpropriatory damages is that if the breach caused a total or near total loss, the tribunal may apply the same compensation methodology as it would if the investment had been expropriated, even if no expropriation is found. For example, in *CMS v. Argentina*, the tribunal found various breaches of the BIT, but not expropriation. Nonetheless, in assessing damages it held that:

> . . . the cumulative nature of the breaches discussed here is best dealt with by resorting to the standard of fair market value. While this standard figures prominently in respect of expropriation, it is not excluded that it might also be appropriate for breaches different from expropriation if their effect results in important long-term losses.[41]

The *CMS* tribunal continued on to assess the investor's loss according to the fair market value standard, calculated using a discounted cash flow methodology.[42]

VALUATION METHODS

Every tribunal must determine the quantum of damages, whether it is applying a fair market value, full restitution, or any other standard to assess loss. Valuation is a complex endeavor that inevitably pits expert accountants and economists against one another in a debate concerning which method of assessing value is most accurate in the particular case. Various methods of determining fair market value exist.[43] Which method is most accurate depends largely on the facts related to the nature of the investment and the financial effect of the breach on the investment.[44] Traditionally, valuation

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41 *CMS v. Argentina*, *supra* note 7, at para. 410.

42 *See also* Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan (ICSID Case No. ARB/05/16), Award of July 29, 2008 at para. 793; *Azurix v. Argentina*, *supra* note 34, at paras. 421–26; *LG & E v. Argentina*, *supra* note 6, at para. 39; PSEG Global Inc. v. Republic of Turkey (ICSID Case No. ARB/02/5), Award of January 19, 2007 at paras. 307–09; Sempra Energy International v. Argentine Republic (ICSID Case No. ARB/02/16), Award of September 28, 2007 at para. 403.

43 Mark Kantor, Valuation for Arbitration (2008); Wälde & Sabahi, *supra* note 7, at 16–25; McLachlan, Shore & Weiniger, *supra* note 18, at 319–30; Marboe, *supra* note 6; Manuel A. Abdala & Pablo T. Spiller, *Damage Valuation of Indirect Expropriation in International Arbitration Cases*, 14 Am. Rev. Int'l Arb. 447 (2003); Ball, *supra* note 19; Tali Levy, *NAFTA's Provision for Compensation in the Event of Expropriation: A Reassessment of the "Prompt, Adequate and Effective" Standard*, 31 Stanford J. Int'l L. 441 (1995); World Bank, Report to the Development Committee and Guidelines on the Treatment of Foreign Investment, 31 I.L.M. 1363 (1992); Paul D. Friedland & Eleanor Wong, *Measuring Damages for the Deprivation of Income-Producing Assets: ICSID Case Studies*, 6 ICSID Rev. –FILJ 400 (1991). *See also* NAFTA Article 1110(2), which contains a nonexhaustive list of valuation methods that arbitrators may select; most investment treaties do not even suggest such a list and leave the method to be used to tribunal discretion.

44 Wälde & Sabahi, *supra* note 7, at 10–14. *See also CMS v. Argentina*, *supra* note 7, at paras. 411–17 for an example of a tribunal's assessment of the most appropriate valuation

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methods were mostly "backward looking," in that they assessed the investment based on historic data and did not capture the investment's potential for a continuous revenue stream from future operations. Methods such as net book value are considered backward looking. In the last few decades, there has been an effort to apply valuation techniques which are forward looking and set a value based on the assets' ability to generate profit in the future. The best example of this is a discounted cash flow (DCF) analysis.

DCF is the most commonly used valuation method in investment arbitration. In a DCF valuation, expected future cash flows from the asset are estimated, then discounted by factors reflecting the cost of capital, the risk of achieving such a cash flow, and the greater value of having cash now as opposed to in the future. The discount for risk includes business and political risk. It is an especially useful method where the enterprise has been completely or near completely destroyed but has a history of profitable operations and sufficient financial history to predict its ongoing cash flow reliably. The DCF method will rarely be appropriate where the investor continues to operate the investment or the loss suffered is partial. Tribunals usually refuse to use DCF if there is an insufficient history of the investment as an ongoing and profitable enterprise. For example, in *Vivendi v. Argentina*, the tribunal refused to apply a DCF assessment, noting that "compensation for lost profits is generally awarded only where future profitability can be established (the fact of profitability as opposed to the amount) with some level of certainty." Ultimately it assessed loss to the investor according to the investment value of the concession at the date of expropriation.[45]

The main critiques of the DCF method are that selection of discount factors is highly subjective and has an overwhelming effect on the net result. Depending on the discount factors selected, the DCF method can produce very large awards. There is also a danger that awards calculated according to the DCF method are speculative or remote, given the numerous assumptions upon which they are based.[46]

Alternatives to DCF include:

- **Market Value.** As its name implies, this approach considers what the market will pay for the asset and is apt where there is a liquid market for such an asset.
- **Liquidation Value.** This approach values the asset as if it were being liquidated and subtracts liabilities from this sum. It is most appropriate for an enterprise that is not profitable.

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methodology; in this case, the tribunal opted for a DCF analysis, noting that the investment was a going concern, that DCF has been adopted by numerous tribunals and that there was adequate data to make a rational DCF valuation.

45 *Vivendi v. Argentina*, *supra* note 25, at paras. 8.3.1–8.3.10; *see also PSEG v. Turkey*, *supra* note 42, at paras. 310–15.

46 Marboe, *supra* note 6, at 736–40; William C. Lieblich, *Determinations by International Tribunals of the Economic Value of Expropriated Enterprises*, 8 J. INT'L ARB. 37 (1990). *See* also *Vivendi v. Argentina*, *supra* note 25, at paras. 8.3.3–8.3.11; *CMS v. Argentina*, *supra* note 7, at para. 436, where the tribunal noted the disparate results that can occur based on changes in variables in a DCF analysis and, generally at paras. 418–62, addressing specific variables in the DCF analysis.

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- **Replacement Value.** This approach measures loss by reference to the cost of replacing the asset taken from the investor. It is rarely used, partially because many assets have unique characteristics and will not be readily replaceable.
- **Book Value.** This approach values the investment based on the difference between its assets and liabilities as disclosed in its financial records. It has been criticized because it is essentially backward looking, valuing the investment at a past moment in time without ascribing value to the investment's ability to generate profit in the future. In addition, book value may not accurately capture the value of intangible assets such as goodwill, contractual options or management expertise.
- **Actual Investment.** This approach values the investment based on what was actually invested and is useful where there is no history of operations.[47] For example, in *Wena Hotels v. Egypt*, the tribunal found the investor's operating history was insufficient for a DCF analysis and elected to value the loss based on the investor's actual investment.[48]

Needless to say, the valuation method used can have a drastic effect on the quantum of the award rendered. A good illustration of the significance of the method chosen is found in *Metalclad v. Mexico.* In that case, the investor was deprived of the ability to operate a landfill in Mexico. It claimed damages for expropriation and breach of the minimum standard of treatment and proposed that these be calculated using the DCF method (resulting in a US$90 million award) or actual investment (resulting in a US$20–25 million award). Mexico argued that DCF valuation was inappropriate as Metalclad had no history of ongoing operations. Mexico proposed that damages be assessed based either on a market capitalization approach (resulting in a US$13–15 million award) or based on direct investment in the project (resulting in US$3–4 million). The tribunal found that there was an insufficient operating history to use the DCF method and agreed with Metalclad that actual investment in the project provided the most accurate assessment tool in the circumstances. As a result, it awarded Metalclad just over US$16 million in damages.[49]

DATE OF VALUATION

The date on which assets are valued can also have a significant effect on the quantum of damages awarded; it is often disputed by the parties. This debate usually concerns whether damage should be assessed on the date of breach or the date of the award. Traditionally, damages are assessed from the date of the illegal act in international law.[50] However, there are instances where damages must be assessed at some later date

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47 *Metalclad v. Mexico*, *supra* note 11, at paras. 114–16.

48 Wena Hotels, Ltd (U.K.) v. Egypt (ICSID Case No. ARB/98/4), Award of December 8, 2000 at paras. 122–25.

49 *Metalclad v. Mexico, supra* note 11, at paras. 112–34.

50 *See, for example*, Bernardus Henricus Funnekotter et al. v. Republic of Zimbabwe (ICSID Case No. ARB/05/6), Award of April 22, 2009 at para. 115; CME Czech Republic B.V. (The Netherlands) v. Czech Republic, Final Award (UNCITRAL), September 13, 2001 at paras. 508–09; *Tecmed v. Mexico*, *supra* note 14, at para. 192.

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to truly effect a restitution of losses.[51] For example, in *MTD*, the tribunal set a valuation date based on the final notification from Chilean government ministers that necessary zoning changes requested by the investor would not be allowed by the government. While other cut-off dates were possible, the tribunal found this was a reasonable date in the circumstances.[52]

In addition, as already noted, expropriation clauses in most investment treaties require that damages be assessed from the time immediately prior to expropriation so as not to reflect any change in value occurring because the intended expropriation became publicly known.[53] In the recent *ADC v Hungary* case, the tribunal assessed damages for unlawful expropriation based on the date of the award, and not the date immediately before the taking. The tribunal held that this was required to reflect the significant increase in value of the investment subsequent to the expropriation, and that failure to set the valuation date as the date of the award would defeat the goal of making the investor whole.[54] While the *ADC* case was based on a very particular set of facts, it is a holding that could have resonance in future cases where the State unlawfully expropriates an ongoing profitable enterprise.

Establishing a valuation date can also present controversial factual questions, especially in cases of indirect and creeping expropriation, where it is difficult to tell when the expropriation has crystallized for purposes of assessing damages. Similar difficulty can arise in determining the date of a nonexpropriatory breach where it may be hard to pinpoint one single event that constitutes breach of a treatment standard.[55]

IMPACT OF PARTIALLY SUCCESSFUL DEFENSES

Recent investment awards have introduced two new considerations: the effect on the calculation of damages of (1) the investor's conduct and (2) economic emergency or a defense of necessity. These are discussed below.

Conduct of Investor

Article 39 of the ILC Articles on State Responsibility allows tribunals to take account of the "contribution to the injury by willful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought." Several recent investment cases have reduced the damages otherwise payable by a percentage

51 Marboe, *supra* note 6, at 751–53. *See also Rumeli v. Kazakhstan*, *supra* note 42, at paras. 794–97.

52 *MTD v. Chile*, *supra* note 33, at paras. 195–96, 247–48 (Tribunal) and paras. 104–06 (Annulment Committee).

53 *See, for example*, NAFTA Article 1110(2).

54 *ADC v. Hungary*, *supra* note 26, at para. 497; Richard C. Deutsch, *An ICSID Tribunal Values Illegal Expropriation Damages from Date of the Award: What Does This Mean for Upcoming Expropriation Claims? A Casenote and Commentary of ADC v. Hungary*, 4(3) Transnat'l Dispute Mgmt. (June 2007); Manuel A. Abdala et al., *Chorzów's Compensation Standard as Applied in ADC v. Hungary*, 4(3) Transnat'l Dispute Mgmt. (June 2007).

55 Sabahi, *supra* note 17, at 12–13; Reisman & Sloane, *supra* note 24.

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intended to reflect the investor's role in the events leading to loss. The most notable of these is *MTD v. Chile*, where the tribunal reduced damages otherwise due by 50 percent to reflect the investor's negligent conduct. It found that:

> . . . the Claimants . . . had made decisions that increased their risks in the transaction and for which they bear responsibility, regardless of the treatment given by Chile to the Claimants. They accepted to pay a price for the land with the Project without appropriate legal protection . . . [T]herefore . . . the Claimants should bear part of the damages suffered . . .[56]

In *Bogdanov v. Moldova*, the tribunal found the investor partially liable for its loss because it did not ensure that the privatization contract at issue was sufficiently precise concerning compensation.[57] Likewise, the tribunal in *Azurix v. Argentina* took into account the fact that the investor paid too much to obtain the contract at issue, and reduced the award accordingly.[58]

Effect of Necessity

A second interesting issue in recent awards is the effect of a state of necessity (if any) on the obligation to compensate for breach of treaty.[59] At customary international law, the wrongfulness of conduct is excused for the period during which the State can establish that its breach was the only way to safeguard an essential interest against a grave and imminent peril.[60] However, according to the ILC Articles on State Responsibility, invocation of a circumstance precluding liability (such as necessity) is without prejudice to the question of compensation for loss caused by the wrongful act.[61]

Four cases arising from the Argentine emergency measures of the late 1990s and early 2000s have addressed this issue. In each of these cases, the respondent raised a defense of customary international law necessity and invoked the provision in the relevant treaty excluding liability for conduct necessary to maintain public order. The tribunals in *CMS*, *Sempra*, and *Enron* rejected the defense of necessity. However, in each of these cases, the tribunal reduced the damages awarded to factor in the weak condition of the Argentine economy at the relevant time. Each of these tribunals suggested that although the defense of necessity did not preclude wrongfulness in the circumstances, the dire state of the Argentine economy justified sharing some of the financial burden among the disputing parties. For example, in *CMS*, the tribunal

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56 *MTD v. Chile*, *supra* note 33, at paras. 242–46 (Tribunal) and paras. 93–101 (Annulment Committee).

57 Bogdanov v. Republic of Moldova (SCC Case), Award of September 22, 2005 at para. 5.2.

58 *Azurix v. Argentina*, *supra* note 34, at paras. 426–29.

59 *See* Andrea K. Bjorklund, *Emergency Exceptions: State of Necessity and Force Majeure*, *in* Oxford Handbook of International Investment Law (Peter Muchlinski et al., eds., 2008); Sergey Ripinsky, *State of Necessity: Effect on Compensation*, 4(6) Transnat'l Dispute Mgmt. (November 2007).

60 Crawford, *supra* note 1, Article 25.

61 *Id.*, Article 27.

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reduced the market value of the shares in its DCF analysis.[62] The Annulment Committee reviewing the *CMS* decision was critical of the *CMS* tribunal's approach to necessity and compensation and found that necessity at customary international law differed from the applicable treaty clause based on public order and hence could result in different rulings concerning compensation.[63] The Annulment Committee further held that if proved, the treaty exclusion would negate any compensation obligation for the period in which the State could prove it acted to protect public order.[64] Nonetheless, this may be seen as *obiter* since the Committee did not, in the end, annul the *CMS* decision. In *Enron*, the tribunal modified assumptions supporting the DCF valuation to account for the state of emergency.[65] In *Sempra v. Argentina*, the tribunal found that it was appropriate to take into account the crisis conditions affecting Argentina when determining compensation.[66] As a result, the tribunal refused to accept various of the investor's assumptions underlying the "but for" scenario, including the extent of the asset base, the projected rate of increase for gas distribution, and the degree of price elasticity it proposed. Instead, the tribunal adjusted these assumptions to more realistically reflect an economy suffering the kind of crisis prevailing in Argentina at the relevant time.

By comparison, in *LG & E*, the tribunal accepted a defense of necessity at international law and agreed that Argentina acted to protect the public order consistent with the exception in its bilateral investment treaty. As a result, it held that Argentina was excused from paying compensation for the period during which the state of necessity had been established.[67] Hence, in *LG & E*, the tribunal ordered that damages suffered during the state of necessity be deducted from the award to the investor.[68] This appears consistent with the view of the Annulment Committee in *CMS*.[69]

OTHER REMEDIES

Investment tribunals are rarely asked to award, and infrequently consider, remedies other than damages. However, in principle whether remedies other than compensation are available to an investor depends largely on the wording of the applicable treaty. If there is no treaty limitation on remedy, a tribunal arguably could exercise discretion to fashion remedies other than an award of monetary compensation.[70] The most likely alternative remedies are restitution, specific performance and injunction. Each is considered below.

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62 *CMS v. Argentina*, *supra* note 7, at paras. 244–49, 443–46.

63 *CMS v. Argentina*, *supra* note 7, at paras. 128–31 (Annulment Committee).

64 *Id.*, para. 146.

65 Enron Corp. v. Argentine Republic (ICSID Case No. ARB/01/3), Award of May 22, 2007 at para. 232.

66 *Sempra v. Argentina*, *supra* note 42, at paras. 397, 416-50.

67 *LG & E v. Argentina*, *supra* note 6, at paras. 2–3, 61, 97.

68 *Id.*, at para. 264.

69 Bjorklund, *supra* note 59, at 510–16.

70 Christoph Schreuer, *supra* note 7; Wälde & Sabahi, *supra* note 7, at 9–10.

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- **Restitution in Kind.** At customary international law, restitution is the primary remedy, to be considered before compensation or satisfaction.[71] In addition, some investment treaties expressly offer the possibility of restitution. For example, Article 1135(1)(b) of NAFTA authorizes a tribunal to make a final award of monetary damages, interest, or restitution of property. However, the disputing NAFTA State can elect to pay damages in lieu of restitution if it prefers. Despite the theoretical primacy of restitution, it is rarely ordered in investment arbitration due to the difficulty in enforcing such an award. Further, in many instances (e.g., regulatory expropriation or nonexpropriatory breach) title to the investment will continue to be held by the investor and hence restitution may not be available.
- **Specific Performance.** Investment tribunals may have authority to award specific performance under the applicable BIT, investment law or investment contract. For example, in *Goetz v. Burundi*, the tribunal held that Burundi had expropriated a certificate entitling the investor to operate in a free zone. The tribunal gave Burundi the option of paying the claimant for the loss or returning the benefit of the free zone certificate. Ultimately the parties settled their dispute, and Burundi agreed to create a new free zone available to the investor.[72] In *Petrobart v. Kyrgyz Republic*, the disputing parties agreed that specific performance was available in principle. However, the tribunal declined to order specific performance of a contract to deliver gas condensate because the investor had left the Kyrgyz Republic and was no longer in a position to deliver the goods required by contract.[73]
- **Injunction.** The *Enron* tribunal dealt with an objection by Argentina that it did not have jurisdiction to enjoin the payment of taxes alleged to be expropriatory. The tribunal held that it had jurisdiction to issue an injunction as well as other remedies. It concluded that:

> An examination of the powers of international courts and tribunals to order measures concerning performance or injunction and of the ample practice that is available in this respect, leaves this Tribunal in no doubt about the fact that these powers are indeed available . . . The Tribunal accordingly concludes that, in addition to declaratory powers, it has the power to order measures involving performance or injunction of certain acts.[74]

As a result, it is clear that investment tribunals can order remedies in the nature of injunction, declaration, and specific performance. One can imagine that in an appropriate situation, other remedies known to municipal contract and tort systems might also be appropriate. For example, rectification of a contract, set-off, and other remedies might be considered in the proper situation. Finally, while perhaps not technically a

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71 Crawford, *supra* note 1, Articles 34–36; Marboe, *supra* note 6, at 744–45: Brower & Ottolenghi, *supra* note 6, at 5–7.

72 Goetz v. Republic of Burundi (ICSID Case No. ARB/95/3), Award of February 10, 1999.

73 Petrobart Ltd v. Kyrgyz Republic (SCC Case), Award of March 29, 2005 at 78.

74 Enron Corp. v. Argentine Republic (ICSID Case No. ARB/01/3), Decision on Jurisdiction of January 14, 2004 at paras. 75–81.

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remedy, the possibility of counterclaims in investment arbitration should also be noted. Whether a counterclaim is available in an investment treaty arbitration will clearly depend on the wording of the BIT. However, a counterclaim will likely be admissible where it is closely connected to the primary claim, and the article authorizing dispute settlement confers broad adjudicative jurisdiction on tribunals, for example, to consider "all disputes" concerning the investment.[75]

INTEREST

Awards of interest are often seen as integral to reinstating the investor to the position it would have been in had there been no breach.[76] The main disputes concerning interest are the rate of interest, whether to award simple or compound interest, and the date from which interest flows. The rate of interest is usually a question of fact based on the legal interest rate available to the investor. The recent trend is to award compound interest,[77] although the date and rate of compounding varies significantly among awards. At the same time, compounding is not appropriate in all cases, and whether it is awarded will be highly fact-dependent.[78] Similarly, interest usually runs from the date when the State's international responsibility was engaged[79] but may be awarded from the date of the award or from some other date appropriate to the circumstances of the case. Counsel should be cautious and ask specifically for pre- and post-award interest in their pleadings and memorials, as failure to do so may disentitle them to such recovery.[80]

COSTS

The cost of litigating an investor-state arbitration is substantial, often ranging from $5 to $10 million or greater. Hence, an award of costs could be perceived as essential to

75 James Crawford, *Treaty and Contract Investment Arbitration*, The 22nd Freshfields Lecture on International Arbitration, November 29, 2007 at 14–17. *See also* Saluka Investments B.V. v. The Czech Republic, (UNCITRAL) Decision on Jurisdiction over the Czech Republic's Counterclaim of May 7, 2004.

76 Cohen Smutny, *supra* note 1, at 21–22; Wälde & Sabahi, *supra* note 7, at 45–48; McLachlan et al., *supra* note 18, at 343–46; Marboe, *supra* note 6, at 753–55; Crawford, *supra* note 1, at 237; John Gotanda, *Awarding Compound Interest in International Disputes*, Oxford University Comparative Law Forum (2004); Natasha Affolder, *Awarding Compound Interest in International Arbitration*, 12 Am. Rev. Int'l Arb. 45 (2001); *LG & E v. Argentina*, *supra* note 6, at para. 55.

77 *Vivendi v. Argentina*, *supra* note 25, at paras. 9.2.1–9.2.8.

78 *See, for example, Duke v. Ecuador*, *supra* note 1, at para. 473; *CME v. Argentina*, *supra* note 50, at paras. 642–47.

79 *Metalclad v. Mexico*, *supra* note 11, at para. 128.

80 *Sempra v. Argentina*, *supra* note 42, at paras. 483–85; *Enron v. Argentina*, *supra* note 65, at para. 452; *LG & E v. Argentina*, *supra* note 6, at paras. 110–13.

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restore the successful investor to the position it would be in "but for" the breach, or, alternatively, to ensure that the public purse is not penalized for successfully defending government measures. That said, the practice with respect to costs in investor-state arbitration has been highly unpredictable. Tribunals do not invariably apply the "costs follow the event" rule and may take account of a party's conduct, the degree of success of each party, the issues at stake, the novelty of the legal questions considered, and other considerations in awarding costs.[81] Investor-state tribunals often require disputing parties to bear their own costs and to share the costs of administering the hearing and paying for the tribunal, regardless of the degree of success of each litigant.[82]

PRACTICAL STRATEGIES

Given the significance of damages to the disputing parties and the potential for very large monetary awards, prudent counsel should develop their theory of the case as early as possible, bearing in mind the damages claimed and what could reasonably be expected to be awarded. A preliminary consideration for investors should be whether damages alone are the optimal remedy or whether other remedies are available and would be appropriate in the circumstances of the case. Notices of intent, notices of arbitration, requests for arbitration and other pleadings should be framed consistent with this theory of damages in the case.

Counsel should also retain a damages expert as early as possible, ideally to assist in formulating the theory of the case respecting damages. The damages expert should be involved at all stages of the case to ensure the damages argument is well supported and logical. In selecting a damages expert, counsel should research potential candidates as thoroughly as they research subject-matter experts. For example, counsel should consider in which cases an expert has testified, whom they worked for in the past, what positions they articulated in prior cases, the result of previous cases in which they testified, and whether the tribunal commented on the damages evidence. If possible, counsel should review past reports submitted by the expert. Counsel should also interview potential damage experts to ensure they have the time available to do justice to the case, discuss how they will structure their internal team, and how much their work

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81 While costs are invariably in the discretion of the tribunal, the applicable arbitration rules may set out different tests that can affect an award: see, for example, Article 61 of the ICSID Convention and Articles 38–40 of the UNCITRAL Arbitration Rules. *See also*, RSM Production Corporation v. Grenada (ICSID Case No. ARB/05/14), Award of March 13, 2009 at paras. 487–97; Romak S.A. (Switzerland) v. Republic of Uzbekistan (PCA Case No. AA 280), Award of November 26, 2009.

82 *See* Matthew Weiniger & Nigel Mackay, *Costs: Do Recent Trends Represent a Dramatic Shift in Tribunal Practice?* 4(6) TRANSNAT'L DISPUTE MGMT. (November 2007), which concludes that there has been a shift away from sharing costs regardless of outcome to a "costs follow the event" rule for international arbitration. *See also* Noah D. Rubins, *The Allocation of Costs and Attorney's Fees in Investor-State Arbitration*, 18 ICSID REV–FILJ. 10 (2003); John Yukio Gotanda, *Awarding Costs and Attorneys Fees in International Commercial Arbitrations*, 21 MICH. J. INT'L L. 1 (1999).

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will cost. It may also be worth obtaining a preliminary opinion from the damages expert to assess whether he or she would be the best candidate for the case.

Another strategic, and early, decision involves whether to request bifurcation of the damages phase of the arbitration. Bifurcation can save substantial costs, especially where the claim on the merits ultimately fails or succeeds only with respect to certain obligations. Bifurcating damages is especially useful where, for example, an expropriation claim fails but breach of another obligation such as national treatment or fair and equitable treatment is found that could dictate a significantly different approach to damage calculation. On the other hand, there may be cases where the merits are not well understood without consideration of damage-related evidence, and the more efficient and economic approach is to address liability and damages in the same hearing.[83]

Counsel should ensure that document requests ask for information relevant to assessment of damages and that its own production includes materials relevant to the damage claim. Damages experts should play a significant role in formulating requests for documents and assessing documents received from opposing counsel related to damages, and they should be incorporated in this aspect of case preparation as well.

Consideration should also be given to the format of the experts' report on damages. In particular, counsel should consider having its experts address alternative damage quantifications based on different valuation methodologies or different theories of liability. While doing this can be very expensive, especially if the tribunal has yet to rule on the merits of the claim and the basis for liability, it can be very useful to a tribunal. In *Vivendi v. Argentina*, the tribunal commented on the fact that the claimant had not addressed theories of compensation other than on the basis of lost profits and suggested that it would be preferable to advance alternative scenarios. The tribunal also asked the parties for guidance locating portions of the record relevant to alternative approaches to calculating compensation such as liquidation value, book value, replacement value, or amounts invested. Ultimately, the *Vivendi* tribunal rejected the claim for lost profits and evaluated compensation based on an approximation of investment value.[84]

Finally, it is often very effective for the damages expert to include summary charts, tables, or other pictorial representations that assist the tribunal and the parties to understand and remember the gist of the experts' evidence. This kind of material is also very useful when the expert testifies *viva voce*.

CONCLUSION

The standard for compensation and the method of determining a quantum of damages usually raises complex theoretical issues and detailed financial calculations. An encouraging trend is that increasingly, attention is being paid to the theory and calculation of

83 Meg Kinnear et al., INVESTMENT DISPUTES UNDER NAFTA, "Bifurcation of Proceedings" (2006) at 1135-9–1135-11.

84 *Vivendi v. Argentina*, *supra* note 25, at paras. 8.1.4–8.1.10, 8.3.1–8.3.20. *See also* Brower & Ottolenghi, *supra* note 6.

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compensation for breach of investment obligations. This is likely to continue given the very large awards rendered in recent cases, the substantial cost of arbitrating investment disputes, the significance of the issues to disputing parties, and the impact of large damage awards on the credibility of investor-state arbitration generally. Such attention ultimately will lead to greater clarity and is to be welcomed by students of investment law.

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Chapter 22

Compensation: A Closer Look at Cases Awarding Compensation for Violation of the Fair and Equitable Treatment Standard

Kaj Hobér

INTRODUCTION

Chapter 21 has dealt generally with compensation required for expropriation and for nonexpropriation breaches of investment treaties. The present chapter is intended to complement that approach by looking in somewhat more detail at how arbitral tribunals have approached compensation in cases dealing with violations of the requirement of fair and equitable treatment, found in most investment agreements, and discussed in Chapter 16.

As noted in Chapter 21, though investment treaties generally contain a provision on the standard of compensation for expropriation, they do not provide guidance on compensation in case of a violation of the other provisions, such as the fair and equitable treatment standard. Since the standard of compensation for lawful expropriation is part of the State's obligations to foreign investors, it is not necessarily the standard to be applied for unlawful conduct such as breaches of the requirement of fair and equitable treatment. However, determination of compensation for violations of the fair and equitable treatment standard is not done in a legal vacuum but in accordance with principles of customary international law, which are generally accepted to be as stated in the Articles on State Responsibility of the International Law Commission (ILC), Article 31 of which provides:

> 1. The respon sible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
>
> 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

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These principles were formulated by the Permanent Court of International Justice in the *Chorzów Factory* case, under which full compensation means to reestablish the situation which would have existed had that violation not occurred.[1]

As stated in Article 34 of the ILC Articles, the different forms of reparation include restitution, compensation, and satisfaction. Even though the primary form of reparation under the ILC Articles is restitution, from an investment dispute point of view, the practically relevant form is compensation. Compensation is regulated in Article 36 of the ILC Articles, which states:

> 1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
>
> 2. The compensation shall cover any financially assessable damage including loss of profit insofar as it is established.

Applying these principles to compensation for violations of the fair and equitable standard has two particular problems: First, Article 31 refers to "full reparation." This means, in the words of the *Chorzów Factory* case, "*to wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.*"[2] Difficult as it may be to apply this principle to expropriation, that may be easier than to apply the principle to compensation for violations of the fair and equitable standard. Expropriation typically puts an end to the investment in question; however, a business activity may well continue following violations of the fair and equitable standard. The difficulty is to determine what "full reparation" means in this context. Second, the language of Articles 31, 34, and 36 refers to the "*injury caused by the internationally wrongful act.*" In the context of fair and equitable treatment, one can easily envisage situations where it will be very difficult to establish the required causal link, i.e., to determine the extent to which an injury has been caused by a violation of this standard and not by any other event.

DECISIONS BY ARBITRAL TRIBUNALS

There are still relatively few recent decisions by arbitral tribunals in investment disputes which deal with compensation for violations of the fair and equitable standard as a discrete and separate matter. Many, if not most, investment disputes primarily focus on expropriation. Questions of fair and equitable treatment tend to play a secondary role and are not given separate treatment. There are[3] eight BIT cases, two ECT cases, and two NAFTA cases which address the issue of compensation for violations of the fair and equitable treatment standard as a separate matter.

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1 *Factory at Chorzów*, 1928, P.C.I.J., Series A, No. 17, p. 47.

2 *Factory at Chorzów*, 1928, P.C.I.J., Series A, No. 17.

3 As of the end of 2008.

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It is essential to keep in mind that each award is based on the facts, arguments, and evidence presented in the individual case. Caution is thus required when trying to draw general conclusions based on a limited number of cases.

BIT Cases

MTD v. Chile. In *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*,[4] MTD (Malaysia) had invested in Chile by participating in a joint venture which planned to buy land for the purpose of constructing a mixed-use upscale community. The investment was approved by the Foreign Investment Commission (the FIC) and a foreign investment contract was signed. Subsequently, the FIC also approved an additional capital contribution by MTD. Thereafter, the project ran into difficulties resulting from the absence of a change of zoning legislation for the use of the land designated for the project. In the end, the project was not approved by the authorities. The tribunal was satisfied that approval of an investment by the FIC for a project that was against the urban policy of the Government amounted to a breach of the obligation to treat an investor fairly and equitably.[5]

On compensation, the tribunal took as a starting point the standard, pronounced in the *Chorzów Factory* case, that the compensation should "*wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed*."[6] Based on this principle, the tribunal concluded that the eligible expenditures were approximately US$ 21.5 million relating to Claimant's investment in Chile that could have been avoided. The tribunal also underlined, however, that Chile was not responsible for the consequences of unwise business decisions, or for the lack of diligence of the investor. Its responsibility was limited to the consequences of its own actions to the extent they breached the obligation to treat the Claimants fairly and equitably. The tribunal observed, *inter alia*, that no specialist on urban development had been contacted by the Claimants until the deal was closed; that the Claimants apparently did not appreciate the fact that their joint venture partner may have had a conflict of interest with the Claimants; that they seemed to have accepted his judgment; that MTD was in a hurry to start the Project; that BITs are not an insurance against business risks; and that the Claimants, as experienced businessmen, must bear the consequences of their own actions. Their choice of partner and the acceptance of a land valuation based on future assumptions without protecting themselves contractually in case the assumptions would not materialize, including the issuance of the required development permits, were risks that the Claimants took irrespective of Chile's actions. Therefore, the tribunal awarded only 50 percent of eligible expenditures resulting from the fact that the zoning legislation was not changed.

While the starting point for the tribunal was thus the concept of "full reparation" as laid down in the *Chorzów Factory* case and in the ILC Articles on State Responsibility,

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4 ICSID Case No. ARB/01/7, Award of May 25, 2004.

5 The Award, para. 214.

6 *See* note 2, *supra*.

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the more interesting aspect of the tribunal's reasoning is that it reduced the amount eligible for compensation by 50 percent. This percentage would seem to be the result of the tribunal exercising its discretion in determining the amount of compensation. The justification for the reduction could be explained in either of the following ways. *First*, the tribunal may have taken the view that the Claimants had not established a causal link between the violation of the fair and equitable treatment standard going beyond 50 percent of the expenditures, since part of the injury was the result of Claimants' own doing. *Second*, an alternative explanation—but to a large extent, the other side of the same coin—would be to view Claimants' conduct as a case of contributory negligence. To the extent Claimants themselves had contributed to their own misfortune, the host state could not be held responsible.

CMS v. Argentina. In *CMS Gas Transmission Company* v. *The Argentine Republic*,[7] the Argentinean company TGN had been granted a license for the transportation of gas. Investors had been invited to invest in the shares of TGN, and as a result hereof the American company CMS acquired 29.42 percent of the shares in TGN. Following the major economic and financial crisis in the country, the Republic of Argentina enacted various measures which, in the Claimant's view, violated the commitments the Government had made to foreign investors in the offering memoranda, relevant laws, and regulations and the license itself, including commitments to calculate tariffs in U.S. dollars and adjust them every five years to maintain their real dollar value. CMS argued that the Argentinean measures constituted indirect and creeping expropriation[8] and a breach of the fair and equitable standard. The tribunal rejected the expropriation claim but upheld the claim of breach of the fair and equitable standard.[9]

On compensation, the tribunal noted that, under international law, there are three main methods of reparation for injury: restitution, compensation, and satisfaction.[10] It ruled out "satisfaction" since the case was not about reparation due to an injured State. As regards "restitution," the tribunal noted, by reference to the *Chorzów Factory* case, that this is the method used to reestablish the situation which existed before the wrongful act was committed, provided that this is not materially impossible and does not result in a burden out of proportion as compared to compensation.[11] Having concluded that reparation by way of restitution was not an alternative for the tribunal in the present situation because it would require a settlement between the parties, the tribunal went on to analyze the issue of compensation.[12]

The tribunal stated that "compensation" is designed to cover any financially assessable damage, including loss of profits insofar as it is established, and that it is only called for when the damage is not made good by restitution.[13] Quoting the decision in

7 ICSID Case No. ARB/01/8, Award of May 12, 2005.
8 The Award, para. 256.
9 The Award, paras. 263–64.
10 The Award, para. 399.
11 The Award, para. 400.
12 *Cf.* Articles 35–36 of ILC's Articles on State Responsibility.
13 The Award, para. 401.

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the *Lusitania* case,[14] the tribunal held that the remedy should be commensurate with the loss so that the injured party may be made whole,[15] i.e., that there should be full compensation.[16]

As for determining the amount, the tribunal found that "the cumulative nature of the breaches discussed here is best dealt with by resorting to the standard of fair market value. While this standard figures prominently in respect of expropriation, it is not excluded that it might also be appropriate for breaches different from expropriation if their effect results in important long-term losses."[17] It identified four ways that "have generally been relied upon to arrive at such value":

> (1) The 'asset value' or the 'replacement cost' approach which evaluates the assets on the basis of their 'break-up' or their replacement cost; (2) the 'comparable transaction' approach which reviews comparable transactions in similar circumstances; (3) the 'option' approach which studies the alternative uses which could be made of the assets in question, and their costs and benefits; (4) the 'discounted cash flow' ('DCF') approach under which the valuation of the assets is arrived at by determining the present value of future predicted cash flows, discounted at a rate which reflects various categories of risk and uncertainty.[18]

The tribunal, in this particular case, concluded that the DCF methodology was the most appropriate way to determine the actual loss of the Claimant.[19] The decisive factor in this respect seems to have been that TGN was a going concern: its license was valid until 2027. To determine the actual loss resulting from the violation of the fair and equitable treatment standard, the tribunal compared two scenarios. The first involved the evaluation of revenues, cash, and profits until 2027 on the assumption that there had been no change in the regulatory environment. The second involved the same evaluation based on the new regulatory framework.[20]

Azurix Corp v. Argentina. In *Azurix Corp v. The Argentine Republic*,[21] the Azurix Group of the United States (at the time of the investment owned by Enron) participated in the privatization of water services in the Province of Buenos Aires, through Azurix Buenos Aires S.A. (ABA), incorporated to act as the concessionaire. After ABA had made a so-called Canon Payment of 438,555,554 Argentine Pesos, ABA and the Province executed a 30-year concession agreement. Claimant maintained that, as the consequence of a number of actions and omissions of the Province in violation of its obligation of fair and equitable treatment under the U.S.-Argentina BIT, ABA had been forced to give notice of termination of the Concession and file for bankruptcy, since it was faced with no hope of recovering its investments in the "*politicized*

14 *Lusitania*, RIAA, Vol. VII, 1923, p. 32.
15 The Award, para. 401.
16 The Award, para. 402.
17 The Award, para. 410.
18 The Award, para. 403.
19 The Award, para. 21.
20 *See* Award, paras. 419, 422.
21 ICSID Case No. ARB/01/12, Award of July 14, 2006.

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regulatory scheme."[22] It also claimed expropriation. The tribunal did not find expropriation but did find that a number of actions of the Province constituted "pervasive conduct" in breach of the standard of fair and equitable treatment, under Article II(2)(a) of the U.S.-Argentina BIT. Those were (i) the refusal by the Province to accept the notice of termination and its insistence on terminating it by itself on account of abandonment of the Concession; (ii) the politicization of the tariff regime because of concerns with forthcoming elections or because the Concession was awarded by the previous government; and (iii) the repeated calls of the Provincial governor and other officials for nonpayment of bills by customers, which verged on bad faith in the case of one incident when the Province itself had not completed the works that would have helped to avoid the problem in the first place.[23] It also found that Argentina had taken measures that could be considered to be arbitrary and to have impaired "*the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal"*[24, 25] *of the investment*.

As regards compensation, the tribunal referred to the *CMS* v. *Argentina* case,[26] in which the tribunal found that the standard of fair market value, which frequently figures in respect of expropriation, may be appropriate also for other breaches if their "*effect results in important long-term losses*."[27] The tribunal found that "*compensation based on the fair market value of the concession would be appropriate, particularly since the Province has taken it over*."[28] In measuring the fair market value, the tribunal stated that the function of the tribunal is to "*try and determine what an independent and well-informed third party would have been willing to pay for the Concession in March 2002, in a context where the Province would have honoured its obligations*."[29]

The Claimant had suggested two methodologies for determining the fair market value: the actual investment and the book value. The tribunal agreed with the Claimant that "*the actual investment method is a valid one in this instance*."[30] The tribunal found that the Claimant's investment in this respect was the price paid for the Concession and the additional investments made to finance ABA. The tribunal emphasized, however, that a significant adjustment was required to arrive at the real value of the Canon paid by the Claimant for the Concession. According to the tribunal, no well-informed investor would at the time of the violation have paid the price paid by Azurix in mid-1999, irrespective of the actions taken by the Province and of the economic situation in Argentina at that time.[31] Claimant argued that, under the concession agreement, the

22 The Award, para. 43.

23 The Award, paras. 375–77.

24 Article II.2(b) of the US-Argentina BIT provides: "*Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments.*"

25 The Award, paras. 390–93.

26 *See* p. 576, *supra*.

27 The Award, para. 420.

28 The Award, para. 424.

29 The Award, para. 427.

30 The Award, para. 425.

31 The Award, para. 426.

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Canon Payment should be included in the asset base that the concessionaire had the right to recover through the tariffs to be applied to the concessionaire's services under the concession agreement. However, in the view of the tribunal, the Canon Payment could not be included as a recoverable asset base for the purpose of tariff increases.[32] The tribunal concluded that no more than a fraction of the Canon Payment could realistically have been recuperated under the existing concession agreement. The tribunal therefore found that the value of the Canon at the time of the violation should be established at US$60,000,000. The tribunal did not explain, however, how it arrived at this amount. The full Canon Payment made by the Claimant amounted to US$438,555,551.[33]

The tribunal did not award any compensation for unpaid bills owed by customers to ABA, which the Province had directed the customers not to pay, since the tribunal found that this amount was owed by the Province to ABA and, therefore, should not be part of the compensation awarded to Azurix.[34] Nor did the tribunal award compensation for certain expenditures incurred by the Claimant in connection with negotiations with the Province and the termination of the Concession, since the tribunal found that it had not received sufficient evidence in support of such costs and that, in any case, these were costs related to the business risk that Azurix took when it decided to make the investment. Therefore, although agreeing in principle that compensation should wipe out the consequences of an illegal act, in the circumstances of this particular case, the tribunal did not find the amount claimed to be justified.[35]

As mentioned before, the tribunal found that Argentina had violated both the fair and equitable treatment standard and the prohibition against arbitrary measures in the U.S.-Argentina BIT. In calculating compensation, however, the tribunal does not seem to have distinguished between these two breaches of the BIT but rather awarded a sum presumably covering both breaches.

PSEG Global v. Turkey. In PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Širketi v. Republic of Turkey,[36] the dispute arose out of a contract concluded by Turkey's Ministry of Energy and Natural Resources (MENR) with PSEG Global Inc. (PSEG) for development of a power plant in the Turkish province of Konya. The Concession Contract provided Claimant with the possibility of submitting a "Revised Mine Plan" after conducting further studies at the mine site as well as the possibility of revising, if necessary, the energy tariff, the fuel production costs, and the future facility's production, subject to MENR's approval and provided that MENR had the discretion to reject the tariff "on reasonable grounds."[37] Further studies at the mine site and the resulting Revised Mine Plan showed a "large" cost increase.[38] The Parties, however, could not agree on the adjustments of several factors such as the plant

32 The Award, para. 427.
33 The Award, para. 429.
34 The Award, para. 431.
35 The Award, para. 432.
36 ICSID Case No. ARB/02/5, Award of January 17, 2007.
37 The Award, para. 52.
38 The Award, para. 96.

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capacity, the amount of electricity that Turkey would be required to purchase, and the tariffs which would have required adjustment for the Project to be viable. Respondent also required that the local project company, which initially operated as a Turkish branch office of a Dutch investment company, be incorporated as a Turkish limited liability company, which would increase its tax burden substantially over the period in question. After negotiations reached a deadlock, Claimants initiated arbitration, claiming violation of the duty to accord fair and equitable treatment, required by Article II(3) of the U.S.-Turkey BIT, as well as indirect expropriation. The tribunal did not find expropriation but did find breach of the duty to provide fair and equitable treatment in several aspects of MENR's conduct, in particular abuse of its authority by demanding renegotiation of substantial terms of the Concession Contract, such as the tariff escalation clause. The tribunal also found that numerous changes in the legislation, inconsistencies in the administration's practice, and notable changes in the attitudes and policies of the administration violated the fair and equitable treatment standard.[39]

As to the amount of damages, Claimants asked for compensation for "*all financially assessable damage, including loss of profits arising from either contract arrangements or from a well-established history of dealings*." Claimant suggested three alternative approaches to the assessment of damages: (i) the fair market value, (ii) the lost profit valuation, or (iii) the investments actually made and out-of-pocket expenses incurred by the Claimant and the cosponsors of the project.

The tribunal found that the fair market value approach was unjustified in this particular case since it did not relate "*to damages to productive assets but to the failure to conduct negotiations in a proper way and other forms of interference by the Respondent Government*," and damages therefore had a different objective and were of a different nature.[40]

As for the loss of profit approach, the tribunal pointed out that ICSID tribunals were reluctant to award lost profits for an infant industry and unperformed work, such measure being reserved for compensation of investments which had been substantially made and had a record of profits.[41] The tribunal found that, since the parties never finalized the essential commercial terms of the Concession Contract, any calculation of future profits would be "*wholly speculative and uncertain*," and the lost profit approach would be unjustified.[42]

What remained was therefore to determine compensation for Claimants' investment expenses, and in particular whether all or only some of the expenses qualified as compensation for the damage caused by Respondent's failure to conduct negotiations in a proper way. The costs were grouped into five categories: legal; mine and fuel supply; other technical studies; environmental; and Project preparation, including financing, permits, corporate structure, preparations for implementation and drafting and negotiations,

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39 The Award, paras. 241–56.

40 The Award, para. 308.

41 The tribunal illustrated this by reference to the award of September 23, 2003 in *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/00/5, Award of September 23, 2003).

42 The Award. paras. 313–15.

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categories which the tribunal found to correspond to the history of the project. Claimants were therefore in principle to be awarded compensation for such categories of costs. The tribunal also observed that it was not unusual for awards to allow compensation for the costs of negotiation of a project.[43] However, the tribunal did not award any compensation for work performed prior to the submission of the Feasibility Study to MENR.[44] Nor did the tribunal award any compensation for legal fees relating to the investigation of one of the cosponsors of the project for possible corrupt practices. These costs were not considered to be related to the development of the project.

As regards the expenses of Claimants' cosponsors, the tribunal found that such expenses could not be compensated since the two cosponsors had no standing in the arbitration.

Enron and Ponderosa v. Argentina. *Enron Corporation and Ponderosa Assets* v. *Argentina*[45] concerned yet another claim related to the various measures taken by Argentina in response to the major economic and financial crisis starting in late 1999. The Claimants had, through a number of complex transactions evolving over time, invested in Transportadora de Gas del Sur (TGS), one of the two gas transportation companies created as part of the privatization of Argentina's gas transportation and distribution system. They asserted that, in making the decision to invest, they had relied on the conditions offered by the legislative and regulatory framework adopted under the privatization program.[46] They maintained that the various measures taken by Argentina in response to the crisis had resulted in violations of specific commitments made and contractual obligations undertaken toward investors, all of it in a manner contrary to the applicable legal and regulatory framework and the specific guarantees provided under the U.S.-Argentina BIT.[47] According to Claimants, Argentina's commitments included, in particular, the right for TGS to calculate tariffs in U.S. dollars, to semiannual adjustments in accordance with the variations of the US PPI and to the quinquiennial review of tariffs. They further maintained that other prominent guarantees were the obligations of Argentina not to freeze tariffs or subject them to price controls (or if done so to provide compensation) and not to alter the Model License provided to investors.[48]

Claimants pleaded direct and indirect (or creeping) expropriation, breach of the obligations of "fair and equitable treatment," and respect for legitimate expectations, as well as arbitrariness and discrimination and failure to afford full protection and security to the investors.[49] After having analyzed various arguments raised by the parties, the tribunal found that the obligations undertaken and the commitments made by

43 The Award, paras. 318–19, with reference made to the *Autopista* award, para. 263.
44 The Award, para. 327–29.
45 ICSID Case No. ARB/01/3, Award, May 22, 2007.
46 The Award, para. 44.
47 The Award, para. 87.
48 The Award, para. 88.
49 The Award, para. 89.

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the Argentine Republic had not been observed.[50] The tribunal found that the actions could not amount to direct expropriation and were not tantamount to expropriation[51] but did constitute a breach of the fair and equitable treatment under the U.S.-Argentina BIT.[52] The tribunal also found that the Argentine Republic had violated the umbrella clause of the U.S.-Argentina BIT, Article II(2)(c), according to which "*[e]ach party shall observe any obligation it may have entered into with regard to investments*."[53] By contrast, the tribunal concluded that there had been no breach of the provision of Article II(2)(b) prohibiting arbitrary or discriminatory measures and that Claimants had not proven that Respondent had failed to give full protection and security.[54]

After having rejected the various arguments on necessity and emergency relied on by Argentina, the tribunal turned to the question of remedies and compensation. With respect to the relief sought, Claimants had submitted first that "*the expropriation they ha[d] suffered require[d] the payment of full compensation in accordance with the fair market value*," calculating such value with respect to either the date of abolition of the US PPI adjustments August 31, 2000) or the calculation of tariffs in U.S. dollars (December 31, 2001).[55] Second, it was submitted that certain fees under a Technical Assistance Agreement (TAA) between TGS and a subsidiary to one of the Claimants "*constituted delayed compensation*" and should be indemnified.[56] Third, Claimants asked compensation for loss of revenue due to the absence of PPI adjustments during the years 2000 and 2001.[57] Three methods of calculating the "fair market value" of the investment were presented by the Claimants' experts; viz., the discounted cash flow approach (DCF), book value, and unjust enrichment.[58] The Republic of Argentina presented a number of objections related to Claimants' calculations of the damage suffered and also to "*the use of DCF to calculate the value of equity damage as a matter of principle*."[59]

The tribunal held that, since the U.S.-Argentina BIT does not specify the damages to which an investor is entitled when the standard of fair and equitable treatment or the umbrella clause has been breached, "*the appropriate standard for reparation under international law*," as was established in the *Chorzów Factory* case,"*is compensation for the losses suffered by the affected party*,"[60] and that "*reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed*."[61]

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50 The Award, para. 231.
51 The Award, paras. 243 ff.
52 The Award, para. 268.
53 The Award, paras. 269, 273, and 277.
54 The Award, paras. 283 and 287.
55 The Award, para. 346.
56 The Award, para. 347.
57 The Award, para. 347.
58 The Award, para. 348.
59 The Award, paras. 353–57.
60 The Award, para. 359.
61 The Award, para. 359, with reference to *Factory at Chorzów*, 1928, P.C.I.J., Series A, No. 21, para. 47.

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In the instant case, the tribunal found that the appropriate compensation amounted to the difference in the "fair market value" of Claimants' investment resulting from the breaches of the U.S.-Argentina BIT.[62] Although the tribunal stated that this standard mainly related to expropriation, it found that it could be applied also to situations not amounting to expropriation. In this respect, it explained that "*the line separating indirect expropriation from the breach of fair and equitable treatment can be rather thin and in those circumstances the standard of compensation can also be similar on one or the other side of the line*."[63] It found compensation according to "fair market value" was appropriate in this case "*[g]iven the cumulative nature of the breaches that have resulted in a finding of liability*."[64]

After considering and rejecting some general arguments opposing liability presented by Respondent, the tribunal addressed the appropriate method for calculating the compensation with respect to the three heads under which the Claimants had sought relief. These were (i) equity damage, (ii) damages relating to the TAA, and (iii) damages because of the freeze of tariff adjustments according to the US PPI.

The tribunal stated that the equity damage corresponded "*to the loss in value of the Claimants' investment in TGS derived from the measures*" and in particular from the abolition of the calculation of tariffs in U.S. dollars. Quoting *S.D. Myers, Inc. v. Canada*, it recalled that "*compensation should undo the material harm inflicted by a breach of an international obligation*."[65] To accomplish this, the tribunal found that it needed to "*compare the value of Claimants' investment before the measures were adopted and its value at present*," applying the principle of fair market value in determining the respective values of the investment.[66] The tribunal rejected the use of "book value" or "unjust enrichment" to calculate the "fair market value," but found that "stock market value," a valuation method proposed by Respondent, could be used.[67]

The tribunal concluded that the DCF method was appropriate to value a "going concern" such as TGS, since that method reflects a company's capacity to generate positive returns in the future.[68] The tribunal found, as a matter of principle, that the DCF method could, as had been done in other awards, be used to determine the value of the investment both before and after the damaging measures were taken.[69] In the present case, however, Claimants had partly sold their interest in TGS, thus rendering it possible to use the "*real value obtained in these transactions*" which, according to the tribunal, "*better reflects the current value of such participation*." The tribunal maintained that this "*value is certain and arises from market transactions*" and "*[m]oreover, such*

62 The Award, para. 361.
63 The Award, paras. 362 and 363.
64 The Award, para. 363.
65 The Award, para. 379 with reference to S.D. Myers, Inc. v. Canada, UNCITRAL Arbitration Proceeding, Partial Award of November 13, 2000, para. 315.
66 The Award, para. 380.
67 The Award, paras. 382 and 383.
68 The Award, paras. 384 and 385.
69 The Award, para. 388.

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transactions were specifically made with the intention of mitigating losses."[70] With regard to the date from which the DCF value was to be calculated, the tribunal considered that the abolition of the calculation of tariffs in U.S. dollars, starting in 2002, was the relevant point in time.[71] For the purpose of verifying the soundness of the assumptions made when using the DCF method, the tribunal considered that the stock market value of the company could be used.[72]

The tribunal rejected the compensation sought by Claimants with respect to the TAA as it was not persuaded that fees under the agreement were in fact "*delayed compensation and therefore should be included in computations of profitability or damages*."[73] With regard to the freeze of tariff adjustments according to the US PPI for 2000 and 2001, which were not included in the equity damage as it was calculated from December 31, 2001, the tribunal accepted the Claimants' calculation of the sum of the outstanding adjustments.[74] There is no discussion by the tribunal of any differentiation between compensation for breach of the fair and equitable standard and the umbrella clause.

LG&E v. Argentina. In *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*,[75] the Claimants purchased shares in three Argentinean companies (the Licensees) which had obtained licenses to operate in the gas distribution market. The latest purchase took place in 1999. The Claimants had relied on the legal guarantees offered by the Argentine government for the privatized energy industry, in particular, tariffs calculated in U.S. dollars, automatic and periodic adjustments to the tariffs based on the Producer Price Index (PPI), a clear legal framework that could not be unilaterally modified, and the granting of "licenses" instead of "concessions" with a view to offering the highest degree of protection to prospective investors.[76] Thus, in 1992, the Argentine government, by virtue of Reglas Básicas de la Licencia, undertook to compensate the licensees fully for any losses resulting from changes to the guaranteed tariff system.[77]

While initially both the Licensees and Argentina abided by their respective obligations, by the end of 1999, a severe economic crisis erupted in Argentina. Against this background, the Argentinean government reached an agreement with the Licensees that the tariff adjustment due in January 2000 was to be postponed for six months, having promised that the tariffs would be recovered at the end of the period with interest. Six months later, the Argentinean government, however, urged the Licensees to accept a second postponement of the tariff adjustments. The crisis deepened, which led

70 The Award, paras. 387 and 388.
71 The Award, para. 403.
72 The Award, paras. 386 and 424–28.
73 The Award, para. 443.
74 The Award, paras. 350 and 448.
75 ICSID Case No. ARB/02/1, Decision of October 3, 2006 (on Liability) and Award of July 25, 2007 (on Damages).
76 Decision on Liability, para. 49.
77 Decision on Liability, para. 42.

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to abrogation in January 2002 of the one-to-one peg of the Argentine peso to the U.S. dollar and to the introduction of a law requiring renegotiation of private and public agreements, in which the Licensees became involved under threat of rescission of contract.[78] By a presidential decree issued one month later, all dollar obligations were converted into pesos at the fixed one-to-one exchange rate, which, according to the Respondent, was a necessary process to return the country to the path of economic stability.[79]

The Claimants alleged multiple breaches of the U.S.-Argentina BIT, in particular Article II(2)(a) guaranteeing, *inter alia*, fair and equitable treatment.[80] They also alleged indirect expropriation without compensation because the value of Claimants' holdings in the Licenses had been reduced by more than 90 percent as a result of Respondent's abrogation of the principal guarantees of the tariff system. Claimants requested full compensation of the difference between the fair market value of the Claimants' investment shortly before the government's interference (in August 2000, according to the Claimants) and its value in October 2002 (once trading activity on the stock exchange had adjusted to the enactment of the legislation in question). Argentina denied the alleged violations of the treaty and, as an alternative defense, claimed state of necessity as grounds for exemption from liability.[81] Compensation according to the discounted cash flow method (without any specific calculation) was pleaded by Argentina in case the tribunal would find it in breach of the treaty.

The tribunal denied Claimants' expropriation claim but concluded that abrogation of specific guarantees[82] which were relied upon by Claimants—and thereby created certain expectations—violated the interest of stability and predictability underlying the standard of fair and equitable treatment.[83] However, recognizing the economic and political hardship of Argentina at the time, the tribunal nevertheless exempted Argentina from responsibility during the period between December 1, 2001 and April 26, 2003. The tribunal found that the previously described measures taken by Argentina were justified during this period of time due to the "state of necessity" caused by Argentina's economic and political hardship as contemplated by Article XI[84] of the U.S.-Argentina BIT and customary international law. In the tribunal's opinion, after the "state of necessity" ended on April 26, 2003, Argentina should have restored the

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78 Decision on Liability, para. 71.

79 Decision on Liability, para. 67.

80 Article II(2)(a) reads: "*Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.*"

81 Decision on Liability, para. 75.

82 Such as calculation of the tariffs in U.S. dollars, semiannual PPI adjustments, tariffs set to provide "reasonable rate of return," and compensation if the tariff scheme were altered.

83 Decision on Liability, para. 133.

84 Article IX provides that: "*[t]his Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests.*"

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tariff regime or should have compensated Claimants.[85] The reason for choosing this specific date as the end of the "state of necessity" was that the serious public disorders justifying the "state of necessity" ended at the time President Kirchner was elected (i.e., April 26, 2003).

As to the standard of reparation, the tribunal, with reference to, *inter alia*, the *Lusitania Cases*, *Factory at Chorzów*, and *Feldman v. Mexico*, as well as to *the ILC's Articles on State Responsibility*, sought to accord "full reparation," compensating the actual losses incurred as a result of the internationally wrongful act. The tribunal emphasized, however, that "causation" had to be established and actual losses had to be identified.

Although the tribunal acknowledged the causality between the actions of the Government in breach of the standard of fair and equitable treatment of Article II(2)(a) of the U.S.-Argentina BIT and the reduction in the value of the Claimants' shares between August 2000 and October 2002 by 93 percent, as alleged by the Claimants, the tribunal did not apply such reduction as a basis for determining compensation. In the tribunal's opinion, compensation for the reduced value would be a premature claim, since Claimants had not sold their investment for the depressed value and the value of Claimants' investment had "rebounded" since the economic crisis. The tribunal stressed the difference between the present case and the decisions to which Claimants referred in justification of its claim for future losses, namely, that in each case referred to by Claimants the investors "*had lost title to their property, or the relevant contracts or licenses had been put to an end*," which made it certain that the opportunity to earn any future profit was lost.[86]

Instead, the tribunal concluded that the Claimants' loss amounted to the dividends that "*would or could have been generated*" during the period of August 18, 2000 (abrogation of the tariff regime) until February 28, 2005 (the tribunal's cut-off date for damages) but for the adoption of the measures.[87] The dividends were adjusted by taking into account the impact of average business growth that would have taken place over the year, and reduced by the dividends actually received by the Claimants as well as damage suffered during the state of necessity (December 1, 2001 to April 26, 2003).

Although in Claimants' view, the breach of Argentina's obligations had continued well after February 28, 2005, and there was no indication that Argentina was willing to restore the tariff regime,[88] the awarded compensation was limited to Claimants' losses during the period ending on February 28, 2005. This was the date fixed by the tribunal for the post-hearing briefs after which no new evidence could be presented. As Claimants themselves opposed introduction of new evidence by Argentina after this date, the tribunal, in line with its cut-off date decision and out of "*respect for due*

85 Decision on Liability, para. 266.

86 Award on Damages, para. 91.

87 Award on Damages, paras. 48 and 59.

88 Award on Damages, para. 65.

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process" disregarded subsequent evidence submitted by the Claimants, since the Respondent had not been given the opportunity to react to such evidence.[89]

Thus, the tribunal's assessment of losses in this case was different from that in *CMS v. Argentina*,[90] where the gas tariffs had been affected by the same State measures, and CMS's claim for future losses for the remaining licence period ending in 2027 was upheld by the tribunal. The tribunal rejected the claim for future losses in this case, since it could "*only award compensation for loss that is certain*," and it was "*not convinced of the certainty of the lost future dividends.*"[91]

Sempra v. Argentina. In *Sempra Energy International* v. *Argentina*,[92] Sempra, an enterprise established in the United States, had invested in two Argentinean gas distribution companies created as part of the privatization of the Argentinean gas market, under the previously described legal and regulatory framework directed at opening the economy to foreign investment. Sempra claimed that in making the decision to invest, it relied specifically on the conditions provided by these legislative and regulatory enactments.[93] Sempra argued that the various measures which Argentina took in response to the major economic and financial crisis starting in late 1999 resulted in the permanent abrogation and repudiation of most of the rights it had previously had under the regulatory framework and the License.[94] These measures included prohibiting the adjustment of tariffs according to the US PPI, the derogation of the calculation of tariffs in U.S. dollars, the unilateral modification of the License by the government without payment of compensation, and the failure to reimburse subsidies owed.[95] Sempra asserted that these measures, in violation of specific commitments made, and of contractual obligations undertaken, contravened the applicable legal and regulatory framework and the specific guarantees provided under the Argentina-U.S. BIT[96] concerning expropriation, fair and equitable treatment, and the umbrella clause, as well as provisions against arbitrariness and discrimination.[97]

The tribunal concluded that Argentina's actions did not constitute expropriation[98] but did breach the requirement of fair and equitable treatment under the treaty[99] and the umbrella clause.[100]

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89 Award on Damages, paras. 92–95.
90 *See* p. 576, *supra*.
91 Award on Damages, paras. 88, 96.
92 ICSID Case No. ARB/02/16, Award and partial dissenting opinion of September 28, 2007.
93 The Award, para. 94.
94 The Award, para. 93.
95 The Award, para. 94.
96 The Award, para. 94.
97 The Award, para. 95.
98 The Award, para. 285.
99 The Award, para. 304.
100 The Award, para. 313.

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Argentina argued that it should be exempted from liability under the treaty in light of the national state of emergency or state of necessity under domestic law, general international law, and the treaty. However, although recognizing the seriousness of the crisis in Argentina, the tribunal—unlike the tribunal in *LG&E v. Argentine Republic*—came to the conclusion that the crisis did not justify "*the operation of emergency and necessity*."[101]

Turning to the question of reparation, the tribunal stated, citing the *Chorzów Factory* case, that in international law "*reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed*."[102] In the absence of restitution or other measures of redress, the tribunal found that "*compensation for the losses suffered by the affected party*" was the appropriate standard of reparation. Quoting Article 26(2) of the ILC's Articles on State Responsibility, the tribunal also stated that the compensation was meant to cover any "*financially assessable damage including loss of profits*."[103] The tribunal referred to other tribunals having "*considered that compensation is the appropriate standard of reparation in respect of breaches other than expropriation, particularly if such breaches cause significant disruptions to the investment made*."[104] The tribunal went on to say that in "*such cases it might be very difficult to distinguish the breach of fair and equitable treatment from indirect expropriation or other forms of taking and it is thus reasonable that the standard of reparation might be the same*." [105]

Article IV of the U.S.-Argentina BIT provides for compensation equivalent to fair market value in case of expropriation. Apparently referring to this provision, the tribunal stated that "*fair market value is thus a commonly accepted standard of valuation and compensation*."[106] The tribunal then explained that in its view, the fair market value was the most appropriate standard to apply "*to establish the value of the losses, if any, suffered by the Claimant as a result of the Treaty breaches which occurred, by comparing the fair market value of the companies concerned with and without the measures adopted by Argentina in January 2002*." [107]

Both Parties' experts had adopted the DCF method to arrive at a fair market value in 2001 prior to the violations of the treaty.[108] The tribunal chose the method proposed by Claimant, in which three values were calculated.[109] The *first* value was the historical damages suffered as a consequence of the nonapplication of adjustment to the US PPI by the companies that Sempra had invested in, the no-payment of subsidies owing to

101 The Award, paras. 346 and 355.

102 The Award, para. 400 with reference to *Factory at Chorzów*, 1928, P.C.I.J., Series A, No 17, p. 47.

103 The Award, para. 401.

104 The Award, para. 403.

105 The Award, para. 403.

106 The Award, para. 404.

107 The Award, para. 404.

108 The Award, para. 407.

109 The Award, paras. 411 and 416.

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them under the License, and the reduction of income the companies suffered from the implementation of taxes which were not translated into tariff increases. The *second* value was the DCF value of the companies in a scenario following the adoption of the measures complained of. Last, the *third* value was the value of the companies in a scenario where the spirit of the original contractual conditions had been maintained utilizing DCF value and book value.[110] The damages suffered were then arrived at by adding the historical damages and the remainder of the value of the companies in the scenario where the conditions had stayed the same, having subtracted the value of the companies in the scenario where the present measures where adopted.[111]

It is interesting to note that the tribunal did not seem to have had a problem with applying the valuation principle for expropriation cases and did not distinguish between the two breaches—fair and equitable treatment, and the umbrella clause—when discussing valuation principles and methodology.

BG Group v. Argentina. In *BG Group Plc* v. *Argentina*,[112] BG, a British corporation, initially held 41 percent of Gas Argentino, S.A. (GASA), the successful bidder for a 70 percent ownership interest in MetroGAS, one of eight natural gas distribution companies created under Argentina's privatization program and its regulatory framework designed to attract foreign investment. Through a number of transactions over the following years, BG slightly increased its share. Following the economic and political crisis starting in 1999, Argentina adopted a number of measures that BG claimed destroyed the key guarantees of the regulatory framework under which BG reasonably could expect to operate.[113] These measures were, in summary: the suspension of adjustments of tariffs according to the US PPI, the abolishment of the calculation of tariffs in dollars, the abolishment of the tariff review mechanisms, and the establishment of a renegotiation process which had produced "*no concrete serious offer to re-establish the guarantees of the tariff regime, or alleviate the imbalance of the Licence*."[114] BG's position was that the measures damaged MetroGAS and constituted a breach of the provisions of the Argentina-UK BIT regarding expropriation, fair and equitable treatment, and reasonableness.[115] Argentina's defense on the merits was that it had not breached the BIT and that the doctrine of state of necessity was applicable.[116]

The tribunal found that no expropriation had taken place.[117] However, in entirely altering the legal and business environment by taking a series of radical measures, thereby derogating from the regulatory framework and specific commitments relied

110 The Award, para. 411.
111 The Award, para. 412.
112 UNCITRAL, Award, December 24, 2007.
113 The Award, para. 282.
114 The Award, para. 282.
115 The Award, paras. 84–85.
116 The Award, para. 88.
117 The Award, para. 271.

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upon by BG, Argentina had "*violated the principle of stability and predictability inherent to the standard of fair and equitable treatment*."[118] Argentina was found also to have breached the provision of the Argentina-UK BIT prohibiting unreasonable measures by the host State impairing the management, maintenance, use, enjoyment, or disposal of the investment.[119] The tribunal rejected Argentina's defense based on national emergency and the principle of necessity.[120]

Claimant sought full compensation for the breaches of the treaty, which it contended amounted to the loss in fair market value of its investment in MetroGAS,[121] and argued that the standard applicable to expropriation, "fair market value," should apply also to breaches of other provisions of the BIT, including fair and equitable treatment, finding support for this approach in *CMS v. Argentina*.[122] This reasoning was not accepted by the tribunal.[123] Nevertheless, it considered that "fair market value" could be relied upon to measure damages for these other breaches, as a matter of customary international law.[124] The tribunal noted that the "vitality" of the *Chorzów Factory* case "*was energized and its scope broadened beyond the law of takings by Article 31 of the ILC Draft Articles*,"[125] from which it follows that the state responsible for an internationally wrongful act is obliged to make full reparation for the damage caused.

The tribunal found that the result reached by Claimant's expert on damages was uncertain and speculative and that it was in particular not convinced by his calculation of the value of BG's investment in the scenario where the measures complained of had been implemented. The tribunal stated that case law required that the damage must be "*the consequence or proximate cause of the wrongful act*" and that damages that are "*too indirect, remote, and uncertain to be appraised*" must be excluded[126] and that "*an award for damages which are speculative would equally run afoul of 'full reparation' under the ILC Draft Articles*."[127]

The tribunal choose to assess the damages due by comparing the value of the shares in MetroGAS—apparently calculated on the basis of the DFC methodology—before and after the damaging measures were taken, by reference to actual transactions. The latter value was calculated on the basis of a transaction, occurring after the damaging measures were implemented, in which BG traded the cancellation of a US$38.2 million debt against an 18.8 percent indirect ownership interest in MetroGAS.[128] The former value was calculated on the basis of a sale of ownership interests in GASA

118 The Award, para. 307.
119 The Award, para. 343.
120 The Award, para. 411.
121 The Award, para. 414.
122 The Award, para. 420, CMS Gas Transmission Company v. The Argentine Republic, ICSID Case No. ARB/01/8, Award of May 12, 2005 (*see* p. 576, *supra*).
123 The Award, para. 421.
124 The Award, para. 422.
125 The Award, para. 426.
126 The Award, para. 428.
127 The Award, para. 428.
128 The Award, para. 440.

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taking place in 1998 and thus after the crisis.[129] With respect to historical loss, the tribunal found that, to the extent that Claimant's pleadings could be interpreted as containing such a claim, there was no support for it.[130]

The Energy Charter Treaty Cases

Nykomb v. Latvia. *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*,[131] the first award on the merits rendered under the ECT, concerned Windau, a wholly owned subsidiary of the Swedish company Nykomb, which had entered into several agreements with Latvenergo, a State-owned company, to build a cogeneration electric plant whose surplus electricity would be purchased by Latvenergo. A dispute ensued over the price to be paid. Windau claimed entitlement to a double tariff in accordance with the Latvian Entrepreneurial Law in force at the time when the contract in question was concluded, while Latvenergo claimed Windau only was entitled to a lower tariff in accordance with subsequent legislation that had amended the Latvian Entrepreneurial Law. Nykomb alleged that the nonpayment of the double tariff constituted an indirect or creeping expropriation,[132] as well as a violation of the duty under Article 10 of the ECT to accord Nykomb's investment at all times fair and equitable treatment and not to impair by unreasonable or discriminatory measures Nykomb's enjoyment of its investment.

The tribunal denied Nykomb's expropriation claim[133] but found that Latvia had breached its obligation not to discriminate against foreign investors by offering the so-called "double tariff" to certain other companies but not to Nykomb's Latvian subsidiary. On the grounds that the damage or loss caused by the nonpayment of the double tariff was the same regardless of what treaty provision had been violated, the tribunal did not determine whether Latvia had violated any other treaty provisions, such as the obligation to accord fair and equitable treatment of the ECT. Its treatment of damages is therefore relevant to this chapter.

With respect to the standard of compensation applicable, the tribunal noted that the principles of compensation provided for in Article 13(1) of the ECT on expropriation were not applicable to the assessment of damages for violations of Article 10. It found that "*the question of remedies to compensate for losses or damages caused by the Respondent's violation of its obligations under Article 10 of the Treaty must primarily find its solution in accordance with established principles of customary international law. Such principles have authoritatively been restated in The International Law Commission's Draft Articles on State Responsibility adopted in November 2001*."[134]

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129 The Award, para. 441.

130 The Award, paras. 447 and 452.

131 1 Stockholm International Arbitration Review 53 (2005). *See* further T. Wälde & K. Hobér, *The First Energy Charter Award*, 22(2) Journal of International Arbitration 83–103 (2005).

132 1 Stockholm International Arbitration Review 97 (2005).

133 1 Stockholm International Arbitration Review 97 (2005), .

134 1 Stockholm International Arbitration Review 104–05 (2005) .

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While, according to Articles 34 and 35 of the ILC Articles, restitution was the primary remedy, the tribunal found restitution to be a suitable remedy primarily where the State had instituted actions directly against the investor. In the present case, where the actions were directed against its subsidiary, the tribunal found the appropriate remedy to be compensation for the losses or damage inflicted on the investor's investment.[135] The tribunal decided not to award Nykomb the full difference between the two sets of tariffs because the higher payments would not have gone directly to Nykomb but to Windau. The "*money would have been subject to Latvian taxes etc., would have been used to cover Windau's costs and down payments on Windau's loans etc., and disbursements to the shareholder would be subject to restrictions in Latvian company law on payment of dividends*."[136]

Taking into account the requirements under applicable customary international law of causation, foreseeability, and the reasonableness of the result, the tribunal found that the reduced earnings of Windau—i.e., Nykomb's investment in Latvia—constituted the best available basis for the assessment also of Nykomb's losses. It concluded that a discretionary award of one-third of the estimated loss in purchase prices of electricity up to the time of the award would serve as a reasonable basis for the quantification of Nykomb's assumed losses up to the time of the award.[137]

As regards Nykomb's alleged losses on delivery of electric power to Latvenergo for the remainder of the eight-year contract period, the tribunal found this potential loss too uncertain and speculative to form the basis of an award of monetary compensation. The tribunal, however, considered it to be a continuing obligation of Latvia to ensure payment of the double tariff for electric power delivered under the contract for the rest of the eight-year contract period. It therefore ordered Latvia to fulfill its obligation to pay the double tariff for future deliveries during the remainder of the contract period.[138]

Petrobart Limited v. The Kyrgyz Republic. The second arbitral award on the merits rendered under the ECT was in a dispute between *Petrobart Ltd of Gibraltar* and the *Kyrgyz Republic*.[139] It concerned a sales contract between Petrobart and the Kyrgyz state-owned company KGM for the purchase by the latter of 200,000 tons of gas condensate.[140] Petrobart delivered five shipments of gas but was only paid for the first two. At the same time as Petrobart turned to domestic courts for recourse, Kyrgyz authorities—as part of a reform of the system for supply of oil and gas in the Kyrgyz Republic—took certain measures that made it impossible for Petrobart to enforce its rights under the contract. The measures included a decision by the Kyrgyz authorities

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135 1 Stockholm International Arbitration Review 105–08 (2005).

136 1 Stockholm International Arbitration Review 105 (2005).

137 1 Stockholm International Arbitration Review 107 (2005).

138 1 Stockholm International Arbitration Review 108 (2005).

139 The full text of the award is *available, e.g., at* http://www.investmentclaims.com/subscriber_article?script=yes&id=/ic/Awards/law-iic-184-2005&recno=8&letter=P.

140 The award was challenged at the Svea Court of Appeal in Stockholm. The challenge was rejected.

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to privatize KGM and to transfer its assets, but not its liabilities (including monies owed to Petrobart), to a new company, as well as, at the request of the Vice Prime Minister of the Kyrgyz Republic, a Kyrgyz court stay of enforcement of a previously rendered judgment in favor of Petrobart against KGM. Before the period of stay of execution ended, KGM was declared bankrupt, which meant that enforcement of the judgment was no longer possible. Petrobart claimed that these actions by the Kyrgyz Republic had contributed to rendering the remainder of Petrobart's investment, i.e., the contract with KGM, worthless. Petrobart claimed indirect expropriation under Article 13(1) of the ECT[141] and breach of the obligations under Article 10 of the ECT to accord Claimant's investment at all times fair and equitable treatment, not to impair by unreasonable or discriminatory measures Petrobart's enjoyment of its investment and to observe obligations it had entered into with Petrobart.

The tribunal found that the measures taken by the Kyrgyz Republic did not reach the level of *de facto* expropriation under the ECT,[142] but that the Republic did breach its obligation under the ECT to provide fair and equitable treatment by transferring assets from KGM to the abovementioned new company to the detriment of KGM's creditors, including Petrobart, and by intervening in court proceedings regarding the stay of execution of a final judgment to the detriment of Petrobart.[143]

Petrobart claimed compensation for (i) the unpaid invoices for gas condensate actually delivered by Petrobart to KGM, and (ii) loss of profit with regard to the remaining deliveries under the contract.

With reference to the *Chorzów Factory* case and to ILC's Articles on State Responsibility, the tribunal found that Petrobart had suffered damage as a result of the Kyrgyz Republic's breaches of the ECT and that Petrobart had to, as far as possible, be placed financially in the position in which it would have found itself had the breaches not occurred.[144]

The tribunal found that, due to the troublesome financial situation of KGM, KGM would probably not have survived irrespective of the breaches of the ECT committed by the Kyrgyz Republic.[145] The tribunal nevertheless found that the transfer by the Kyrgyz Republic of substantial assets belonging to KGM to other state entities caused substantial damage to KGM's creditors, including Petrobart. Due to the inadequacy of the information submitted by the parties, the tribunal found that the damage suffered by Petrobart could not be established with precision. The tribunal therefore found it necessary to make a general assessment based on its appreciation of the situation as a whole. In making such assessment, the tribunal found that the Kyrgyz Republic, "*as responsible for the transfer and lease of KGM's assets, shall compensate Petrobart for damage which the Arbitral tribunal estimates at 75% of its justified claims against KGM.*"[146]

141 Petrobart Limited v. The Kyrgyz Republic, p. 29.
142 Petrobart Limited v. The Kyrgyz Republic, p. 77.
143 Petrobart Limited v. The Kyrgyz Republic, p. 76.
144 Petrobart Limited v. The Kyrgyz Republic, pp. 77–78.
145 Petrobart Limited v. The Kyrgyz Republic, p. 81.
146 Petrobart Limited v. The Kyrgyz Republic, pp. 83–84.

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With regard to Petrobart's claim for lost profit, the tribunal found that there remained a great deal of uncertainty as to the consequences of the breakdown of the business relations between Petrobart and KGM. The tribunal therefore concluded that Petrobart had not established that it was entitled to compensation for loss of future profits.[147]

Since most of the respective tribunals' findings regarding damages in both the *Nykomb* case and the *Petrobart* case are rather fact specific, only limited conclusions can be drawn from such cases. It should be noted, however, that in the absence of express provisions on the standard of compensation, both tribunals relied on general provisions of customary international law on state responsibility. It should also be noted that in the *Nykomb* case, where the investment—the local subsidiary Windau—was still in operation and the contract for delivery of electric power still in force between Windau and Latvenergo, the tribunal made a clear distinction between the damage suffered by Nykomb—the foreign investor—and the damage suffered by Windau. The tribunal only awarded damages that would compensate Nykomb for the damage that it had actually suffered and not for losses suffered by Windau. Nykomb's damage was quantified as a proportion of the earnings that would have been generated by Windau, had there not been any breach of the treaty, i.e., the tribunal estimated the dividends that would have been received by Nykomb from its subsidiary, rather than establishing a reduction of the value (if any) of Nykomb's shares in Windau.

NAFTA Cases

S.D. Myers, Inc. v. Canada. In *S.D. Myers, Inc.* v. *Canada*,[148] S.D. Myers, Inc. (SDMI) (USA) claimed that Canada had failed to comply, *inter alia*, with its obligation under Article 1105 of the NAFTA[149] to treat investors of another party to the NAFTA in accordance with international law, including fair and equitable treatment. SDMI, an Ohio corporation that processed and disposed of PCB waste, alleged that Canada's ban on the export of PCB wastes from Canada to the United States in late 1995 had resulted in SDMI suffering economic harm to its investment through interference with its operations, lost contracts,and opportunities in Canada. SDMI also claimed that the measures adopted by Canada were tantamount to an expropriation in violation of Article 1110 of the NAFTA.[150]

The tribunal found that Canada's actions did not constitute expropriation.[151] In its first Partial Award of November 14, 2000, the tribunal did hold, however, that Canada

147 Petrobart Limited v. The Kyrgyz Republic, pp. 86–87.

148 8 ICSID Reports (2005) 18.

149 Article 1105(1) of NAFTA reads as follows: "*Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.*"

150 First Partial Award, para. 279.

151 First Partial Award, paras. 283–88.

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had breached the fair and equitable treatment obligation of Article 1105 of the NAFTA.

As regards the principles for compensation, the tribunal stated that in nonexpropriation cases, the drafters of the NAFTA had left "*it open to tribunals to determine a measure of compensation appropriate to the specific circumstances of the case, taking into account the principles of both international law and the provisions of the NAFTA*."[152] The tribunal further concluded that in some nonexpropriation cases, a tribunal might find it appropriate to adopt the fair market value approach and in some, not. In this case, the tribunal found that the fair market value standard was not a logical, appropriate, or practicable measure of the compensation to be awarded. Instead, the tribunal, citing the *Chorzów Factory* case, stated that "*whatever precise approach is taken, it should reflect the general principle of international law that compensation should undo the material harm inflicted by a breach of an international obligation*."[153] Further, the tribunal made clear that it was for SDMI to prove the quantum of the losses. The tribunal also stated that compensation is payable only in respect of harm that is proved to have a sufficient causal link with the specific NAFTA provision that has been breached, and that double recovery must be avoided in situations, e.g., when several NAFTA provisions have been breached.[154]

In the second Partial Award of October 21, 2002, the tribunal held that "*the appropriate loss to be considered in this particular case is the loss of net income stream*."[155] The tribunal noted that this approach formed part of the submissions of both Parties and, further, that expert accountants retained by both sides agreed that SDMI's lost income stream was capable of rational assessment. In order to assess the compensation due to SDMI as a result of Canada's export ban on PCB waste, the tribunal used a 12-step methodology aimed at determining the net income stream lost by SDMI plus compensation for abridged opportunity and delay.[156] The tribunal finally determined the total compensation (excluding interest) by using this methodology to Can$6,050,000.

Pope & Talbot Inc. v. Canada. In *Pope & Talbot Inc.* v. *Canada*,[157] Pope & Talbot claimed that Canada's implementation of the 1996 Softwood Lumber Agreement (SLA) between Canada and the United States, which among other things regulated the export of softwood lumber from Canada to the United States, *inter alia*, violated several provisions of the NAFTA. Under the SLA, export fees were levied on exports of softwood lumber out of Canada to the United States, unless the exports came within a certain annual quota for all such softwood lumber exports. There was also a certain

152 First Partial Award, para. 309.
153 First Partial Award, para. 315.
154 First Partial Award, para. 316.
155 Second Partial Award, para. 100.
156 Second Partial Award, para. 229.
157 UNCITRAL Award, April 10, 2001, www.investmentclaims.com.

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export quota on which a lower fee was levied. Pope & Talbot claimed that Canada's implementation of the SLA constituted expropriation in violation of Article 1110 of the NAFTA. Pope & Talbot also claimed that a number of measures taken by Canada with regard to the allocation of the above export quotas violated Article 1105, obligating parties to treat investors of another party to the NAFTA in accordance with international law, including fair and equitable treatment.

The tribunal found that the measures undertaken by Canada in this case did not constitute an expropriation,[158] although it did find that the handling of the "*verification review procedure*" regarding information underlying Pope & Talbot's quota applications initiated by Canada's Softwood Lumber Division (SLD) constituted a denial of the investor's fair treatment required by NAFTA Article 1005. In the view of the tribunal, the actions undertaken by SLD meant that Pope & Talbot was subjected to threats, denied its reasonable requests for pertinent information, required to incur unnecessary expense and disruption in meeting SLD's requests for information, and forced to expend legal fees, and that Pope & Talbot probably suffered a loss of reputation in government circles.[159]

In its award on damages,[160] the tribunal did not expressly discuss the standard of compensation to be applied in case of violations of fair and equitable treatment under NAFTA Article 1105. In light of the tribunal's conclusions with regard to liability, the tribunal simply awarded the investor compensation for costs and expenses incurred due to SLD's "*verification review procedure*," which primarily included accountants' fees and legal fees as well as expenses incurred in lobbying efforts.[161] Claimant's claim for compensation for the value of management time devoted to the "*verification review procedure*" was denied, since the tribunal found the management costs to be a fixed cost which the Claimant would have had irrespective of the "*verification review procedure*."[162]

SUMMARY AND CONCLUSIONS

As mentioned, there are relatively few—12—arbitral awards dealing with the issue of compensation for violations of the fair and equitable treatment standard. They have been rendered within a short period of time—from 2001 through 2007. These basic facts call for caution when trying to draw general conclusions from such awards. It is submitted that it is in fact too early to draw any general conclusions at all. The cases discussed in this contribution show that there is, for the time being, no general approach to this issue. This is illustrated in the table below, which summarizes the holdings in the cases discussed.

158 Interim Award, para. 96.
159 The Award, para. 181.
160 UNCITRAL Award, May 31, 2002, www.investmentclaims.com.
161 The Award, para. 85.
162 The Award, para. 80.

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	Bases for awarding compensation					Bases for reducing compensation	
	Investment Costs	**Fair Market Value—Discounted Cash Flow**	**Fair Market Value—Investment Costs**	**Loss of Dividends or Other Form of Revenue that Could Have Been Generated**	**Increased Costs Due to the Violation**	**Reduction For Negligence and/or Risk Taken in Connection With Making the Investment**	**Loss of Future Profits Too Uncertain**
MTD[163]	X					X	
CMS[164]		X					
Azurix[165]			X			X	
PSEG[166]	X						
Enron[167]		X					
LG&E[168]				X			X
Sempra[169]		X					
BG Group[170]		X					
Nykomb[171]				X			X
Petrobart[172]				X			X
S.D Myers[173]				X			
Pope & Talbot[174]					X		

163 MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award of May 25, 2004, p. 575 *et seq.*, *supra*.

164 CMS Gas Transmission Company v. The Argentine Republic, ICSID Case No. ARB/01/8, Award of May 12, 2005, p. 576, *supra*

165 Azurix Corp v. The Argentine Republic, ICSID Case No. ARB/01/12, Award of July 14, 2006, p. 577, *supra*.

166 PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Širketi v. Republic of Turkey, ICSID Case No. ARB/02/5, Award of January 17, 2007, p. 579, *supra*.

167 Enron Corporation and Ponderosa Assets v. Argentina, ICSID Case No. ARB/01/03, Award of May 22, 2007, p. 581, *supra*.

168 LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision of 3 October 2006 (on Liability) and Award of July 25, 2007 (on Damages), p. 584, *supra*.

169 Sempra Energy International v. Argentina, ICSID Case No. ARB/02/16, Award and partial dissenting opinion of September 28, 2007, p. 587, *supra*.

170 BG Group Plc v. Argentina, UNCITRAL, Award , December 24, 2007, p. 589, *supra*.

171 Nykomb Synergetics Technology Holding AB v. The Republic of Latvia, Stockholm International Arbitration Review, 2005:1, p. 591, *supra*.

172 Petrobart Limited v. The Kyrgyz Republic¸ Award, SCC Case No. 126/2003, March 29, 2005, p. 592, *supra*.

173 S.D. Myers, Inc. v. Canada, *Ad hoc*—UNCITRAL Arbitration Rules, 8 ICSID Reports (2005) 18, p. 594, *supra*

174 Pope & Talbot Inc. v. Canada, UNCITRAL Award, April 10, 2001, www.investmentclaims.com, p. 595, *supra*

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In analyzing the cases, it must also be kept in mind that seven of the twelve cases do not deal exclusively with compensation for violation of the fair and equitable standard but also with other breaches of investment treaties. For example, *Enron* and *Sempra* also address violations of the umbrella clause, *Azurix* includes arbitrary actions and *BG* unreasonable measures. *Petrobart* covers also violations of Article 10(12) of the ECT, i.e., failure to ensure that domestic law provides effective means for the assertion of claims and enforcement of rights. In their reasons, the tribunals do not, however, distinguish between the different breaches when analyzing the issue of compensation. One case, *Nykomb*, is, strictly speaking, a discrimination case. Needless to say, all of this increases the uncertainty when it comes to identifying rules and methods for determining compensation for violation of the fair and equitable treatment standard.

The foregoing notwithstanding, some preliminary observations come to mind.

First, given the absence of treaty provisions in this area, tribunals rely—as they must—on customary international law. Guidance is usually sought from the ILC Articles on State Responsibility, which in turn, build on the principles laid down in the *Chorzów Factory* case. This is, however, only the first step in that it establishes the standard of compensation. As stated in Article 31 of the ILC Articles, the standard is "full reparation."

Second, when it comes to the *method* of establishing and calculating "full reparation," customary international law does not provide much guidance. The cases discussed above illustrate that the method chosen depends on, and varies with, the circumstances of each individual case, including, *inter alia*, the nature of the violation of the fair and equitable treatment standard and the kind and nature of the investment in question. Sometimes the starting point might be the amount actually invested; in other cases, it might be more appropriate to focus on lost future profits as established by using the DCF method. For example, several tribunals have used the DCF method in situations when the violations of the fair and equitable standard have been deemed to come very close to an indirect expropriation, based on the idea that the standard and method of calculating compensation should be similar, when the consequences of a breach are similar.[175]

Third, it would seem that the issue of causality has the potential of creating more problems in this context than in relation to compensation for expropriation. In two cases discussed—*MTD*[176] and *Azurix*[177]—compensation has been reduced on the ground that the investor has been unable to demonstrate that the damage has been caused by the host State's violation of the fair and equitable treatment standard. The other side of the same coin is found in another three cases—*LG&E*,[178] *Nykomb*,[179] and *Petrobart*[180]—where the tribunals have concluded that the loss of future profits was too uncertain to warrant compensation. Put differently, the investors in question were not

175 *Cf., e.g.,* CMS, p. 576, *supra*; Azurix, p. 577, *supra*; Enron, p. 581, *supra*.
176 *See* p. 575, *supra*.
177 *See* p. 577, *supra*.
178 *See* p. 584, *supra*.
179 *See* p. 591, *supra*.
180 *See* p. 592, *supra*.

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able to prove the causal link between the violation of the fair and equitable treatment standard and the alleged loss of future profits. One explanation is that violation of the fair and equitable treatment standard, typically, does not automatically result in the elimination of the investment, as is mostly the case with expropriation, but rather results in a decline in the business in question or in other negative impact on it. The difficulty is to determine the extent to which this is caused by the violation of the fair and equitable treatment standard and not by other violations of the investment treaty in question.

Only time—and more cases—will tell if there will ever be a general approach to compensation for violation of the fair and equitable treatment standard. Many claims in investment disputes rely on this standard, at least as an alternative argument. It is therefore reasonable to assume that there will be more cases in the future dealing with this issue.

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PART VI

The Post-award Phase

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Chapter 23

Annulment of ICSID Awards: Limited Scope But is There Potential?

*Katia Yannaca-Small**

INTRODUCTION

Review of arbitral awards is designed to preserve the interests of the Parties. Where a defeated Party is dissatisfied with the arbitral tribunal's award, it may seek to set it aside. The possibilities for challenging the award differ according to the system of arbitration chosen by the Parties, institutional or *ad hoc*. The review, which is different for ICSID and non-ICSID cases, is based on limited grounds and does not have as broad a potential scope as an appeal. The review for non-ICSID awards is submitted to the domestic courts of the seat of arbitration, on the grounds provided for by the arbitration law of the seat (see Chapter 24). On the contrary, the ICSID Convention system prevents domestic courts from reviewing any of its decisions, and ICSID awards are therefore immune from challenges brought before national courts which may have a local bias or be subject to the influence of the host government. The ICSID Convention mechanism is self-contained, providing for internal control which includes provisions on the review of awards.

According to the ICSID Convention provisions on review, either Party is allowed to request a review of the award of an ICSID tribunal. The review consists of a revision, [1]

* The author is grateful to Milanka Kostadinova and Eloise Obadia, Senior Counsel, ICSID, for their valuable comments on this chapter and Frauke Nitscke, Consultant, ICSID for her valuable comments and the very solid statistics she provided.

1 According to Article 51 of the ICSID Convention, a revision of the award is possible when new facts emerge which may affect the award decisively and were unknown to the tribunal and to the party seeking to introduce these facts, and the latter's ignorance was not due to negligence. The review shall, if possible, be undertaken by the same tribunal. If that is not possible, a new tribunal will be constituted. The new elements must be ones of fact and not law and the facts

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interpretation,[2] or annulment of the award. The most common remedy used is annulment, which is also by far the most drastic form of review.[3] Either party can ask for the annulment of the award by a separate *ad hoc* Committee (Article 52 of the ICSID Convention). The *ad hoc* Committee can only annul the decision of the tribunal under one or more of the following narrow grounds:

- The tribunal was not properly constituted
- The tribunal has manifestly exceeded its powers
- There was corruption on the part of a member of the tribunal
- There has been a serious departure from a fundamental rule of procedure
- The award has failed to state the reasons on which it is based

Only three of these grounds have been used in practice as basis for annulment: manifest excess of powers, failure to state reasons, and serious departure from a fundamental rule of procedure. There is no public information as to whether the other two grounds for annulment, improper constitution, and corruption have ever been invoked. In the past 10 years, almost three out of ten ICSID annulment applications eventually led to annulment. Typically, several grounds are used cumulatively. Manifest excess of powers and failure to state reasons were the basis for annulment in three-quarters of the cases submitted to annulment, while the serious departure from a fundamental rule of procedure was the basis for the remaining one-quarter of cases submitted.[4]

According to Article 52(3) of the ICSID Convention, *ad hoc* Committees have the "authority" to annul the award in case any of these grounds is fulfilled. This provision has been interpreted to give Committees some discretion to decide whether annulment

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must be of such a nature that they would have led to a different decision had they been known to the tribunal. There have been three revision proceedings, in American Manufacturing & Trading, Inc. v. Democratic Republic of the Congo, ICSID Case No. ARB/93/1, Pey Casado v. Chile, ICSID Case No. ARB/98/2, and Siemens v. Argentina, ICSID Case No. ARB/02/8. In *AMT v. Congo*, a settlement was agreed by the parties and the proceeding discontinued at the request of the Respondent (Order taking note of the discontinuance issued by the tribunal on July 26, 2000 pursuant to Arbitration Rule 44). In *Pey Casado v. Chile*, the tribunal issued a Decision on the Application for the Revision of the Award on November 18, 2009. In *Siemens v. Argentina*, a settlement was agreed by the parties and the proceeding discontinued at their request (Order taking note of the discontinuance issued by the tribunal on September 9, 2009 pursuant to ICSID Arbitration Rule 43(1)).

2 According to Article 50 of the ICSID Convention, a party to the dispute may request the interpretation of the meaning or scope of the award. Interpretation has been requested in Wena v. Egypt, ICSID Case No. ARB/98/4 and Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited, ICSID Case No. ARB/98/8. Interpretation was also requested in two NAFTA cases, Marvin Roy Feldman Karpa v. United Mexican States, ARB(AF)/99/1 and Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States, ARB(AF)/04/5. However, these two proceedings were conducted under the ICSID Additional Facility Rules, not under the ICSID Convention.

3 C. Schreuer with L. MAlintoppi, A. reinisch and A. Sinclair, The ICSID Convention: A Commentary (Cambridge University Press, 2nd ed. 2009.)

4 G. Verhoosel, *Annulment and Enforcement Review of Treaty Awards: To ICSID or not to ICSID*, 23 (1) ICSID Rev. 119–54 (Spring 2008).

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is warranted when one of the grounds has been found to apply. In *Vivendi v. Argentina* the Committee held that:

> [I]t appears to be established that an *ad hoc* committee has a certain measure of discretion as to whether to annul an award, even if an annullable error is found. Article 53(1) [. . .] has been interpreted as giving committees some flexibility in determining whether annulment is appropriate in the circumstances. Among other things, it is necessary for an *ad hoc* committee to consider the significance of the error relative to the legal rights of the parties.[5]

The ratio of cases submitted for annulment and the total registered cases[6] is no more than approximately one to eight. However, there is a growing trend for the losing party to submit the award for annulment, a trend which could be explained in part by the increasing familiarization of both investors and governments with the annulment process—due to a wealth of decisions and doctrinal writings and to the fact that the process is now considered, in general, as one which is functioning well. Nine applications for annulment had been registered with ICSID up to 2004.[7] These applications involved awards in *Klöckner v. Cameroon* (twice),[8] *Amco v. Indonesia* (twice),[9] *MINE v. Guinea*,[10] *SPP v. Egypt*,[11] *Philippe Gruslin v. Malaysia*[12] *Wena Hotels v. Egypt*,[13] and

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5 Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic, Decision on Annulment, July 3, 2002, para. 66.

6 There were 300 cases registered at ICSID by November 15, 2009 (266 ICSID and 34 Additional Facility and Conciliation cases).

7 For a comprehensive analysis on annulment procedures and cases, see IAI Arbitration Series No 1, *Annulment of ICSID Awards*, E. Gaillard & Y. Banifatemi eds., 2004.

8 The *ad hoc* Committee annulled the first award on the grounds that the tribunal had failed in its duty to state the reasons for the award. The dispute was resubmitted to a second tribunal which rendered a new award; both Parties asked for its annulment but the second *ad hoc* Committee rejected the applications for annulment. Klöckner v. Cameroon, ICSID Case No ARB/81/2, Award, October 21, 1983, 2 ICSID Reports 9. Klöckner v. Cameroon, Decision on Annulment, May 3, 1985, 2 ICSID Reports 95.

9 The *ad hoc* Committee annulled the award on the basis of the tribunal's failure to apply the proper law–which the Committee considered to be beyond its jurisdiction *ratione materiae*; Amco Asia Corporation v. Republic of Indonesia, ICSID Case ARB No.ARB/81/1, Decision on Annulment, May 16, 1986, 1 ICSID Reports 509. The case was retransmitted to a new tribunal which decided first on Jurisdiction, May 10, 1988, 1 ICSID Reports 543, and then on the merits, Award, June 5, 1990, 1 ICSID Reports 569. Both Parties applied for annulment of the second award, applications rejected by a second *ad hoc* Committee.

10 The *ad hoc* Committee annulled the damages section of the award because the tribunal had failed to deal with questions raised by Guinea, and this failure might have affected the damages awarded. Maritime International Nominees Establishment (MINE) v. Republic of Guinea, ICSID Case No. ARB/84/4, Decision on Annulment, December 22, 1989, 4 ICSID Reports 79. After MINE resubmitted the damages question for decision by a new tribunal, the parties reached a settlement by agreement.

11 Southern Pacific Properties (Middle East Limited v. Arab Republic of Egypt, ICSID Case No. ARB/84/3). This case was settled before the *ad hoc* Committee issued its decision.

12 Philippe Gruslin v. Malaysia, ICSID Case No. ARB/99/3. The Proceeding discontinued for lack of payment of advances pursuant to Administrative and Financial Regulation 14(3)(d), Order for the discontinuance of the proceeding, April 2, 2002.

13 Wena Hotels Limited v. Arab Republic of Egypt, ICSID Case No ARB/98/4. The *ad hoc* Committee rejected all three bases for annulment advanced by Egypt: manifest excess of

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Vivendi v. Argentina.[14] Fifteen applications were registered from the beginning of 2004 through 2007,[15] and thirteen applications were registered from the beginning of 2008 through the third quarter of 2009.[16] Annulment of an arbitral award may lead to the submission of the dispute to a new tribunal. Also, an application for a second annulment may be submitted. By mid-December 2009, there have been three cases with respect to which an application for a second annulment has been registered.[17]

In total, to date, thirty seven annulment proceedings have been registered, of which twenty three have been concluded, and fourteen are pending.[18]

This chapter will discuss (i) the scope and application of annulment of ICSID awards under the ICSID Convention; (ii) the grounds for annulment; (iii) the stay of

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powers, serious departure from a fundamental rule of procedure, and failure of the award to state the reasons on which it was based. See 41 ILM 933 (2002) and E. Gaillard, *supra* note 7.

14 Compañía de Aquas del Aconquija S.A. and Vivendi Universal, ICSID Case No. ARB/97/3. The *ad hoc* Committee annulled the tribunal's award on the basis of manifest excess of powers. See E. Gaillard, *Vivendi and Bilateral Investment Treaty Arbitration*, N.Y. L.J., February 6, 2003.

15 Consortium R.F.C.C. v. Kingdom of Morocco, ICSID Case No. ARB/00/6; CDC Group plc v. Republic of the Seychelles, ICSID Case No. ARB/02/14; Patrick Mitchell v. Democratic Republic of the Congo, ICSID Case No. ARB/99/7; Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador*)*, ICSID Case No. ARB/01/10; MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile, ICSID Case No. ARB/01/7; Hussein Nuaman Soufraki v. United Arab Emirates, ICSID Case No. ARB/02/7; Joy Mining Machinery Limited v. Arab Republic of Egypt, ICSID Case No. ARB/03/11; Lucchetti S.A and Lucchetti Peru, S.A. v. Republic of Peru, ICSID Case No ARB/03/4; CMS Gas Transmission Company v. Argentine Republic, ICSID Case No ARB/01/8; Azurix v. the Argentine Republic, ICSID Case No. ARB/03/30; Siemens A.G. v. Argentine Republic, ICSID Case No ARB/02/8; Malaysian Historical Salvors, SDN, BHD v. Malaysia, ICSID Case No. ARB/05/10; Ahmonseto, Inc. and others v. Arab Republic of Egypt, ICSID Case No. ARB/02/15; M.C.I Power Group, L.C. and New Turbine, Inc.v. Republic of Ecuador, ICSID Case No. ARB/03/6; Compañía de Aquas del Aconquija S.A. and Vivendi Universal, ICSID Case No. ARB/97/3.

16 Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines, ICSID Case No ARB/03/25; Sociedad Anónima Eduardo Vieira v. Republic of Chile, ICSID Case ARB/04/7; Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16; Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3; Companie d'Exploitation du Chemin de Fer Transgabonais v. Gabonese Republic, ICSID Case No. 04/5; LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1; Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16; Helnan International Hotels A/S v. Arab Republic of Egypt, ICSID Case No. ARB/05/19; Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru, ICSID Case No. ARB/03/28*;* Continental Casualty Company v. the Argentine Republic, ICSID Case No. ARB/03/9; Victor Pey Casado and President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2; RSM Production Corporation v. Grenada, ICSID Case No. ARB/05/14; Waquih Elie, George Siag and Clorinda Vecci v. Arab Republic of Egypt, ICSID Case No. ARB/05/15.

17 *Klöckner v. Cameroon, Amco v. Indonesia*, and *Vivendi v. Argentina*.

18 *Vivendi v. Argentina*; *Enron v. Argentina*; *LG&E v. Argentina; Sempra v. Argentina; Fraport v. the Philippines;Duke Energy v. Peru; Transgabonais v. Gabon; Eduardo Vieira v. Chile*; *Rumeli v. Kazakhstan; Helnan v. Egypt; Continental Casualty v. Argentina*; *Pey Casado v. Chile*; *RSM v. Grenada; Siag v. Egypt*

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enforcement as a quasi-routine requirement accompanying an application for annulment; and (iv) finally the debate surrounding proposals for improvement of the current system, including an appeal mechanism for investment disputes.

SCOPE AND APPLICATION OF ANNULMENT UNDER THE ICSID CONVENTION

An Exceptional Recourse?

As already noted, in the last few years and in particular after the *Vivendi I* annulment, there has been a rise in the number of awards submitted to annulment. ICSID and commentators often stressed the exceptional character of an annulment, which should not become a routine recourse but should be used scarcely. As a result, recently, some Committees have even taken the step of ordering the applicant to pay a major part of the procedural expenses. As the *ad hoc* Committee in *Repsol v. Petroecuador*[19] observed:

> . . . the Committee notes that the grounds for the possible annulment of an award rendered by an ICSID Tribunal are clearly set forth in Article 52 of the Convention. The Parties are aware that the annulment proceedings are designed to grant reparation for damages only in cases of serious violations of certain fundamental principles. Such procedures should not be confused with the proceedings of an Appeals Tribunal and, therefore, should be adopted only in special situations. *Thus, annulment proceedings should not be applied routinely, or as means of delaying the objectives of an award, or the enforcement thereof.”* [emphasis added][20]

The Committee in this case not only dismissed the application for annulment but also requested Petroecuador to pay for all the procedural expenses and half of the expenses paid by Repsol for its defense.

A similar decision was taken by the *ad hoc* Committee in *CDC v. Seychelles*,[21] where the Committee ordered the unsuccessful Seychelles to pay both the CDC’s and the administrative costs of the annulment proceedings. The Committee noted that the annulment application was “fundamentally lacking in merit” and that Seychelles’s case was, “to any reasonable and impartial observer, most unlikely to succeed.”[22]

The outcomes in the annulment proceedings have not usually been in favor of the applicant. Among the twenty-two concluded annulment proceedings, one proceeding was discontinued for nonpayment of fees according to ICSID’s Administrative and Financial Regulation 14(3)(d),[23] three proceedings were discontinued by agreement of the parties pursuant to Rule 43(1),[24] eleven decisions rejected the application for

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19 Repsol v. Petroecuador, Decision on the Application for Annulment, January 8, 2007.

20 *Ibid.*, para. 86.

21 CDC v. Seychelles, Decision on Annulment, June 29, 2005, paras. 89–90.

22 *See* 11 ICSID Reports 237, 266 (para. 89).

23 *Philippe Gruslin v. Malaysia*.

24 *SPP v. Egypt*, March 9, 1993; *Joy Mining v. Egypt*, December 16, 2005; *Siemens v. Argentina*, September 28, 2009.

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annulment,[25] and eight decisions annulled the award (five decisions annulled the award in its entirety,[26] and three decisions annulled it partially).[27]

Annulment v. Appeal: A Thin Line in ICSID Annulment Proceedings

Annulment is different than appeal. This is apparent from Article 53 of the ICSID Convention, which provides that the award shall not be subject to any appeal or to any other remedy except those provided for in the Convention. Moreover, it does not extend beyond the closed list of grounds to errors on the merits, *i.e.*, errors of law or fact in the award. As Prof. Schreuer states in his treatise on the ICSID Convention, "annulment is concerned only with the legitimacy of the process of decision. It is not concerned with the substantive correctness of the decision. Appeal is concerned with both."[28] The result of a successful annulment procedure is the invalidation of the original award; in contrast, an appeal may result in the modification of the award.[29] In theory, an appellate body could substitute its own decision for that of the first tribunal or require that tribunal to rectify its mistakes.

Review of the process is a narrow standard of evaluation which allows the limited sacrifice of finality for a greater integrity and fairness in the decision-making process. Review of the substantive correctness entails a higher level of scrutiny to obtain greater accuracy in the legal reasoning.[30] Successive *ad hoc* Committees have emphasized that annulment is different from appeal.

The ad hoc Committee in M.C.I. v. Ecuador[31] insisted on the fact that *ad hoc* Committees are not courts of appeal:

> [. . .] their mission is confined to controlling the legality of awards according to the standards set out expressly and restrictively in Article 52 of the Washington Convention. It is an overarching principle that *ad hoc* committees are not entitled to examine the substance of the award but are only allowed to look at the award

25 *Amco v. Indonesia* (Second Annulment); *Klöckner v. Cameroon* (Second Annulment); *Wena Hotels v. Egypt; R.F.C.C. v. Morocco*; *MTD v. Chile; Repsol v. Ecuador (Petroecuador)*,*;* *Soufraki v. United Arab Emirates*; *CDC v. Seychelle*; *Lucchetti v. Peru*; *Azurix v. Argentina*; *M.C.I. v. Ecuador*.

26 *Amco v. Indonesia* (resubmitted to a new tribunal); *Klöckner v. Cameroon* (resubmitted to a new tribunal); *Patrick Mitchell v. Congo; MHS v. Malaysia; MCI v. Ecuador*.

27 *MINE v. Guinea*; *CMS v. Argentina*; and *Vivendi v. Argentina* (resubmitted to a new tribunal).

28 C. Schreuer *et al, supra* note 3, p. 901, para. 11.

29 *See* D.D. Caron, *Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction between Annulment and Appeal*, 7 ICSID Rev.–FILJ 21 (1992).

30 According to H. Van Houtte: "Arbitrators and counsel in ICSID cases, both will benefit from a better insight into the grounds for annulment. Indeed, for arbitrators, the risk that otherwise their decision may be annulled is an extra reason to render good justice—if ever they would need such additional motive. For counsel, a deeper insight in the grounds for a possible annulment helps to evaluate whether or not a request for annulment could be successful." *in* E. Gaillard & Y. Banifatemi 2004, *supra* note 7.

31 M.C.I. Power Group L.C. and New Turbine Inc. v. Republic of Ecuado*r*, ICSID Case No. ARB/03/6, Decision on Annulment, October 19, 2009.

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> insofar as the list of grounds contained in Article 52 of the Washington Convention requires. . . . Consequently, the role of an *ad hoc* committee is a limited one, restricted to assessing the legitimacy of the award and not its correctness . . . The committee cannot for example substitute its determination on the merits for that of the tribunal . . .[32]

However, there is a very thin line between annulment and appeal and some *ad hoc* Committees, even some which emphasized this separation, have been criticized for stepping over this line.

Based on the degree of respect shown for this line of separation and the limited role it provides for *ad hoc* Committees, doctrine and commentators divide the *ad hoc* Committee decisions into three generations.

The first generation of annulment applications (*Klöckner v. Cameroon (Klöckner I), Amco v. Indonesia (Amco I)*) were filed between 1985–1986; the second (*Klöckner v. Cameroon (Klöckner II), MINE v. Guinea, Amco v. Indonesia (Amco II)*) between 1989 and 1992; and the third between 2000 and 2009.

The first group resulted in decisions which were very much criticized because the *ad hoc* Committees were considered to have exceeded their powers by re-examining the merits of the cases, crossing the line between annulment and appeal. In *Amco I*, the new tribunal found that the *ad hoc* Committee had made statements "*obiter* to the annulment function"[33] and had expressed views beyond its jurisdiction *ratione materiae*.[34]

The second generation of decisions appears to have avoided this approach. The decisions of the *ad hoc* Committees in *MINE, Klöckner II*, and *Amco II*, were more cautious. The decision in *MINE* deals for instance with the issues of concern raised about the earlier decisions, and the decisions on both *Klöckner II* and *Amco II* refused to annul the awards.

The third generation of annulment decisions, received a mixed reaction from commentators. The first decisions of this period, *Wena v. Egypt*, and *Vivendi v. Argentina*, seemed to follow the same cautious line as their immediate predecessors, and these *ad hoc* Committees took a position on their obligation or discretion to annul once they found a ground for annulment.[35] The *ad hoc* Committee in *Wena*, for instance, found that, in order to lead to annulment, a serious departure from a fundamental rule of procedure would have to have been capable of taking the tribunal to a result different from the one it would have reached if the rule had been followed.

However, two decisions were criticized by some as a setback to the progress made the last few years in the annulment proceedings: *Patrick Mitchell v. Congo*[36] and *CMS v. Argentina*.[37] The criticisms were focused again on the crossing of the line between

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32 *Ibid.*, para. 24.

33 Amco v. Indonesia, Resubmitted case: Decision on Jurisdiction, May 10, 1988, 1 ICSID Reports 560.

34 Amco v. Indonesia, Resubmitted case: Award, June 5, 1990, 1 ICSID Reports 607.

35 C. Schreuer, *Three Generations of ICSID Annulment Proceedings*, *in* ANNULMENT OF ICSID AWARDS (E Gaillard & Y. Banifatemi eds.), *supra* note 7.

36 Patrick Mitchell v. Congo, Decision on the Application of Annulment, November 1, 2006.

37 CMS v. Argentina, Decision on the Application of Annulment, September 25, 2007.

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annulment and appeal and the role of the *ad hoc* Committees. The ICSID system was declared in crisis, and the discussions ranged from the lack of consistency of ICSID jurisprudence to the reform of the ICSID system and its Rules. It incited one scholar to declare 2006–07 "a black year for ICSID."[38]

Under Article 52 of the ICSID Convention, the role of the *ad hoc* Committee has been interpreted as to "ensure that the resulting award is truly an 'award,' i.e., a result arrived at fairly, under due process and with transparency and hence in the basic justice of which parties will have faith."[39] There is a fine line between analyzing the award and imposing a doctrine—a criticism over the *obiter dicta* expressed by the *ad hoc* Committee in the *CMS* annulment procedure. In this case, the annulment decision contains very extensive criticism of the original *CMS v. Argentina* award but also a sense of frustration, the Committee finding errors of law but not being able to set the award aside. In concluding its analysis the Committee stated that:

> The Award contained manifest errors of law. It suffered from lacunae and elisions. All this has been identified and underlined by the Committee. However the Committee is conscious that it exercises its jurisdiction under a narrow and limited mandate conferred by Article 52 of the ICSID Convention.[40]

In *Patrick Mitchell v. Congo*,[41] the annulment was based on the grounds of manifest excess of powers and failure to state reasons. The *ad hoc* Committee criticized the tribunal for having decided that the activities of a law firm constitute an investment according to Article 25 of the ICSID Convention, disregarding the fact that it did not contribute to the economic development of the host State, which the Committee considered to constitute an essential characteristic of an Article 25 investment.[42]

THE GROUNDS FOR ANNULMENT

As mentioned before, there are five grounds for annulment of which only three have been invoked usually cumulatively, in the published cases. Some have a greater chance to succeed than others.

Manifest Excess of Powers

The ground of excess of powers is viewed as a disciplinary control over the conduct of the arbitral tribunal and not over the merits. The most important form of excess of powers occurs when a tribunal exceeds the limits of its jurisdiction, which are determined by Article 25 of the ICSID Convention and the Parties' agreement on consent.

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38 E. Gaillard, *A Black year for ICSID*, N.Y. L.J., International Arbitration Law, 2007.

39 *CDC v. Seychelles*, para. 36.

40 *CMS v. Argentina*, para. 158.

41 *Patrick Mitchell v. Congo*.

42 *See* Chapter 11, K. Yannaca-Small: *Definition of "Investment": An Open Ended Search for a Balanced Approach*.

Other forms of excess of powers could consist of a violation of Article 42 on applicable law[43] and a decision given *ex aequo et bono*—that is to say, in the exercise of a general discretion not conferred by the applicable law—which is not authorized by the Parties under Article 42(3) of the Convention. According to Prof. Schreuer, nonapplication of the law determined by Article 42(1) goes against the Parties' agreement to arbitrate and may constitute an excess of powers.[44]

However, the excess of powers should also be "manifest," a term that expresses a threshold and not a standard. According to the *ad hoc* Committee in *Wena*:

> The classic example of manifest excess of power under international law is that of a tribunal having been asked to adjudicate on one of two possible boundary lines submitted by the parties chooses a third line. The excess of power must be self-evident rather than the product of elaborate interpretations one way or the other. When the latter happens, the excess of power is no longer manifest. This is, among others, the reason why earlier decisions reached by *ad hoc* committees have been so extensively debated.[45]

In *Repsol v. Petroecuador,*[46] the Committee also observed that:

> it is generally understood that exceeding one's powers is "*manifest*" when it is "*obvious by itself*" simply by reading the Award, that is, even prior to a detailed examination of its contents.

As Prof. Schreuer states:

> In accordance with its dictionary meaning, 'manifest' may mean 'plain', 'clear', 'obvious' 'evident' and easily understood or recognized by the mind. Therefore, the manifest nature of an excess of powers is not necessarily an indication of its gravity. Rather it relates to the ease with which it is perceived. On this view, the word relates not to the seriousness of the excess or the fundamental nature of the rule that has been violated but rather to the cognitive process that makes it apparent. An excess of powers is manifest if it can be discerned with little effort and without deeper analysis.[47]

Jurisdiction. The most obvious situation of an excess of powers would be an award when there is no jurisdiction or when the award goes beyond the limits of an existing jurisdiction. The verification of the existence of jurisdiction is generally about ensuring that there is an investment, that the legal dispute arises out of an investment, that the nationality requirements are met, and that there is written consent. Where a tribunal assumes jurisdiction in a matter for which it lacks competence under the relevant BIT or other consent instrument, it exceeds its powers. The same is true in the inverse case,

43 *See* Chapter 9, Y. Banifatemi, *The Law Applicable in Investment Treaty Arbitration*.

44 C. Schreuer *et al, supra* note 3.

45 Wena v. Egypt, Decision on Annulment of Award, February 5, 2002, 41 I.L.M. 933 (2002), para. 25.

46 *Repsol v. Ecuador (Petroecuador)*.

47 C. Schreuer *et al*, *supra* note 3, para. 135, p. 938.

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where a tribunal refuses or fails to exercise jurisdiction in a matter for which it is competent under the BIT or other consent instrument.

In general, very few decisions deal with jurisdiction. The *ad hoc* Committee in *Vivendi* took the following position:

> It is settled, and neither party disputes, that an ICSID tribunal commits an excess of powers not only if it exercises a jurisdiction which it does not have under the relevant agreement or treaty and the ICSID Convention, read together, but also if it fails to exercise a jurisdiction which it possesses under those instruments . . . The failure by a Tribunal to exercise a jurisdiction given to it by the ICSID Convention and a BIT, in circumstances where the outcome of the inquiry is affected as a result, amounts in the Committee's view to a manifest excess of powers within the meaning of Article 52(1)(b).[48]

The Committee had to deal with the contention that the tribunal had failed to decide with respect to federal claims on the one hand and provincial (Tucumán) claims on the other hand. While it dismissed the first contention, it reached a different result with respect to the Tucumán claims:

> For all these reasons the Committee concludes that the Tribunal exceeded its powers in the sense of Article 52 (1) (b), in that the Tribunal, having jurisdiction over the Tucumán claims, failed to decide those claims. Given the clear and serious implications of that decision for Claimants in terms of article 8 (2) of the BIT, and the surrounding circumstances, the Committee can only conclude that that excess of powers was manifest. It accordingly annuls the decision of the Tribunal so far as concerns the entirety of the Tucumán claims.[49]

In *Lucchetti v. Peru*,[50] an *ad hoc* Committee declined, by a two to one margin, to annul a jurisdictional award rendered in an environmental dispute between a Chilean company (Lucchetti) and the Republic of Peru. In so doing, the *ad hoc* Committee left undisturbed a ruling by the arbitral tribunal which had held that ICSID lacked jurisdiction over the dispute due to its having arisen prior to the entry into force of the Chile-Peru bilateral investment treaty. Lucchetti had argued that the original tribunal manifestly exceeded its powers when it:

> arrogated to itself an authority it did not properly possess, to determine that a government measure taken after an investment treaty's entry into force fell outside that treaty's coverage, simply because its 'subject matter' was the same as earlier government measures which were formally, legally and irrevocably invalidated by the local courts . . . .[51]

The *ad hoc* Committee observed that the tribunal had not spelled out clearly the interpretive steps which it took in reaching its interpretation of Article 2 of the Chile-Peru BIT.

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48 *Vivendi v. Argentina*, para. 86.

49 *Ibid.*, para. 115.

50 Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A v. The Republic of Peru, (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.), Decision on Annulment, September 5, 2007.

51 *Ibid.*, para. 31.c.

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However, it added that this "somewhat simplified" approach betrayed no signs that the tribunal "disregarded any significant element of the well-known and widely recognized international rules of treaty interpretation." As such, there was no manifest excess of powers, in the view of the majority of the Committee.

The third Committee member, in a dissenting opinion, took what he characterized as a "sterner view" of the "manifold shortcomings of the Tribunal's Award." He stated that ICSID tribunals must offer "clear and strong" explanations in the event that they decline jurisdiction over investment treaty claims at the initial stage. Should a tribunal fail to offer "clearly explained and justified" grounds, its ruling might be able to be annulled.[52] Indeed, he stressed the need for tribunals to make clear to Claimants—and to "other consumers of the ICSID system"—what it has done and why, in cases where it moves to decline jurisdiction over a claim (and not hear the claim on its merits).

The Committee in *MHS v. Malaysia*[53] found that the tribunal exceeded its powers by failing to exercise the jurisdiction with which it was endowed by the terms of the Agreement and the Convention and that it "manifestly" did so for three reasons: (a) it failed to take account of and apply the BIT, which defines investment in "broad and encompassing terms" but, instead, it limited itself only to the applicable criteria interpreting Article 25(1) of the ICSID Convention (the so-called *Salini* criteria)[54]; (b) it interpreted the contribution to the economic development so as to exclude the kind of contribution deemed to be an investment according to the Committee, i.e., small contributions and contributions of a cultural and historical nature; and (c) it failed to take account of the preparatory work of the ICSID Convention and decision of the drafters of the Convention to leave "investment" undefined.[55]

The third Committee member, in his dissenting opinion,[56] insisted on the existence of "outer limits" in the definition of an ICSID investment and on the fact that these "outer limits" comprise a requirement for contribution to the economic development of the host State, which has to be "substantial" or "significant." He considered that the investment in question was lacking these characteristics. In addition, he held that even if the tribunal had erred in its finding, "this did not lead it into a manifest excess of powers."

According to this member of the Committee:

> the Committee is not empowered to intervene if all that it finds is that the Tribunal exceeded its powers; it must go on to find that the Tribunal manifestly exceeded its powers, a manifest error not being necessarily the same thing as a manifest excess of powers, there being an obvious distinction between them. An annulment committee is not a court of appeal. The Award is unimpeachable if all it does is to exceed the Tribunal's powers.[57]

52 Dissenting opinion of Sir Franklin Berman, at para. 4.

53 Malaysian Historical Salvors, SDN BHD v. The Government of Malaysia, Decision on the Application for Annulment, April 16, 2009. The third arbitrator issued a dissenting opinion.

54 For an analysis on the definition of "investment", see Chapter 11, K. Yannaca-Small, *Definition of "Investment": An Open-Ended Search for a Balanced Approach.*

55 *MHS v. Malaysia*, para. 80.

56 *Ibid.*, Dissenting opinion by Mohamed Shahabuddeen.

57 *Ibid.*, para. 54.

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Applicable law. According to C. Schreuer, there is widespread agreement that a failure to apply the proper law may amount to an excess of powers by the tribunal. The practice of *ad hoc* Committees on this point leads to this result.[58]

In the *Klöckner v. Cameroon*[59] case, the Committee, having referred to "the fine distinction between the 'nonapplication' of the applicable law and mistaken application of this same law,"[60] stated:

> It is clear that the 'error in *judicando*' could not be admitted as is as cause for annulment under penalty of indirectly reintroducing the appeal against the arbitral award, and the annulment process of Article 52 of the Convention does not, any more than the Permanent Arbitration Court in the *Orinoco* case, have 'the mission to state whether the issues were properly or poorly judged, but whether the judgment is to be annulled'.[61]

The Committee's annulment decision in the *Amco v. Indonesia*[62] *(I or II?)* case was equally categorical:

> The law applied by the Tribunal will be examined by the *ad hoc* Committee, not for the purpose of scrutinizing whether the Tribunal committed errors in the interpretation of the requirements of applicable law or in the ascertainment or evaluation of the relevant facts to which such law has been applied. Such scrutiny is properly the task of a court of appeals, which the *ad hoc* Committee is not. The *ad hoc* Committee will limit itself to determining whether the Tribunal did in fact apply the law it was bound to apply to the dispute. Failure to apply such law, as distinguished from mere misconstruction of that law, would constitute a manifest excess of powers on the part of the Tribunal and a ground for nullity under Article 52(1) (b) of the Convention. *The ad hoc Committee has approached this task with caution, distinguishing failure to apply the applicable law as a ground for annulment and misinterpretation of the applicable law as a ground for appeal.* [emphasis added].

This opinion was shared by the Committee in the *MINE v. Guinea*[63] case. After explaining the reason for which failure to apply the respective law constitutes a form of exceeding one's powers, the Committee added:

> [A] tribunal's disregard of the agreed rules of law would constitute a derogation from the terms of reference within which the tribunal has been authorized to function. Examples of such a derogation include the application of rules of law other than the ones agreed by the parties, or a decision not based on any law unless the parties had agreed on a decision *ex aequo et bono*. If the derogation is manifest it entails a manifest excess of power. Disregard of the applicable rules of law must

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58 C. Schreuer *et al, supra* note 3, para. 192, p. 954.

59 Klöckner v. Cameroon, Decision on Annulment of May 3, 1985, ICSID Reports, Vol. 2, 1994, pp. 95 *et seq.*; p. 119.

60 *Ibid.*, para. 60.

61 *Ibid.*, para. 61.

62 *Amco v. Indonesia*, *supra* note 9, para. 23.

63 *MINE v. Guinea*, *supra* note 10.

be distinguished from erroneous application of those rules which, *even if manifestly unwarranted*, furnishes no ground for annulment . . . .[64]

The *ad hoc* Committee in *CMS v. Argentina*[65] found that:

> it is well established that the ground of manifest excess of powers is not limited to jurisdictional error. A complete failure to apply the law to which a Tribunal is directed by Article 42(1) of the ICSID Convention can also constitute a manifest excess of powers.[66]

The *ad hoc* Committee in *Repsol v. Petroecuador*[67] recalled that:

> in ICSID's annulment system, the errors made in the application of a law, in contrast with the breach of said law (or of legal rules agreed upon by the parties), do not constitute, pursuant to Article 42 of the Convention, grounds for annulment of an award.[68]

As the *ad hoc* Committee in *MTD v. Chile*[69] stated:

> An award will not escape annulment if the tribunal, while purporting to apply the relevant law actually applies another, quite different law. But in such a case the error must be 'manifest', not arguable, and a misapprehension (still less mere disagreement) as to the content of a particular rule is not enough.[70]

In *CDC v. Seychelles,*[71] the *ad hoc* Committee put the question in the following way:

> Regardless of our opinion of the correctness of the Tribunal's legal analysis . . . our inquiry is limited to a determination of whether or not the Tribunal endeavored to apply English law.[72]

Failure to State Reasons

The failure to state reasons on particular points contained in the award has been alleged in virtually every application for annulment. The standards were set by the *ad hoc* Committee in *MINE* and continued in subsequent decisions of *ad hoc* Committees. It has not been disputed that contradictory reasons amount to a failure to state reasons. On this point, the *MINE* Committee stated that:

> [T]he requirement that an award has to be motivated implies that it must enable the reader to follow the reasoning of the Tribunal on points of fact and law. It implies

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64 *Ibid.*, 4 ICSID Reports 79, 87 (paras. 5.03–5.04) (emphasis added).

65 *CMS v. Argentina*, Decision on Annulment.

66 *Ibid.*, para. 49.

67 *Repsol v. Ecuador (Petroecuador)*,

68 *Ibid.*, para. 38.

69 *MTD v. Chile*.

70 *Ibid.*, para. 47.

71 *CDC Group v. Seychelles*.

72 *Ibid.*, 11 ICSID Reports 237, 252 (para. 45).

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> that, and only that. The adequacy of the reasoning is not an appropriate standard of review under paragraph 1(e) . . . .[73]

> [T]he requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A to Point B and eventually to its conclusion, even if it made an error of fact or of law. The minimum requirement is in particular not satisfied by either contradictory or frivolous reasons.[74]

The *ad hoc* Committee in *Vivendi* restated these standards:

> "P]rovided that the reasons given by a Tribunal can be followed and relate to the issues that were before the tribunal, their correctness is beside the point in terms of Article 52(1)(e)" and the review under this provision concerns "a failure to state any reasons with respect to all or part of an award, not the failure to state correct or convincing reasons . . . .[75]

In addition, according to the Committee, the reasons may be stated "succinctly or at length," and annulment should only occur in a clear case, i.e., first, the failure to state reasons leaves "the decision on a particular point essentially lacking in any expressed rationale"; and second, that point must itself be "necessary to the tribunal's decision."[76]

Committees in other annulment cases have expressed similar views.[77] In *Wena Hotels*, the Committee added:

> Neither Article 48(3) nor Article 52(1)(e) specify the manner in which the Tribunal's reasons are to be stated. The object of both provisions is to ensure that the Parties will be able to understand the Tribunal's reasoning. This goal does not require that each reason be stated expressly. The Tribunal's reasons may be implicit in the considerations and conclusions contained in the award, provided they can be reasonably inferred from the terms used in the decision.[78]

In addition, the Committee held that if the award is lacking reasons, "the remedy need not be the annulment of the award" because "the purpose of this particular ground for annulment is not to have the award reversed on its merits. It is to allow the parties to understand the Tribunal's decision . . . and the reasons supporting the tribunal's conclusions can be explained by the *ad hoc* Committee itself."[79]

In *Patrick Mitchell v. Congo*,[80] the Committee annulled the award on the ground of a failure to state reasons. It stated that failure to state reasons exists "whenever reasons are purely and simply not given or are so inadequate that the coherence of the reasoning

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73 *MINE v. Guinea*, para. 5.08.

74 *Ibid.*, para. 5.09.

75 *Vivendi v. Argentina*, paras. 64–65.

76 *Ibid.*

77 *See, e.g.*, *Amco Asia I* (1986) 1 ICSID Reports 509, 519–21 (paras. 38–44); *MINE* (1989) 4 ICSID Reports 79, 88–89 (paras. 5.07–5.13); *Amco Asia II* (1992) 9 ICSID Reports 3, 48–49 (paras. 7.55–7.57); *Wena Hotels* (2002) 6 ICSID Reports 129, 145–46 (paras. 77–82); *CDC Group* (2005) 11 ICSID Reports 237, 259–61 (paras. 66–72); *Patrick Mitchell v. Congo*, para. 21.

78 *Wena Hotels*, para. 81.

79 *Ibid.*, para. 83.

80 *Patrick Mitchell v. Congo*.

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is seriously affected . . . .such an inadequacy of reasons is deemed to be particularly grave, as it seriously affects the coherence of the reasoning and moreover, as it opens the door to a risk of genuine abuses . . . .[81] In the particular case, the Committee held that the tribunal had not "provided the slightest explanation as to the relationship between the 'Mitchell & Associates' firm and the DRC,"[82] and also "it would be necessary for the award to indicate that, through his know-how, the Claimant had concretely assisted the DRC . . . ."[83]

In this decision, the Committee refused to characterize an operation as an investment, on the basis of its lack of contribution to the economic development of the host State. It went on to say that the abuse in question occurs "to the extent that it boils down to granting the qualification as investor to any legal counseling firm or law firm established in a foreign country, thereby enabling it to take advantage of the special arbitration system."[84]

Serious Departure from a Fundamental Rule of Procedure

A fundamental irregularity in the arbitration process is an easily recognizable basis to set aside the award, not only under the ICSID Convention but also under national laws. It is also the least controversial and the most important for the safeguard of the system itself. This ground has often been invoked but has rarely succeeded.

How is this violation expressed? The violation of a rule of procedure will be a ground for annulment only if two requirements are met: the departure from the rule must be serious, and the rule concerned must be fundamental. The Committee in *MINE v. Guinea*, in analyzing the provision, stated that the "the departure must be substantial and be such as to deprive a party from the benefit or protection which the rule was intended to provide."[85] However, according to the *MINE* Committee, "even a serious departure from a rule of procedure will not give rise to annulment unless that rule is 'fundamental.'"[86]

In *Wena v. Egypt*, the Committee said that:

> [It] refers to a set of minimum standards of protection to be respected as a matter of international law. It is fundamental as a matter of procedure that each party is given the right to be heard before an independent and impartial tribunal. This includes the right of a party to state its claim or its defence and to produce all arguments and evidence in support of it. This fundamental right has to be ensured on an equal level in a way that allows each party to respond adequately to the arguments and evidence presented by the other. [] In order to be a serious departure from a fundamental rule of procedure, the violation of such a rule must have caused the tribunal to

81 *Ibid.*, paras. 40, 41.
82 *Ibid.*, para. 40.
83 *Ibid.*, para. 39.
84 *Ibid.*, para. 40. See also Chapter 10 of this book, K. Yannaca-Small, *Who Is Entitled to Claim? Nationality Challenges*.
85 *MINE v. Guinea*, para. 5.05.
86 *Ibid.*, para. 5.06.

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reach a result substantially different from what it would have awarded had such a rule been observed.

The annulment applications based on this ground have rarely been retained, given the difficulty to demonstrate that a tribunal has departed from a fundamental rule of procedure. The most common arguments that have been advanced under this ground are lack of impartiality of the tribunal, the violation of the right to be heard, absence of deliberations of the tribunal, inadequate evidence, and burden of proof on the wrong party.[87]

STAY OF ENFORCEMENT

Under Article 52(5) of the Convention, the *ad hoc* Committee may stay enforcement of an award "if it considers that the circumstances so require."[88] If a stay is requested in the annulment application, enforcement of the award will be stayed provisionally by the Secretary-General upon registration until the *ad hoc* Committee rules on such request. Upon request of one of the Parties, under Arbitration Rule 54(2), the *ad hoc* Committee is required to rule within 30 days of its constitution on whether or not provisional stay should be continued or lifted. If the Committee does not decide within 30 days, the stay is automatically terminated—although the 30-day limit may be extended by agreement of the Parties.[89] The stay of an award may be subject to the condition that the requesting Party provides a bond or other security in the full amount of the award rendered against it. Under the ICSID Rules, if a Committee decides or is asked to only annul part of the award, it may at its discretion "order the temporary stay" of the non-annulled part.[90]

So far, all ICSID decisions on the stay of enforcement of an award have granted the stay requested. However, the practice of the *ad hoc* Committees is not homogenous on the conditions tied to the stay of enforcement, such as the posting of a bank guarantee or the setting up of an escrow account. Out of all the decisions on the stay of enforcement of an award (sixteen in total), eight have ruled in favor of a conditional stay (with a bond guarantee, the setting up of an escrow account, or language in the decision which would condition the posting of security upon certain action to be taken by the party challenging the annulment or a declaration by that party that it will promptly

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87 C. Schreuer, *in* E. Gaillard & Y. Banifatemi, *supra* note 7; A. Cohen Smutny, *Procedural Review*, *in* 1 INVESTMENT TREATY LAW, CURRENT ISSUES (F. Ortino et al., eds., British Institute for International and Comparative Law 2006).

88 *See* P.D. Friedland, *Stay of Enforcement of the Arbitral Award Pending ICSID Annulment Proceedings*, *in* E. Gaillard & Y. Banifatemi eds., *supra* note 7 (2004); M. Polasek, *Introductory Note to Three Decisions on the Stay of Enforcement of an ICSID Award*, ICSID REV 581–86 (2006).

89 See examples in *Patrick Mitchell v. Congo*, and *MTD v. Chile*, Decision on Annulment, March 21, 2007.

90 ICSID Arbitration Rule 54(3).

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comply with the award)[91], and eight have granted an unconditional stay.[92] There is only one case, *Sempra v. Argentina*, in which the *ad hoc* Committee decided to lift the stay of enforcement status.[93]

In deciding against the granting of security, the Committee in *Patrick Mitchell v. Congo* held that the granting of security would put the creditor in a more favorable position than before the filing of the application for annulment, allowing it to avoid issues of sovereign immunity from execution.[94] In *MTD v. Chile*[95] and *CMS v. Argentina*,[96] the *ad hoc* Committees were equally not favorable to this public guarantee, considering that the delay in the execution of the award is a condition of the annulment process which was to be compensated by interest on the award.

In a similar vein, the *ad hoc* Committee in *Azurix v. Argentina* noted that the burden of proof was on the investor to prove that the suspension should be accompanied by a bond guarantee. In addition, the *ad hoc* Committee noted that the posting of a security is within its discretion to order but is not mandatory. To require the posting of a security might undermine the confidence of all nations in ICSID by implying that there was discrimination between States because security is usually only sought against

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91 Amco Asia Corporation and others v. Republic of Indonesia, Order of May 17, 1985 (first annulment proceeding) and Interim Order of March 2, 1991 (second annulment proceeding); Wena Hotels Limited v. Arab Republic of Egypt, Procedural Order No 1 of April 5, 2001; CDC Group PLC v. Republic of Seychelles, Decision on Whether or Not to Continue Stay and Order of July 14, 2004; Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador*)*, Procedural Order No. 1 concerning the Stay of Enforcement of the Award (December 22, 2005), Procedural Order No. 4 concerning the Stay of Enforcement of the Award (February 22, 2006); Vivendi v. Argentina (Vivendi II), Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, November 4, 2008; Sempra Energy International v. Argentine Republic, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, March 5, 2009; Compagnie d'Exploitation du Chemin de Fer Transgabonais v. Gabonese Republic, Decision on the Stay of Enforcement of the award, March 13, 2009;Rumeli & Telsim v. Kazakhstan, Decision on the Stay of Enforcement, March 19, 2009.

92 Maritime International Nominees Establishment (MINE) v. Republic of Guinea, Interim Order No. 1, August 12, 1988; Patrick Mitchell v. Congo, Decision on the Stay of Enforcement, November 30, 2004; MTD v. Chile, Ad Hoc Committee's Decision on the Respondent's Request for a Continued Stay of Execution, June 1, 2005; CMS v. The Argentine Republic, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, September 1, 2006; Azurix v. the Argentine Republic, Decision on the Continued Stay of Enforcement, December 28, 2007; Enron v. the Argentine Republic, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, October 7, 2008; Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic, Decision on Enron Creditors Recovery Corporation and Ponderosa Assets, L.P.'s Further Request for a Continued Stay of Enforcement of the Award, May 20, 2009; Continental v. The Argentine Republic, Decision on Argentina's Application for a Stay of Enforcement of the Award, October 23, 2009.

93 Sempra Energy International v. Argentine Republic Decision on Sempra Energy International's Request for the Termination of the Stay of Enforcement of the Award, August 7, 2009.

94 M. Polasek, *supra* note 88.

95 *MTD v. Chile*, para. 110.

96 *CMS v. Argentina*, para. 161.

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developing nations.[97] The Committee further noted that the general approach is against strict adherence to previous Committee determinations as if they were common-law precedent. In rejecting Azurix's arguments for annulment, the Committee reasoned that Argentina had not denounced the ICSID Convention and was thus still bound to enforce ICSID awards as final judgments of its domestic courts. The Committee thus found the principal "security" for Azurix to be the very obligations to which Argentina had agreed pursuant to the ICSID Convention.[98]

In *Continental v. Argentina*[99], the Committee after it rejected Continental's preliminary objection to Argentina's application for annulment,[100] ordered the continuation of the stay of enforcement of the award, which had been requested by Argentina.[101] The Committee considered that the relevant circumstances in the present case, i.e., the small amount of damages (USD 2.8 million), and the fact that both parties had applied for annulment, justified a continuation of the stay, without the need for security.

The Committees which condition the stay of enforcement on putting up a bond or setting up an escrow have become increasingly creative in the conditions they impose and the combination thereof.

The Committee in *Repsol v. Petroecuador* conditioned the stay upon the issuance of "an unconditional and irrevocable bond for the total amount of the award plus the corresponding interest."[102]

In *Rumeli & Telsim v. Kazakhstan,*[103] the Committee conditioned the stay of enforcement on the issuance by Kazakhstan of a declaration that it will comply with the award 30 days from a decision rejecting the application for annulment. It decided, alternatively, that if Kazakhstan failed to issue the declaration and wished the stay to continue, Kazakhstan had to deposit 50 percent of the award into an escrow account.

Although initially most of the Committees in the annulment cases against Argentina had not conditioned the stay of enforcement upon the issuance of a guarantee, the positions of later Committees evolved as they observed Argentina's official statements.

In *Vivendi v. Argentina*,[104] for instance, the Committee ordered Argentina to make a statement that contained a specific paragraph ensuring that full payment would be made within a fixed period of time which the Committee considered reasonable. As an alternative, Argentina would have to provide a bank guarantee for the entire sum due if the award were not annulled. The Committee gave Argentina 30 days from the issuance of its decision to provide such a commitment at the end of which a 60-day period

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97 *Azurix v. Argentina*, para. 32. Ultimately, the *ad hoc* Committee in its decision of September 1, 2009, dismissed in its entirety, Argentina's application for annulment. The stay of enforcement of the award ordered by the Committee on December 28, 2007, was terminated.

98 *Ibid.*, para. 38.

99 *Continental v. Argentina.*

100 *Ibid.*, Decision by *ad hoc* Committee on Continental Casualty Company's preliminary objection to Argentina's application for annulment, October 23, 2009.

101 *Ibid.*, Decision by the *ad hoc* Committee on Argentina's application for a stay of enforcement of the Award, October 23, 2009.

102 *Repsol v. Petroecuador*, para. 10.

103 *Rumeli v. Kazakhstan*.

104 *Vivendi v. Argentina*.

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began for Argentina to provide a bank guarantee for the entire sum. If, in turn, Argentina did not provide such bank guarantee, the stay of enforcement would be lifted. The 60-day time line for such a guarantee expired without the requested communication or guarantee from Argentina. This opened the way for Vivendi to seek the enforcement of the award.

In *Enron v. Argentina*, the Committee decided to continue the stay of enforcement of the award and gave Argentina a 60-day period to reconsider its position on fulfilling its obligation to comply with the award should it not be annulled. This grace period was granted by the Committee because Argentina was under a misapprehension as to the meaning and correlation of Articles 53 and 54 of the ICSID Convention and Article VII(2) of the U.S.-Argentina BIT. At the end of this period, Argentina was asked to reconsider its position and provide a statement of assurance that it would comply with the award. Argentina did not respond to the Committee's request. Subsequently, the Committee gave another 60 days from the date of its last decision to Argentina to reconsider its position; otherwise, it stated that it would, upon the application of Enron, be prepared to reconsider the issue of continuance of the stay and the issue of security by reference to the circumstances then existing. In an interesting twist, the Committee took the decision that it would not lift the stay or require financial security unless arrangements were put in place by Enron that would ensure the recovery of any amounts or security by Argentina if the award were annulled.[105] In response, Enron proposed three options for a guarantee that would be protected from creditors: (i) an escrow agreement, administered exclusively by an agent in the name of Argentina, with Enron having a security interest in all of Argentina's rights, titles, and interest in the escrow account; (ii) a letter of credit from a bank of Argentina's choice; and (iii) a commitment by the Claimants, if the stay is lifted, to undertake enforcement action against Argentina only in the name of Ponderosa Assets (a solvent Delaware company) and to reimburse any amounts collected by Ponderosa Assets should the award be annulled.

In *Sempra v. Argentina,*[106] the Committee had initially ruled that it would continue the stay of a 2007 arbitral award, only on the condition that the Argentina put US$75 million into an escrow account. The Committee, after having surveyed developments in the other ongoing annulment proceedings, in which Argentina had not complied with its payment obligations promptly, drew its own conclusions as to Argentina's likely compliance with ICSID awards and indicated that it would condition any continued stay of enforcement of the award upon some more tangible demonstration of Argentina's preparedness to comply. In this regard the Committee held that:

> Argentina's posture makes it clear that it will in fact *not* comply with its obligation 'to abide by and comply with' an arbitral award in Sempra's favour unless and until Sempra seeks recognition and enforcement of the Award before an Argentine judicial tribunal in the manner prescribed by the national law of Argentina.[107]

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105 Enron v. Argentina, Decision on the Argentine Republic Request for a Continued Stay of Enforcement of the Award, paras. 102, 103.

106 *Sempra v. Argentina*.

107 *Ibid.*, para. 104.

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The Committee provided for 120 days during which Argentina could make such arrangements. In the event that the payment was not posted, Sempra could request the Committee to lift the stay of enforcement—thus paving the way for the company to seek enforcement of the award even as the ICSID annulment process runs its course.[108] Argentina did not make such arrangements. Its defense was based on the fact that the placing of funds in escrow would cause prohibitive cost to Argentina, and in addition, placing funds in escrow would create "unacceptable risk of attachment to Argentina," implying that the funds, if and when released, would run the risk of being applied to satisfy third-party creditors' claims rather than be repatriated to Argentina.

The Committee did not accept these defenses brought by Argentina and issued a decision lifting the stay of enforcement.[109]

THE QUEST FOR COHERENCE AND CONSISTENCY: HOW FAR CAN IT GO?

As mentioned before, the decisions in *Patrick Mitchell v. DRC* and *CMS v. Argentina* have fueled discussions about the role of *ad hoc* Committees and the scope of the annulment procedures and decisions and have exposed the limits of the system. Divergent views emerged, in particular with respect to the *obiter dicta* expressed by the Committee in *CMS*. Some saw in them a decision which gives an expansive role to the *ad hoc* Committees, at least with respect to the control of the failure to state reasons. This decision has been criticized for not making the distinction between the existence of the reasons and the quality of the motivation.[110]

> The pertinence for the reasoning, its fairness, its convincing character are without consequence in the annulment procedure, because all these notions derive from the substance of the reasoning and are indifferent for the needs of the external control of the existence of reasons as wanted by the authors of the Washington Convention.[111]

Some others, however, saw in it a partial response to increasing demands from a range of stakeholders (including state parties themselves) for greater coherence and consistency in the reasoning of investor-state arbitral tribunals and, in the absence of any appeal mechanism, characterized its "creative use of the ICSID annulment procedure"[112] as an alternate means of advancing the transition between finality and

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108 In the event that Argentina was to place the stipulated amount in escrow, the Committee had indicated that Sempra should not pursue any enforcement or asset-attachment measures which it may have earlier initiated.

109 Sempra requested the termination of the stay of enforcement on May 13, 2009. The *ad hoc* Committee granted the request on August 7, 2009.

110 E. Gaillard, *CIRDI, Chronique des Sentences Arbitrales*, 2009, p. 361.

111 *Ibid.*

112 OGEMID discussion on the Committee's decision on the *CMS v. Argentina* annulment proceeding.

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correctness. Some saw these critical statements of the Committee as simply part of the required analysis carried out by the Committee on whether Argentina's case for annulment had been established. This was particularly so because ICSID's threshold for annulment is very high: accordingly, there may be an error of law in the decision but not one that meets the strict conditions for annulment under ICSID.

Another issue which is a relatively new development in the ICSID context is the parallel use of the review proceedings. Although it has not been thoroughly discussed or debated, this phenomenon may lead to problematic situations if it is not properly and carefully monitored.

Although the criticisms about inconsistency of the system are not always justified, they nevertheless demonstrate that there is a certain expression of lack of confidence in the system itself. What could be done to improve the system so as to respond to concerns about consistency? On the one hand, it could seem possible to undertake some changes without having recourse to the amendment of the ICSID Convention, and on the other hand to reflect on some other ideas requiring more drastic systemic changes.

Improvements of the System Without Changing the ICSID Instruments

The choice of Committee Members. One possible response would be to create a roster of arbitrators exclusively dedicated to sitting on Committees in annulment procedures. However, this proposal carries two challenges: the governments will have to effectively appoint competent and available persons to the ICSID Panels, and these persons would commit themselves not to accept to participate in primary ICSID proceedings, at least as Party-appointed arbitrators.

With respect to the first point, the responsibility of the governments in the appointment of Panel members is evident. However, in order for the governments to appoint competent and informed persons to the ICSID Panel of Arbitrators, they should first be better informed themselves about the challenges of the ICSID procedures and the skills required. Not all governments are aware of these challenges, in particular those governments which have not been exposed to ICSID arbitration proceedings.

With respect to the second point, arbitrators could accept an exclusive membership in *ad hoc* Comittees. Currently, there is an effort undertaken by ICSID for a pool of arbitrators to be appointed almost exclusively in annulment proceedings, although it is just a tendency and has not yet become a regular practice.

Caution vis-à-vis parallel review proceedings. In the context of ICSID, the familiarity of the users of the system has brought a greater sophistication in the use of the different methods of review, with an increasing use of parallel review proceedings, simultaneously or successively. This new phenomenon entails the risk of endless procedures and contradictory decisions by two different decision making bodies and more generally raises a potential risk of abusing the system. There is also a risk of compromising the finality of the awards by several procedures of parallel remedies.

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Recently, there have been several cases of parallel review proceedings. In *Siemens v. Argentina*, an annulment application[113] was followed by a revision application,[114] both initiated by Argentina. In *Pey Casado v. Chile,*[115] an application for revision[116]—initiated by Pay Casado was followed by an application for annulment initiated by Chile.[117] Finally, in *Continental Casualty v. Argentina,*[118] both parties requested rectification[119] of the award, which was followed by an application for annulment by one party[120] within 120 days of the original award. The tribunal rectified the award, and the other party, taking advantage of the new deadline running from the tribunal's rectification of the award, submitted an application for partial annulment of the award [121](which includes the rectification), while the annulment proceedings of the initial award were still pending. This web of consecutive or concurrent proceedings may create difficulties in particular with respect to the evaluation of the different deadlines involved.

A number of questions arise with respect to the situations that may occur as a result of this new phenomenon: When there is a revision proceeding, should there be registration of an annulment application? If there is registration, should the *ad hoc* Committee be immediately constituted? If so, should the annulment proceeding be suspended? If the award has been revised, would the annulment refer to the original or the revised award? When do the different deadlines start to run? What happens if both parties apply for annulment? In *Continental v. Argentina*, two separate *ad hoc* Committees were constituted—one for each application—and although there is *de facto* consolidation because they have the same members, the Committees could issue two separate decisions.

ICSID will have to increase its efforts to better accommodate the administration of these parallel procedures. When, for instance, there is a decision on the stay of enforcement for two parallel procedures, such as revision and annulment, the Centre could encourage the suspension of the annulment procedure, since the award may be put into question in the revision proceedings. Once the decision on revision has been issued, the proceeding could continue at a later stage, examining the possibility for annulment of the revised award. This was the case in *Siemens v. Argentina*, where the

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113 Siemens v. Argentina, Application for Annulment, registered in July 2007.

114 *Ibid.*, Application for Revision, registered in July 2008. On August 12, 2009, the parties requested the discontinuance of the proceeding pursuant to ICSID Arbitration Rule 43(1). On September 9, 2009, the tribunal issued an order taking note of the discontinuance of the proceeding.

115 *Pey Casado v. Chile*.

116 *Ibid.*, Application for Revision, registered on June 17, 2008.

117 *Ibid.*, Application for Annulment, registered on July 6, 2009.

118 *Continental Casualty v. Argentina*.

119 *Ibid.*, Rectification and Supplementary Request by Continental, registered on October 16, 2008. Decision on the Rectification of the Award, February 23, 2009. The Rectification Request by Argentina was registered on November 6, 2008.

120 *Ibid.*, Application for Annulment, submitted by Continental, registered on January 14, 2009.

121 *Ibid.*, Application for Partial Annulment of the Award, submitted by Argentina, registered on June 8, 2009.

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annulment proceeding was suspended upon request of the parties during the revision proceeding.[122]

Systemic Changes Requiring a Revision of the ICSID Instruments

Any proposals for systemic changes should not necessarily be viewed as a reaction to cure problems of the present system but as a phase in the evolution of a new and more sophisticated system for the settlement of investment disputes.[123] Several proposals have been made and discussed in literature and different fora which range from the creation of a standing Annulment Committee through an Appeals Mechanism to a World Court. The Appeals Mechanism has been by far the one that has drawn the most discussion and attention, due in particular to the insertion of relevant provisions in some investment agreements.

A standing Annulment Committee. It has been proposed[124] that a standing ICSID Annulment Committee, or several standing panels, with lottery assignment of cases and long-term appointments, excluding any parallel arbitrator work, could be an important step in the direction of streamlining the ICSID annulment process. This idea has not been openly debated, and the desirability for such a standing Committee has not been explored. Although there may be some merit in exploring it further, there are a number of questions related to the desirability of such a Committee and to the feasibility of this proposal, pertaining essentially to the mode of the appointment of the members who would be sitting on the Committee or the panels, amidst concerns about the appointing authority and issues related to the fair representation of both developed and developing countries.

Appeals mechanism: is it a solution? There is no effective hierarchical order in investment arbitration as with national judiciaries and within the WTO system for settling international trade disputes, so as to make it possible for inconsistencies or manifest errors of law to be held in check. An Appeals Facility would expand the scope of review of ICSID awards from the review of procedural legitimacy currently allowed under the ICSID Convention to also include review of the substantive correctness of the award.

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122 E. Obadia, comments made in IAI Forum, on the *Review of Arbitral Awards*, September 12–14, 2008. The proceedings of the Forum will be published as IAI Series on International Arbitration No. 6.

123 D. Bishop, *The Case for an Appellate Panel and its Scope of Review*, *in* 1 Investment Treaty Law, Current Issues (F. Ortino et al., eds., British Institute for International and Comparative Law 2006).

124 T. Wälde, *Improving the Mechanisms for Treaty Negotiation and Investment Disputes: Competition and Choice as the Path to Quality and Legitimacy*, *in* Yearbook on International Law and Policy, 2008/2009 (K. Sauvant ed., 2009.)

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Discussion on the possibility of appeal for investment disputes started among scholars as far back as the early 1990s,[125] while the first discussion at the governmental level took place during the OECD's negotiations of a Multilateral Agreement on Investment (MAI).[126] Some countries have inserted provisions in their investment agreements on the possibility of developing an appeal mechanism for investment disputes.[127] Governments and legal experts have debated the possible advantages and disadvantages of such a mechanism in investor-state arbitration.[128]

PROVISIONS ON THE ESTABLISHMENT OF AN APPEAL MECHANISM INCLUDED IN INVESTMENT AGREEMENTS.

The U.S. Trade Act of 2002, which granted trade promotion authority to the executive branch of the U.S. government[129] and has been the basis for the conclusion of several recent U.S. free trade agreements, set down a number of objectives with respect to foreign investment.[130] These included a negotiating objective of an appellate mechanism for investment disputes under free trade agreements[131]: ". . . providing for an appellate body or similar mechanism to provide coherence to the interpretations of investment provisions in trade agreements . . ." As a result of this Act, the following

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125 See E. Lauterpacht, Aspects of the Administration of International Justice, 1991; S. Schwebel, *The Creation and Operation of an International Court of Arbitral Awards*, *in* The Internationalisation of International Arbitration 115 (M. Hunter et al., eds., 1995). (see also the exchanges in the early 1990s in the ICSID Review, e.g., Vol. 7)

126 At a high-level Meeting in February 1998, one delegation proposed the establishment of an Appeal Mechanism in the MAI for both State-State and investor-state dispute settlement. In informal consultations, delegations broadly agreed with the objectives of ensuring the development of a coherent jurisprudence and permitting an appeal where there may have been an error in law—particularly concerning the interpretation of MAI obligations. However, concerns were expressed about the delays and costs that might be engendered by adding an appeal and departing for investor-state arbitration from the traditional philosophy of fast, inexpensive, and final one-step arbitration. As an alternative, it was proposed and accepted, that awards under the MAI dispute settlement mechanism would initially remain drafted as final and binding, but it would be made subject to review of practical experience in five years from signature of the MAI. If, as a result of that review, the Contracting Parties considered it advisable to introduce an appeals body, this could be done by amending the Agreement. *Selected Issues on Dispute Settlement (Note by the Chairman)*, DAFFE/MAI(98)12, March 13, 1998.

127 *Possible Improvements of the Framework for ICSID Arbitration*, ICSID Secretariat Discussion Paper, October 22, 2004, *at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive&AnnounceNo=14_1.pdf.

128 The OECD Investment Committee and ICSID held a joint meeting of legal experts on November 4, 2004, in order to get the reaction of arbitrators and counsel on this issue. The discussions focused on i) developments with respect to the creation of an appeal mechanism and the possible consequences, if any, for the OECD member countries; and ii) the rationale for creating such a mechanism, i.e., its advantages and disadvantages.

129 "This trade authority, formerly known as 'fast-track,' allows the Executive Branch to present trade agreements to Congress for approval by a yes-or-no vote by a simple majority." *See* B. Legum, *The Introduction of an Appellate Mechanism: The US Trade Act of 2002*, *in* Annulment of ICSID Awards, *supra* n. 7, pp. 289–313.

130 19 U.S.C. § 3802(b)(3).

131 *See* B. Legum, *supra* note 129; 19 U.S.C. § 3802(b)(3)(G)(iv).

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specific language on an Appeals Mechanism was inserted in the U.S. Free Trade Agreements with Chile,[132] Singapore,[133] Morocco,[134] Peru,[135] Colombia,[136] South Korea,[137] and the 2004 U.S. Model BIT[138]:

> Within three years after the date of entry into force of this Agreement, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article . . . in arbitrations commenced after they establish the appellate body or similar mechanism.[139]

The language of the U.S.-Dominican Republic-Central America FTA[140]—the U.S. FTA with five Central American countries and the Dominican Republic—sets out a very specific schedule for establishing a Negotiating Group to advance the development of an appellate body, and a number of issues to be considered:

> Within three months of the date of entry into force of this Agreement, the Commission shall establish a Negotiating Group to develop an appellate body or similar mechanism to review awards rendered by tribunals under this Chapter. Such appellate body or similar mechanism shall be designed to provide coherence to the interpretation of investment provisions in the Agreement. The Commission shall direct the Negotiating Group to take into account the following issues, among others:
>
> (a) the nature and composition of an appellate body or similar mechanism;
>
> (b) the applicable scope and standard of review;
>
> (c) transparency of proceedings of an appellate body or similar mechanism;
>
> (d) the effect of decisions by an appellate body or similar mechanism;
>
> (e) the relationship of review by an appellate body or similar mechanism to the arbitral rules that may be selected under Articles 10.16 and 10.25; and
>
> (f) the relationship of review by an appellate body or similar mechanism to existing domestic laws and international law on the enforcement of arbitral awards.

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132 Annex 10-H. The US-Chile Free Trade Agreement was signed on June 6, 2003.

133 Letter exchange, U.S. Trade Representative R. Zoellick to Singapore Minister of Trade and Industry, G. Yeo on May 6, 2003. The U.S.-Singapore Free Trade Agreement was concluded on January 15, 2003.

134 Annex 10-D. The U.S.-Morocco Free Trade Agreement was signed on June 15, 2004.

135 Annex 10-D. The U.S.-Peru Trade Promotion Agreement was signed on April 12, 2006.

136 Annex 10-D. The U.S.-Colombia Trade Promotion Agreement was signed on November 22, 2006 but has not been approved by the U.S. Senate as of September 18, 2009.

137 Annex 11-D. The U.S.-South Korea Free Trade Agreement was signed on June 30, 2007 but has not been approved by the U.S. Senate as of September 18, 2009

138 Annex D. For the text of the 2004 U.S. Model BIT, see http://www.state.gov/documents/organization/38710.pdf.

139 *Ibid.*

140 Annex 10-F. The Dominican Republic—Central America—United States Free Trade Agreement was signed on August 5, 2004. The Central American countries are Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua.

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> The Commission shall direct the Negotiating Group to provide to the Commission, within one year of establishment of the Negotiating Group, a draft amendment to the Agreement that establishes an appellate body or similar mechanism. On approval of the draft amendment by the Parties, in accordance with Article 22.2 (Amendments), the Agreement shall be so amended.

ICSID PROPOSALS ON THE ESTABLISHMENT OF AN ICSID APPEALS FACILITY.

When there was a discussion among governments, practitioners, and the ICSID Secretariat on the feasibility of such a mechanism,[141] there was a concern that any future decisions by the parties to such agreements to establish an appellate body or similar mechanism would mean in practice the creation of an *ad hoc* appeal tribunal under each such treaty, instead of one single institutionally managed and widely accepted appeals mechanism. At the risk of the fragmentation of the dispute settlement system that could ensue under the first scenario and may itself affect the consistency of law, ICSID, in the context of the 2006 Revision of the ICSID Rules, offered some proposals on the creation of an optional ICSID Appeals Facility, which would be established and operated under a set of Appeals Facility Rules. This Facility was to be designed for use in conjunction with both forms of ICSID arbitration, UNCITRAL Rules, and any other forms provided in investor-state dispute settlement provisions of investment treaties.

The proposed Appeals Facility Rules provided for the establishment of an Appeals Panel composed of 15 persons elected by the Administrative Council of ICSID on the nomination of the Secretary-General of the Centre. Eight of the first fifteen members would serve for a three-year term, while all others would be elevated in six-year terms. Each member would be of different nationality and members would be "all persons of recognized authority, with demonstrated expertise in law, international investment and investment treaties."[142]

According to the proposed Rules, an award could be challenged for a clear error of law or on any of the five current grounds for annulment of an award. In addition, the inclusion of serious errors of fact was proposed to be "narrowly defined to preserve appropriate deference to the findings of fact of the arbitral tribunal."[143] An appeal tribunal could uphold, modify, or reverse the award concerned or wholly or partially annul it on any of the existing annulment grounds (borrowed from Article 52 of the ICSID Convention).

WHY AN APPEAL MECHANISM IN INVESTMENT DISPUTES?ADVANTAGES AND DISADVANTAGES.

It is difficult to dissociate the rationale for an appeal mechanism from the approach to be taken vis-à-vis the scope and the specific modalities of such a mechanism and, in particular, its advantages and disadvantages as have been discussed in the context of the amendment of the ICSID Rules, in literature and in debates in different fora.

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141 K. Yannaca-Small, *Improving the System of Investor-State Dispute Settlement: An Overview, in* International Investment Perspectives (OECD 2006).

142 ICSID Secretariat Discussion Paper, *supra* note 127, para. 5.

143 *Ibid.*, para. 7.

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Issues such as the appointment authority of the appeal tribunal's members (the Contracting States, ICSID the Secretariat, or other) or the possibility to give investors a voice, by allowing them to appoint *ad hoc* Members to the appellate tribunal, have been raised during the debate and discussion. There were perceptions that this would be a higher level tribunal whose decisions should have a higher precedential value, although in essence they would be issued from the same legal community as the first-instance arbitral tribunals. There was also concern that certain most-favored-nation clauses might bring an appeal mechanism into play under treaties that had not envisaged appeal. The Parties to existing and new BITs would therefore need to consider the potential interaction between their investment agreements and any future appellate mechanism to which they may decide to subscribe. Advantages and disadvantages of the proposals have also been discussed and are still being debated from time to time.

Advantages

The main advantages advanced were consistency; the possibility of rectification of legal errors; and possibly, serious errors of fact—the fact that the review would be confined to an impartial international tribunal instead of national courts, and the fact that it might enhance effective enforcement.

Consistency. One of the main advantages for the creation of an Appeals Mechanism that was advanced by its proponents is consistency. Consistency and coherence of jurisprudence create predictability and enhance the legitimacy of the system of investment arbitration. The chances for consistency could be reinforced by the existence of a common appeals body which would handle not only ICSID awards but also UNCITRAL awards and awards rendered by the International Chamber of Commerce (ICC), the Stockholm Chamber of Commerce (SCC) and other *ad hoc* arbitral tribunals.

The notion of consistency would go beyond the situation when two panels constituted under different agreements deal with the same set of facts and give conflicting opinions or reach a different conclusion. It might also encompass coherence of interpretation of basic principles which may underlie differently worded provisions in particular agreements and therefore might enhance the development of a more consistent international investment law.[144]

144 However, it is often pointed out that one needs to approach the question of consistency with some caution and clarity in terms of one's objectives. For example, several discussions and debates on the substantive obligations in investment agreements have revealed that countries' intent with respect to the interpretation of a similar provision in their investment agreements may differ in some respects. Thus, the development of consistent international legal principles needs to be balanced by respect for the intent of the parties to specific agreements. Even where the intent of the countries may differ in some respects in relation to similar provisions in their investment agreements, there could be a value in encouraging consistency in interpretation across the agreements of a particular country or countries where the intent of the parties do not differ.

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If there is a single appellate body with a wide scope of review—for instance, review of issues of jurisdiction and admissibility, fundamental errors of procedure, due process issues, errors of law—there is a greater likelihood of consistent interpretations of investment provisions.

An appellate mechanism could provide a more uniform and coherent means for challenging awards if the traditional bases for annulment were incorporated, and this mechanism would become the exclusive means to challenge an award.

Rectification of legal errors and possibly serious errors of fact. Another advantage that was advanced, was that it would allay public concern that awards affecting important public policy issues and interests could be enforced, despite serious error of law or of fact. This could enhance support for investor-state arbitration at a time of growing numbers of cases.

Review confined to an impartial tribunal versus national courts. While arbitral awards may not be appealed on the merits under the current ICSID arbitration system, the system reserves a limited but real role for national courts in reviewing the non-ICSID awards. In some instances, national courts are exceeding their authority to review awards, thereby compromising a central advantage of international arbitration.

The creation of an appeals mechanism would uphold the principal advantage of investor-state dispute settlement: the review of investment awards, in particular those outside the ICSID system, i.e., under UNCITRAL and the ICSID Additional Facility Rules, would be confined to impartial and qualified international tribunals which would operate on the basis of international standards and procedures instead of taking place in domestic courts, which may have a local bias or be subject to governmental influences.

Effective enforcement. Under the current system, for ICSID awards, there is a treaty obligation to recognize, which extends to the entire award,[145] and an obligation to enforce,[146] which extends only to the pecuniary obligations imposed by the award. The enforcement provision is a distinctive feature of the ICSID Convention. Most other instruments governing international adjudication do not cover enforcement but leave the issue to domestic laws or applicable treaties.[147] Therefore, non-ICSID awards are

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145 It does not extend to any other obligation under the award, such as restitution or other forms of specific performance or an injunction to desist from a certain course of action. According to Schreuer, "it is conceivable, although not likely, that a non-pecuniary obligation imposed by an ICSID award may be enforced on a different legal basis—under the New York Convention, for instance". C. Schreuer *et al*, supra note 3. para. 80, p. 1138.

146 According to Article 54(1) of the ICSID Convention:

> Each Contracting State shall recognise an award rendered pursuant to this Convention as binding and shall enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgement of a court in that State . . . .

147 NAFTA Article 1136(3)(b) expressly provides for the possibility of actions in national courts to "revise, set aside or annul" awards, requiring the winning party to refrain from enforcement until the losing side has had the opportunity to pursue such relief.

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enforceable under the normal rules governing the recognition and enforcement of arbitral awards established by national law, the New York Convention, and other relevant treaties, which give the principal role to domestic courts. Under the New York Convention, the national court could refuse to honor an award on certain grounds.[148]

In the discussions on creating an ICSID appellate mechanism, it was suggested that it might enhance the expeditious and effective enforcement of awards if a Respondent that appealed were required to post a bond in the amount of the award and if appeal decisions were excluded from domestic court review.

Disadvantages

The main disadvantages brought forward were that an appeal would go against the principle of finality, bring additional delays, costs and caseload, and lead to the politicization of the system.

Against the principle of finality. The finality of arbitration proceedings, i.e., that an arbitration award is binding and not open to appeal on the merits, has generally been seen as one of the major advantages of arbitration over judicial settlement. The "final" award puts an end to the Parties' conflict and related dispute settlement expenses in a limited period of time. The finality of arbitration proceedings, i.e., that an arbitration award is binding and not subject to appeal on the merits, has generally been seen as an advantage over judicial settlement. Some however, point out that while finality is considered one of the main advantages of international arbitration—for the savings it brings in costs and time—it may sometimes come at the risk of having to live with flawed or inconsistent awards on the same or very similar questions or facts. To the extent the appeal mechanism would expand the grounds for annulment or set-aside of an award it would compromise the finality of arbitration. However, it has been argued that investment arbitration involves issues of public interest which make the acceptance of the risk of flawed or erroneous decisions less justifiable in the name of finality than it may be in traditional commercial arbitration.

Additional delays and costs. The existence of an appeal mechanism could result in additional costs and delays in the resolution process, although this potential problem could be limited by setting specific time limits in the appellate process. Another aspect affecting the potential delay and cost of an appeal mechanism could be the scope of the review. An appeal limited to pure questions of law and excluding review for even serious error of fact could be less potentially costly and time consuming.

Additional caseload. By including additional grounds to the ones under the current annulment and review procedures, an appeal in investment arbitration could result in a

148 The New York Convention requires contracting states to "recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon." Article V sets out limited grounds on which recognition and enforcement of the award may be refused.

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greater number of challenges to arbitral awards. There was concern that there would be a tendency to appeal in every case, which would result in decreasing confidence in the main body of decisions and the authority of the "first instance" arbitrators. On this point, it might be possible to negotiate a balance of disincentives to appeal, such as the requirement of the deposit of a bond to secure the award or the costs of the proceedings, which would discourage routine resort to appeal.

Politicization of the system. There were concerns that the depoliticization of investment disputes, considered one of the main achievements of investor-state arbitration, could be undermined. Governments, to please their constituencies, might appeal on every case they lose in the first instance, and they would be the main beneficiaries of the system. In addition, if the choice of appellate arbitrators is made by the states only, there might be a risk of bias against investors. However, a number of arguments could be advanced about the benefits that investors could draw from the creation of an appeals mechanism. First, statistics have shown that investors lose at least as often as governments, so they would have at least the same opportunity to appeal. Second, the posting of a bond could provide a security for the investor of the amount of the award rendered. Finally, different solutions could be envisaged for the choice of arbitrators so as to ensure impartiality of the system.

WHAT LIES AHEAD?

The review of the advantages and disadvantages produced no consensus on the merits of adding an appeal to the investor-state dispute settlement system. Considering the ICSID proposal on this matter, the ICSID Administrative Council and most of those who participated in the discussions and offered comments expressed the view that it would be premature to attempt to establish such an ICSID mechanism at that stage, particularly in view of the difficult technical and policy issues raised. The ICSID Secretariat, in its statement, committed to continue studying such issues to assist member countries when and if it is decided to proceed toward the establishment of an ICSID Appeal Mechanism.[149]

Despite the inclusion of provisions on the establishment of an Appeals Mechanism in several investment agreements and the discussions that followed in this regard, there is standstill, and the idea has not been actively pursued. This may be explained in part by the current environment of international investment law, which is defined in great part by a web of approximately 2700 bilateral investment treaties with very different provisions—although their texts may look similar. This diversity of texts and contexts provides a very different basis than the other legal bases upon which standing tribunals operate. It is worth noting, in this respect, that usually the standing international tribunals have been established with respect to multilateral agreements, such as the WTO

149 .*See Suggested changes to the ICSID Rules and Regulations*, page 4, Working Paper of the ICSID Secretariat, May 12, 2005, *at*http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnouncementType=archive&AnnounceNo=22_1.pdf.

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Appellate Body issued from the WTO agreements or the tribunal on the Law of the Sea from the U.N. Convention on the Law of the Sea.

Another factor is that the absolute need for greater consistency and coherence has not been established and therefore there has not had sufficient political will to proceed further. A number of governments which have never been directly involved in investor-state procedures did not feel immediately concerned and expressed great scepticism about embarking in systemic changes of such magnitude.

A World Court—How Utopist Is It?

Some scholars have discussed the possibility of establishing a World Investment Court. It is however hard to conceive how one World Investment Court would be set up to adjudicate over the approximately 2700 investment protection treaties currently in force. Presumably, it would require either a new multilateral investment treaty—even in the context of the Multilateral Agreement on Investment (MAI), the idea was never raised—or a revision or protocol to the ICSID Convention replacing *ad hoc* tribunals and the annulment committees in the hope that the parties to multilateral and bilateral investment treaties would gradually then refer disputes optionally or exclusively to a new World Investment Court. At present, it seems that the chances for a World Investment Court are minimal. The idea might reemerge if a new effort toward a multilateral instrument were undertaken. In that case, one alternative, on the model of the WTO and of the current discussions within Mercosur, might be to combine *ad hoc* tribunals with a standing Appeals Body, which could be located within ICSID or elsewhere.

CONCLUSION

The most widely used procedure of review of ICSID awards, the annulment procedure, is confined by the ICSID Convention to a limited scope of review. Annulment is not appeal and does not rectify legal errors. It has become a frequent recourse for unsatisfied parties based on limited grounds, but the line between annulment and appeal is a very thin one.

Some Committees have stepped over this line and have been heavily criticized for doing so. Criticisms also are being directed at the composition of the *ad hoc* Committees, the multiplicity in recourse to parallel review procedures, and the lack of consistency of awards which cannot be cured by the current annulment procedures.

Proposals have been formulated for changes to the system. Some do not require any major changes, such as the choice of arbitrators and the vigilance in particular of ICSID over parallel and multiple review procedures. Some are more systemic in nature and would require drastic changes to the system, such as the creation of a standing Annulment Committee, of an Appeals Facility, or, ultimately, of a World Investment Court.

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Difficulties encountered for the systemic changes may be seen to come from the lack of strong political will, associated with the perception of a number of governments over the lack of need for such an endeavor and also the difficulties in establishing a permanent body based on a fragmented legal canvas of investment agreements.

However, if there were a standing ICSID Appeals Body rather than the current *ad hoc* annulment committees and if that Appeals Body were to gain credibility, it is not unthinkable that, over time, bilateral and multilateral treaties would be renegotiated, or a multilateral agreement would be negotiated with a view to using such an institutional facility as an option.

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Chapter 24

Review of Investment Treaty Awards by Municipal Courts

Prof. Dr. Kaj Hobér and Dr. Nils Eliasson***

INTRODUCTION

In investment arbitration, just as in commercial arbitration between two private parties, the final award of the arbitral tribunal is not always the end of the matter. It is not uncommon that the final award is merely the starting shot for challenge and/or enforcement proceedings that may take as long as, or even longer than, the arbitral proceedings leading up to the final award. For example, in the first ever investment arbitration leading to an award against the Russian Federation, not only did the Claimant, Mr. Franz Sedelmayer, have to defend the award in challenge proceedings brought by the Russian Federation, but it also took him about 10 years of persistent enforcement attempts before he could enforce his award. Thus, in Mr. Sedelmayer's case, the final award was clearly not the end of the dispute. It was not even the beginning of the end. It was merely the end of the beginning.

This chapter discusses the challenge and review of investment treaty awards in municipal courts. It is based on a number of such cases seeking to set aside investment treaty awards. We have identified 19 cases from 6 different jurisdictions: Belgium (1),[1]

* Partner, Mannheimer Swartling, Stockholm; Professor of East European Commercial Law, Uppsala University; and as of January 2010, Professor of International Law, Centre for Energy, Petroleum and Mineral Law and Policy (CEPMLP), University of Dundee.

** Head of Dispute Resolution Asia, Mannheimer Swartling, Hong Kong.

1 The Republic of Poland v. Eureko, Court of First Instance of Brussels, November 23, 2006, RG 2005/1542/A.

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Canada (4),[2] England (2),[3] France (1),[4] Sweden (5),[5] Switzerland (4),[6] and the United States (2).[7] Additional unreported cases might, however, exist.

The Canadian and U.S. cases are all challenges of NAFTA awards, whereas all but two of the cases from the European continent are challenges of awards based on bilateral investment treaties (BITs). Of the two remaining cases, one is a challenge of an award based on the Energy Charter Treaty (ECT) and the other a challenge of a decision on jurisdiction under the Kyrgyz Foreign Investment Law, both before the courts of Sweden. Apart from the fact that no Dutch case is on the list, the nationalities of the cases constitute a fairly accurate reflection of the jurisdictions that are frequently chosen as the seat of non-ICSID arbitrations.

Fourteen of the cases are challenges of partial awards on liability, or final awards on damages brought by the state-party to the dispute, whereas five of the cases are investor challenges of decisions declining jurisdiction or denying liability. The grounds for challenge invoked in these cases include lack of jurisdiction (11 cases),[8] excess of

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2 The United Mexican States v. Metalclad Corporation, Supreme Court of British Columbia, Judgment of May 2, 2001; The Attorney General of Canada v. S.D. Myers Inc., Federal Court of Canada, Judgment of January 13, 2004; Bayview Irrigation District #11 and ors v. Mexico, Ontario Superior Court, Ontario Superior Court of Justice, Judgment of May 5, 2008; Mexico v. Feldman, Ontario Superior Court of Justice, Judgment of December 3, 2003.

3 Ecuador v. Occidental Exploration and Production Company, Judgment, [2006] EWHC 345 (Comm), March 2, 2006; Czech Republic v. European Media Ventures SA, Judgment on jurisdiction, [2007] EWHC 285 (Comm), December 5, 2007.

4 The Czech Republic v. Pren Nreka, Recours en Annulation, Court d'Appel de Paris, Arret du September 25, 2008.

5 The Russian Federation v. Sedelmayer, Judgment of the Stockholm District Court, December 12, 2002, Case No. T6-583-98; The Czech Republic v. CME Czech Republic B.V., Judgment of the Svea Court of Appeal of May 15, 2003, Case No. T-8735-01; Mr Nagel v. The Czech Republic, Decision of the Svea Court of Appeal of May 30, 2005, Case No. T 9059-03; Petrobart Limited v. Kyrgyz Republic, Judgment of the Svea Court of Appeal of April 13, 2006, Case No. T 3739-03 and Judgment of the Supreme Court of March 28, 2008, Case No. 2113-06; Kyrgyz Republic v. Petrobart Limited, Judgment of the Svea Court of Appeal of January 19, 2007, Case No. T 5208-05.

6 The Republic of Poland v. Saar Papier Vertriebs GmbH, Judgment of the Federal Court of September 20, 2000; Saar Papier Vertriebs GmbH v. The Republic of Poland, Judgment of March 1, 2002; The Czech Republic v. Saluka Investments BV, Judgment of the Federal Court of Switzerland, September 7, 2006; Lebanon v. France Télécom Mobiles Internationales SA and FTML SAL, Judgment of the Federal Court of Switzerland, November 10, 2005.

7 Raymond L. Loewen v. United States of America, United States District Court for the District of Columbia; Civil Action No. 04-2151, October 31, 2005; International Thunderbird Gaming Corporation v. Mexico, United States District Court for the District of Columbia, Civil Action 06-00748, February 14, 2007.

8 The Republic of Poland v. Saar Papier Vertriebs GmbH, Judgment of the Federal Court of September 20, 2000; The United Mexican States v. Metalclad Corporation, Judgment of the Supreme Court of British Columbia, May 2, 2001; The Attorney General of Canada v. S.D. Myers Inc., Federal Court of Canada, Judgment of January 13, 2004; Bayview Irrigation District #11 and ors v. Mexico, Ontario Superior Court, Judgment of May 5, 2008; The Russian Federation v. Sedelmayer, Judgment of the Stockholm District Court, December 12, 2002, Case No. T6-583-98; Case No. T-8735-01; Mr Nagel v. The Czech Republic, Decision of the Svea Court of Appeal of May 30, 2005, Case No. T 9059-03; Petrobart Limited v. Kyrgyz

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mandate (2 cases),[9] procedural irregularities/violation of due process (7 cases),[10] and violations of public policy (3 cases).[11] Two cases also deal with the question of whether challenges of investment treaty awards are "justiciable" and/or come within the jurisdiction of municipal courts.[12]

Since it is not possible to deal with all these cases and issues in this chapter, we focus on three issues: (i) do municipal courts have jurisdiction to determine challenges of investment treaty awards, (ii) is it appropriate for municipal courts to review investment treaty awards, and (iii) what standards of review do municipal courts apply when they review challenges to the jurisdiction of the arbitral tribunal? It is particularly in relation to these issues that questions specific to investment treaty arbitration arise in challenge proceedings before municipal courts.

The first two issues stem directly from the fact that investment treaty arbitration is different from regular international commercial arbitration, primarily due to the public international law element in the former.

The third issue—the standard of review applied by municipal courts in challenges to the jurisdiction of the arbitral tribunal in investment treaty arbitration—is also different from jurisdictional challenges in regular international commercial arbitration. The ruling on jurisdiction in international commercial arbitration is often limited to determining whether the dispute "*arose out of or in connection with*" the contract containing the arbitration clause. Arbitral tribunals in investment arbitration, on the other hand, frequently must rule on complex issues of public international law, including

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Republic, Judgment of the Svea Court of Appeal of April 13, 2006, Case No. T 3739-03; Kyrgyz Republic v. Petrobart Limited, Judgment of the Svea Court of Appeal of January 19, 2007, Case No. T 5208-05; Ecuador v. Occidental Exploration and Production Company, Judgment [2006] EWHC 345 (Comm), March 2, 2006; Czech Republic v. European Media Ventures *SA*, Judgment on jurisdiction [2007] EWHC 285 (Comm), December 5, 2007; The Czech Republic v. Saluka Investments BV, Judgment of the Federal Court of Switzerland, September 7, 2006.

9 The Czech Republic v. CME Czech Republic B.V., Judgment of the Svea Court of Appeal of May 15, 2003; The Czech Republic v. Pren Nreka, Recours en Annulation, Court d'Appel de Paris, Arret du 25 September 2008.

10 The United Mexican States v. Metalclad Corporation, Judgment of the Supreme Court of British Columbia, May 2, 2001; Mexico v. Feldman, Ontario Superior Court of Justice, December 3, 2003; Raymond L. Loewen v. United States of America, United States District Court for the District of Columbia; Civil Action No. 04-2151, October 31, 2005; International Thunderbird Gaming Corporation v. Mexico, Civil Action 06-00748, United States District Court for the District of Columbia,February 14, 2007; Lebanon v. France Télécom Mobiles Internationales SA and FTML SAL, Federal Court of Switzerland, November 10, 2005; The Republic of Poland v. Eureko, Court of First Instance of Brussels, November 23, 2006, RG 2005/1542/A; The Czech Republic v. CME Czech Republic B.V., Judgment of the Svea Court of Appeal of May 15, 2003, Case No. T-8735-01.

11 Saar Papier Vertriebs GmbH v. The Republic of Poland, Judgment ofMarch 1, 2002; The United Mexican States v. Metalclad Corporation, Judgment of the Supreme Court of British Columbia, May 2, 2001; Mexico v. Feldman, Ontario Superior Court of Justice, December 3, 2003.

12 Ecuador v. Occidental Exploration and Production Company, Judgment, [2006] EWHC 345 (Comm), March 2, 2006; The Russian Federation v. Sedelmayer, Judgment of the Stockholm District Court, December 12, 2002, Case No. T6-583-98.

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treaty interpretation, such as whether the claimant qualifies as an "investor" as defined in the treaty, whether the claimant has made an "investment" as defined in the treaty, whether the dispute is covered by the dispute resolution clause of the treaty, etc.

In the 19 reviewed cases, challenges based on any of the *other* grounds mentioned—i.e., excess of mandate, procedural irregularities, due process, and public policy—did not raise issues unique to investment treaty arbitration. This suggests that challenges of arbitral awards based on these other grounds are similar to challenges in regular international commercial arbitration.

THE LEGAL FRAMEWORK FOR REVIEW AND CHALLENGE OF INVESTMENT TREATY AWARDS

For obvious reasons, public international law plays a significant role in investment treaty arbitration. The issues in dispute are normally decided in accordance with the applicable investment treaty supplemented by rules and principles of customary public international law. The rules and principles of public international law relating to the interpretation of treaties and the law of state responsibility will often be decisive.[13] Also, the dispute resolution provisions in investment treaties are part of public international law and, as such, are interpreted in accordance with the rules and principles of public international law relating to the interpretation of treaties.

The significance of public international law notwithstanding, in non-ICSID investment arbitration, the arbitral procedure is ultimately anchored in a national jurisdiction.[14] To date, arbitration under the ICSID Convention is the only form of settlement of investment disputes that provides for a completely "delocalized" arbitral procedure, in the sense that the arbitral procedure is not subject to the laws of any national jurisdiction. ICSID arbitrations are governed by the ICSID Convention and its self-contained system for annulment of arbitral awards and for their recognition and enforcement.

In non-ICSID arbitration, including arbitration under the ICSID Additional Facility, on the other hand, the arbitral procedure is ultimately subject to the law applicable at the seat of the arbitration. This means that in all non-ICSID arbitration, be it *ad hoc* arbitration under the UNCITRAL Rules or administered arbitration under the ICSID Additional Facility, the ICC Rules, or the SCC Rules, the normal way to challenge an investment treaty award is through municipal courts. Thus, in non-ICSID investment arbitration, the seat of arbitration plays a significant role.[15]

Most jurisdictions with modern arbitration legislation accept the finality of arbitral awards. This means that the award is not subject to any appeal on the merits, can be set

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13 *See, e.g.*, K. Hobér, *State Responsibility and Attribution*, *in* The Oxford Handbook of International Investment Law (Muchlinski et al., eds., 2008).

14 *See also* J. van Haersolte-van Hof & A. Hoffmann, *The Relationship Between International Tribunals and Domestic Courts*, *in* The Oxford Handbook of International Investment Law (Muchlinski et al., eds., 2008); C. Dugan et al., Investor-State Arbitration 635–673 (2008).

15 *See also* S. Wilske, *The Global Competition for the 'Best Place' of Arbitration for International Arbitrations*, 1(1) Contemp. Asia Arbitration J. 21–66 (2008).

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aside only on narrowly defined procedural grounds, and is immediately enforceable under the New York Convention.

Although the grounds on which an arbitral award may be set aside vary from jurisdiction to jurisdiction, modern arbitration legislation is to a large extent based on similar principles with regard to the challenge and review of arbitral awards. To date, more than 60 individual jurisdictions have adopted the UNCITRAL Model Law. Moreover, most non-Model Law jurisdictions that frequently host international arbitrations have adopted arbitration legislation in line with the UNCITRAL Model Law with regard to the challenge of arbitral awards.[16] The most important of these widely recognized principles is that the grounds for setting aside an award do not allow any review of the merits of the arbitral award. The correctness of the arbitral tribunal's determination of legal and factual issues is not for the court that hears the challenge to review. Instead, the review is limited to four main categories: (i) the jurisdiction of the arbitral tribunal,[17] (ii) irregularities with regard to the independence or impartiality of arbitrators,[18] (iii) procedural irregularities and violations of due process,[19] and (iv) public policy and arbitrability.[20]

DECISIONS BY MUNICIPAL COURTS

This section sets out 10 cases dealing with one or more of the investment arbitration issues on which this chapter focuses: (i) do municipal courts have jurisdiction to determine challenges of investment treaty awards, (ii) is it appropriate for municipal courts to review investment treaty awards, and (iii) what standards of review do municipal courts apply when they review challenges to the jurisdiction of the arbitral tribunal?[21] The presentation of these cases is limited to elements of relevance for the abovementioned issues. The cases are presented in chronological order. It is essential to keep in mind that each judgment and decision is based on the facts, arguments, and evidence presented in such case. Caution is thus required when trying to draw general conclusions based on a limited number of individual cases.

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16 Jernej Sekolec & Nils Eliasson, *The UNCITRAL Model Law on Arbitration and the Swedish Arbitration Act: A Comparison*, *in* THE SWEDISH ARBITRATION ACT OF 1999, FIVE YEARS ON: A CRITICAL REVIEW OF STRENGTHS AND WEAKNESSES (Heuman & Jarvin, 2006).

17 *See, e.g.*, the UNCITRAL Model Law Article 34(2)(a)(i) and 34(2)(a)(iii).

18 *See, e.g.*, the UNCITRAL Model Law 34(2)(a)(iv).

19 *See, e.g.*, the UNCITRAL Model Law Article 34(2)(a)(ii) and 34(2)(a)(iv).

20 *See, e.g.*, the UNCITRAL Model Law Article 34(2)(b)(i) and 34(2)(b)(ii).

21 See p. 637, *supra*. The scope of this article has caused us not to include certain well-known challenge cases, i.e., *The Czech Republic v. CME Czech Republic B.V., Mexico v. Feldman* and *The Republic of Poland v. Eureko*. The reason is that such cases do not raise any of the three issues on which we have chosen to focus in this contribution. Another case which has not been included is *Mr Nagel v. The Czech Republic*. The reason is that this case, although raising issues of jurisdiction, turned on the fact that the reviewing court found that the srbitral tribunal had rejected Mr Nagel's claim on the merits rather than dismissing the claim for want of jurisdiction. See further note 153, *infra*.

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THE REPUBLIC OF POLAND V. SAAR PAPIER VERTRIEBS GMBH

The dispute between Saar Papier and the Republic of Poland concerned a factory in Poland established by Saar Papier in 1990 with the intention of producing recycled paper products using imported used paper. Although Saar Papier first obtained a license from the Polish Agency for Foreign Investments to operate its investment, it soon ran into difficulties with the Polish environmental authorities, which in 1991 stopped Saar Papier's import of used paper from Germany. In a first arbitration, pursuant to the German-Polish BIT, under the UNCITRAL Arbitration Rules and with the seat of arbitration in Zurich, the arbitral tribunal ruled that Poland's treatment of Saar Papier had been "tantamount to an expropriation" and ordered compensation.[22] Thereafter, Saar Papier commenced a second arbitration seeking damages for a subsequent time period during which Poland allegedly continued to block Saar Papier's operations. In an interim award, the arbitral tribunal ruled that it had jurisdiction and that Saar Papier, in principle, was entitled to compensation, the quantum of which was deferred to a second stage.

The Republic of Poland challenged the interim award before the Swiss Federal Court[23] and argued, *inter alia*, that the arbitral tribunal did not have jurisdiction over the subject matter of the dispute. In accordance with Article 11[24] of the German-Polish BIT, the investor's right to arbitration was limited to disputes under Article 4.2 (expropriation) and Article 5 (free transfer of payments). The Republic of Poland claimed that, since it had not committed an act of expropriation, the arbitral tribunal lacked jurisdiction. The Republic of Poland further claimed that since it was a precondition for jurisdiction of the arbitral tribunal under the German-Polish BIT that the dispute was about expropriation, the Federal Court was entitled freely to review the arbitral tribunal's finding of expropriation.[25]

The Federal Court did not agree. As to the standard of review for challenges of the jurisdiction of the arbitral tribunal, the Federal Court held that it must make a free assessment as to whether the arbitral tribunal had been correct in finding that it had jurisdiction.[26] The Federal Court emphasized, however, that this did *not* mean that the Court, as part of such review, like an appellate body, would be entitled to review the circumstances of the case.[27] Whether or not the arbitral tribunal had been correct in

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22 This award, and the subsequent awards between the same parties, are not in the public domain. The information we have been able to collect is based on information provided in the Swiss court cases which we will discuss below in this section.

23 The Republic of Poland v. Saar Papier Vertriebs GmbH, Judgment of the Federal Court of September 20, 2000.

24 Article 11 of the German-Polish BIT provides in relevant parts that *"(1) Disputes with regard to investments between either Contracting Party and an investor of the other Contracting Party should, if possible, be settled amicably between the parties to the dispute. (2) If a dispute under paragraph 2 of Article 4 or under Article 5 has not been settled within six months after it has been raised by one of the parties to the dispute, either of the parties to the dispute shall be entitled to appeal to an international arbitral tribunal . . . ."*

25 The Republic of Poland v. Saar Papier Vertriebs GmbH, para. 4.*a*.

26 The Republic of Poland v. Saar Papier Vertriebs GmbH, para. 4.b.

27 The Republic of Poland v. Saar Papier Vertriebs GmbH, para. 4.b.

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finding that the Republic of Poland had committed an act of expropriation did not affect the jurisdiction of the arbitral tribunal. Therefore, the Republic of Poland's challenge of the jurisdiction of the arbitral tribunal was denied.

The Republic of Poland also argued that, by awarding Saar Papier damages in the first arbitration, the arbitral tribunal had exhausted its jurisdiction with respect to the dispute between the parties regarding the prohibited import of used paper. Therefore, on the grounds of res judicata, Saar Papier was precluded from bringing its new claims in the second arbitration.[28] The Federal Court dismissed the Republic's res judicata claim on procedural grounds. Under Swiss law, if an arbitral tribunal rules on a claim which is res judicata, such error constitutes a violation of procedural public policy. It does not, however, affect the jurisdiction of the arbitral tribunal.[29] Under Swiss law, an interim award may only be challenged on the grounds that the arbitral tribunal was not properly constituted or that the arbitral tribunal lacked jurisdiction.[30] Other grounds for setting aside an arbitral award (excess of mandate, procedural irregularities, and public policy) may only be invoked in challenge proceedings against a final award.[31]

UNITED MEXICAN STATES V. METALCLAD CORPORATION

The Arbitration

In this case,[32] Metalclad alleged that Mexico interfered with its development and operation of a hazardous waste landfill in violation of NAFTA Article 1105 (fair and equitable treatment)[33] and NAFTA Article 1110 (expropriation).[34] The arbitral proceedings were conducted pursuant to the ICSID Additional Facility Rules. The seat of arbitration was Vancouver. The essence of Metalclad's claim was that even though the federal Mexican authorities had assured Metalclad that all authorizations required had

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28 The Republic of Poland v. Saar Papier Vertriebs GmbH, para. 3a.

29 The Republic of Poland v. Saar Papier Vertriebs GmbH, para. 3b.

30 *See* Article 190(3) of the Federal Staute of Private International Law (1988).

31 At the final, or quantum, stage, the arbitral tribunal rejected the entire amount claimed by Saar Papier, and Saar Papier unsuccessfully challenged the final award before the Federal Court. (Saar Papier Vertriebs GmbH v. The Republic of Poland, Judgment of March 1, 2002.) However, none of the grounds invoked by Saar Papier is of relevance for the issues discussed in this chapter.

32 Metalclad Corporation v. The United Mexican States, Award, August 30, 2000, ICSID Case No. ARB(AF)/97/1.

33 Article 1105(1) of NAFTA reads as follows: "*Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security*."

34 Article 1110 of NAFTA reads as follows: "*no Party to NAFTA may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment, except: (a) for a public purpose; (b) on a non–discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6*."

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been issued, local authorities refused to issue a construction permit that was required under local laws and regulations. An injunction essentially barred the landfill from operation from 1995 to 1999. In addition, the authorities issued an Ecological Decree in 1997 which permanently prevented Metalclad's use of its investment.

The arbitral tribunal held that Metalclad had not been treated fairly and equitably, in violation of Article 1105,[35] that the actions of the Mexican authorities constituted measures tantamount to expropriation, in violation of Article 1110,[36] and that the implementation of the Ecological Decree, in and of itself, constituted an act tantamount to expropriation.[37] Metalclad was awarded damages.

The Challenge Proceedings

Mexico challenged the award before the Supreme Court of British Columbia,[38] pursuant to Article 34 of the Canadian International Commercial Arbitration Act (International CAA), which is based on the UNCITRAL Model Law.[39] Mexico argued, *inter alia*, that the arbitral tribunal's finding that Mexico had breached Articles 1105 and 1110 of the NAFTA involved decisions beyond the scope of the submission to arbitration, since the arbitral tribunal had used the transparency provisions in Chapter 18 of the NAFTA as a basis for finding a breach of Article 1105 and as a basis for its first finding of expropriation under Article 1110 while, under the investment protection regime of the NAFTA, the mandate of the arbitral tribunal only extended to violations of Chapter 11.

The Court agreed with Mexico that, in making its decision that Mexico had violated Article 1105, as well as its first finding of expropriation, on the basis of the *concept of transparency*, the arbitral tribunal had decided a matter beyond the scope of the submission to arbitration. Since the tribunal had not cited any authority or introduced any evidence that transparency was part of customary international law, the Court rejected Metalclad's argument that the tribunal simply had interpreted Article 1105 to include a minimum standard of transparency.[40] Regarding the arbitral tribunal's second

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35 Metalclad Corporation v. The United Mexican States, para. 99.

36 *Ibid.*, para. 104.

37 *Ibid.*, para. 111.

38 The United Mexican States v. Metalclad Corporation, Judgment of the Supreme Court of British Columbia, May 2, 2001.

39 In relevant parts Article 4 of the UNCITRAL Model Law reads as follows: "*[. . .](2) An arbitral award may be set aside by the court specified in article 6 only if: (a) the party making the application furnishes proof that: (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; [. . .] (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside[. . .].*"

40 The United Mexican States v. Metalclad Corporation, paras. 70, 76, and 79.

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finding of expropriation, the Court found that the arbitral tribunal's conclusions with regard to the Ecological Decree were based on its interpretation of Article 1110 and not on lack of transparency.[41] Accordingly, the Court found that the award could only be partially set aside, in relation to the first two findings but not the third.

THE RUSSIAN FEDERATION V. SEDELMAYER

The Arbitration

The dispute between Mr. Sedelmayer and the Russian Federation arose out of a forced transfer of certain premises in St. Petersburg belonging to Mr. Sedelmayer's Russian investment, a local joint venture company in which Mr. Sedelmayer had invested through SGC International, incorporated in the United States. Mr. Sedelmayer, as the ultimate investor controlling SGC International, commenced arbitral proceedings under the German-Soviet BIT, claiming expropriation of his investment. The arbitral proceedings were conducted under the auspices of the Arbitration Institute of the Stockholm Chamber of Commerce. The seat of arbitration was Stockholm. The arbitral tribunal ruled in favor of Mr. Sedelmayer.[42] However, one of the arbitrators filed a dissenting opinion to the effect that the arbitral tribunal did not have jurisdiction under the German-Soviet BIT, since the investments in question had been made by a U.S. corporation and not by Mr. Sedelmayer, and since there is no BIT in force between the United States and the Russian Federation.

The Challenge Proceedings

The Russian Federation challenged the arbitral award before the Stockholm District Court[43] on the ground that the arbitral tribunal had no jurisdiction.[44]

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41 *Ibid.*, paras. 92–95.

42 The *Sedelmayer* case is discussed in greater detail in KAJ HOBÉR, INVESTMENT ARBITRATION IN EASTERN EUROPE: IN SEARCH FOR A DEFINITION OF EXPROPRIATION 46–60 (2007).

43 The challenge proceedings in this case were brought under the old Swedish Arbitration Act of 1929, which was in force in Sweden until April 1, 1999 when the new Arbitration Act entered into force. The grounds for setting aside arbitral awards under the old Arbitration Act were more or less the same as under the new Act. One difference, however, is that under the old Arbitration Act, lack of a valid arbitration agreement, constituted a ground for invalidity of the arbitral award, which could be invoked without any time limitation. Under the new Arbitration Act, on the other hand, the lack of a valid arbitration agreement constitutes a ground for setting aside the arbitral award. Such an action for setting aside an arbitral award must be brought within three months from the date on which the party received the award. Another difference is that under the old Arbitration Act, an action for setting aside an arbitral award commenced in the District Court, with the right to appeal the judgment of the District Court to the Court of Appeal. Under the new Arbitration Act, on the other hand, an action to set aside an arbitral award is brought directly before the Court of Appeal.

44 The Russian Federation v. Sedelmayer, Judgment of the Stockholm District Court, December 12, 2002, Case No. T6-583-98. For English translations of the judgment of the Stockholm District Court, see 2 STOCKHOLM INTERNATIONAL ARBITRATION REVIEW 2005.

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Jurisdiction of the courts of Sweden. Mr. Sedelmayer claimed that the courts of Sweden lacked jurisdiction to hear the challenge. He argued that the arbitral proceedings as well as the award were governed by public international law and that the award therefore could not be challenged under the Swedish Arbitration Act.[45] In the alternative, Mr. Sedelmayer argued that, despite the fact that the seat of arbitration was Stockholm, the arbitral award should be equated with a foreign arbitral award and therefore was not challengeable under the Swedish Arbitration Act.[46] Finally, Mr. Sedelmayer argued that it was implied in the German-Soviet BIT that the Contracting parties had agreed that an arbitral award issued under the BIT could not be challenged in municipal courts.[47]

The Stockholm District Court dealt very briefly with Mr. Sedelmayer's objections to its jurisdiction. The Court emphasized that it was a well-established principle of Swedish arbitration law that an arbitral award issued in proceedings having their seat in Sweden can be challenged before the Swedish courts, even if neither of the two parties has any connection to Sweden. Since the seat of arbitration in the present case was Stockholm, the proceedings—unless otherwise agreed between the parties—were governed by the Swedish Arbitration Act, and the award must be regarded as a Swedish arbitral award that can be challenged in accordance with the provisions of the Swedish Arbitration Act. Mr. Sedelmayer had not established that the parties had agreed that any of the provisions of the Swedish Arbitration Act should not apply to the proceedings or to the award. The Court concluded that, at least where one of the parties to the arbitration was a subject of municipal law, and not a sovereign state, the fact that the arbitration was based on a treaty concluded between two sovereign States did not cause it to reach a different conclusion.[48]

Jurisdiction of the arbitral tribunal. The Russian Federation argued that the tribunal lacked jurisdiction for three reasons. *First*, indirect investments, such as Mr. Sedelmayer's, fell outside the scope of the arbitration clause in the German-Soviet BIT. *Second*, Mr. Sedelmayer could not be regarded as an "investor" under the German-Soviet BIT, since he did not have his "*permanent place of residence*"[49] in Germany. *Third*, the request for arbitration had been directed to the Procurement Department of the Russian Federation and not to the Russian Federation,and no arbitration agreement existed between the Procurement Department and Mr. Sedelmayer; accordingly, the decision by the arbitrators to issue its award against the Russian Federation had no legal effect between the parties.

45 *Ibid.*, p. 8.

46 *Ibid.*

47 *Ibid.*

48 *Ibid.*, p.16.

49 Article 1(c) of the German-Soviet BIT provides that "'*investor' means an individual having a permanent place of residence in the area covered by this Agreement, or a body corporate having its registered office therein, authorized to make investments*."

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The District Court found that the first two grounds relied on by the Russian Federation should be resolved applying the so-called "doctrine of assertion,"[50] a Swedish procedural law principle which means that the dispute falls within the jurisdiction of the arbitral tribunal if one of the parties asserts that its claim comes within the scope of the agreement which contains the arbitration clause, provided that such assertion is not completely without foundation and provided that there is no dispute as to the validity of the arbitration agreement.[51] This meant that Mr. Sedelmayer's assertion that he was an "investor" with a "permanent place of residence" in Germany, thus being assured of investment protection under the German-Soviet BIT, was sufficient to establish jurisdiction for the arbitral tribunal.[52]

The District Court also explained, however, that the application of the doctrine of assertion did not mean that the arbitral tribunal subsequently, when ruling on the merits of the dispute, would be bound by the determination of these issues for the purpose of jurisdiction. Whether or not Mr. Sedelmayer in fact was an "investor" who had made an "investment" in Russia would still have to be determined by the arbitral tribunal as part of the merits. Such determination, however, could not be subject to court review in challenge proceedings, since it is part of the merits of the dispute.[53]

Regarding the argument by the Russian Federation that the request for arbitration had been directed to the Procurement Department of the Russian Federation and not to the Russian Federation, the District Court noted that under the German-Soviet BIT, it was the Russian Federation—as a party to the BIT—that was the proper Respondent regarding claims under the BIT. The court found that since the Procurement Department was the state organ directly involved in the forced transfer of the premises, the Russian Federation was properly represented in the arbitration through the Procurement Department.

The Russian Federation appealed the judgment of the Stockholm District Court to the Svea Court of Appeal. The Court of Appeal upheld the District Court's decision on the grounds given by the District Court.[54] Mr. Sedelmayer's objection to the jurisdiction of the courts of Sweden was dismissed by the Court of Appeal on procedural grounds, since Mr. Sedelmayer had failed to appeal the decision of the District Court rejecting his objection.[55]

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50 *See also* pp. 652–53, *infra*.

51 The Russian Federation v. Sedelmayer, p. 17. *See also* L. Heuman, Arbitration Law of Sweden: Practice and Procedure 56–63 (2003).

52 *Ibid.*, p.17.

53 *Ibid.*, p.18.

54 The Russian Federation v. Sedelmayer, Judgment of the Svea Court of Appeal, May 15, 2003, Case No. T8735-01, p.3. For English translations of the judgment of the Svea Court of Appeal, see 2 Stockholm International Arbitration Review 2005.

55 *Ibid.*, p. 3.

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CANADA AND THE UNITED MEXICAN STATES V. S.D. MYERS INC.

The Arbitration

In *S.D. Myers, Inc.* v. *Canada*,[56] S.D. Myers Inc. (SDMI), a family-owned corporation based in Ohio, claimed that Canada's ban on the export of PCB wastes from Canada to the United States in late 1995 had caused economic harm to its Canadian investment, S.D. Myers Inc. (Myers Canada), in violation, *inter alia*, of Canada's obligations under Article 1105[57] of the NAFTA. SDMI also claimed that the Canadian measures were tantamount to an expropriation in violation of Article 1110[58] of the NAFTA. The arbitral proceedings were brought pursuant to the UNCITRAL Arbitration Rules. The seat of arbitration was in Toronto.

In its first partial award, the tribunal held that, based on principles of indirect control, SDMI was an investor in Canada even though Myers Canada was owned only by the family members controlling SDMI and not by SDMI directly.[59] The tribunal also held that Canada had breached its obligations to accord to investments of investors of another NAFTA party treatment in accordance with international law, including fair and equitable treatment and full protection and security under Article 1105 of the NAFTA.[60] SDMI's expropriation claim, however, was denied.[61] In a second partial award on quantum, SDMI was awarded damages.[62]

The Challenge Proceedings

In an application to the Canadian Federal Court,[63] Canada asked to set aside the awards rendered by the arbitral tribunal. The application was filed pursuant to Article 34 of the Canadian Commercial Arbitration Code, which incorporates Article 34 of the UNCITRAL Model Law.[64] Mexico intervened in support of Canada. They jointly claimed, *inter alia*, that the arbitral tribunal had exceeded the scope of the arbitration agreement by dealing with disputes not contemplated by Chapter 11 of the NAFTA. Canada claimed that the decision of the arbitral tribunal to the effect that SDMI was covered by the definition of "*investor*" and that Myers Canada was "*an investment of the investor*" under Article 1139 of NAFTA went beyond the scope of the submission

56 S.D. Myers Inc v. Canada, First Partial Award and Separate Opinion, November 13, 2000, Second Partial Award, 21 October 2002, Final Award and Dissenting Opinion, 30 December 2002, *Ad ho* –UNCITRAL Arbitration Rules.

57 *See* note 33, *supra*.

58 *See* note 34, *supra*.

59 S.D. Myers Inc v. Canada, First Partial Award and Separate Opinion, paras. 22–32.

60 *Ibid.*, para. 268.

61 *Ibid.*, paras. 287–88.

62 *Ibid.*, paras. 300–01.

63 The Attorney General of Canada v. S.D. Myers Inc. (Federal Court of Canada), Judgment of January 13, 2004.

64 *See* note 39, *supra*.

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to arbitration.[65] Mexico claimed that the arbitral tribunal exceeded the scope of the submission to arbitration by applying Chapter 11 to "*cross-border and trade in services*" which are governed by Chapter 12 and are therefore beyond the scope of the submission to arbitration under Article 1139 of the NAFTA.[66]

SDMI argued that Canada, during the arbitral proceedings, did not object to the tribunal's jurisdiction to hear the dispute, as required by Article 21(3) of the UNCITRAL Arbitration Rules[67] and that Canada therefore must be deemed to have waived its right to judicial review of the jurisdiction of the arbitral tribunal.[68]

The Federal Court agreed with SDMI, on the grounds that the question whether SDMI was an "investor" and the question whether Myers Canada constituted an "investment" had only been discussed as a mixed matter of fact and law and not as an objection to jurisdiction. The Court found that:

> Jurisdiction is a term of art and legal objection must be raised clearly at the outset of the arbitration. Canada failed to do so in this case, and cannot now argue that the Tribunal did not have jurisdiction to render the three decisions which are the subject of these applications for judicial review. To find otherwise would undermine the clear and express procedures incorporated in NAFTA for the resolution of disputes.[69]

Since Canada had lost its right to claim that the arbitral tribunal lacked jurisdiction, the Court found that it did not have to determine Canada's or Mexico's applications. Nevertheless, the Court proceeded to do so, in the alternative that it was wrong in its conclusion that Canada had lost its right to challenge the tribunal's jurisdiction.

The Court found that the arbitral tribunal had exercised its power properly to apply the definition in Article 1139 "of investment of an investor of a Party" to the facts of the case.[70] The Court also found that the interpretation of Article 1139 proposed by Canada was "*a narrow, legalistic, restrictive interpretation contrary to the objectives of NAFTA and contrary to the purposive interpretation which NAFTA Article 2.01 and Article 31 of the Vienna Convention stipulate.*"[71] The Court therefore concluded that Canada's application would have been denied even if Canada had not lost its right to object to the arbitral tribunal's jurisdiction.

The Court also dismissed Mexico's claim that the arbitral tribunal had exceeded its mandate by applying Chapter 11 obligations to "*cross-border and trade in services*," which are governed by Chapter 12. The Court found that the different chapters of NAFTA overlap and that NAFTA rights are cumulative, unless there is a direct conflict between such cumulative rights. Since the rights under Chapter 12 were not inconsistent

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65 The Attorney General of Canada v. S.D. Myers Inc., p. 21.

66 *Ibid.*, p. 21.

67 Article 21(3) of the UNCITRAL Arbitration Rules provides that "*a plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter-claim.*"

68 The Attorney General of Canada v. S.D. Myers Inc., p. 21.

69 *Ibid.*, p. 24.

70 *Ibid.*, p. 29.

71 *Ibid.*, p. 30.

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with the rights under Chapter 11, and the award was based on SDMI's rights under Chapter 11, the Court found that the arbitral tribunal had not exceeded its mandate under NAFTA Article 1139.

THE REPUBLIC OF ECUADOR V. OCCIDENTAL EXPLORATION & PRODUCTION COMPANY

The Arbitration

The dispute between Occidental Exploration & Production Company (OEPC), a California corporation, and the Republic of Ecuador[72] concerned whether OEPC was entitled to refunds of VAT payments made in connection with its operations under its hydrocarbon exploration and exploitation contract with Ecuador. OEPC commenced arbitral proceedings under the U.S.-Ecuador BIT, claiming, among other things, breach of Ecuador's obligation under Article II.1 of the BIT[73] to afford equal treatment. The arbitral proceedings were conducted pursuant to the UNCITRAL Arbitration Rules. London was the seat of the arbitration.

Ecuador objected to the jurisdiction of the arbitral tribunal on the grounds, *inter alia*, that matters of taxation were expressly excluded from the applicability of the BIT, save for three limited exceptions not applicable in the present case. The arbitral tribunal found, however, that it had jurisdiction since it considered OEPC's claim to fall within the third exception, under the relevant BIT article, which provided that the BIT provisions apply to taxation with respect to:

> *the observance and enforcement of terms of an investment agreement or authorization as referred to in Article VI (1)(a) or (b)*, to the extent they are not subject to the dispute settlement provisions of a Convention for the avoidance of double taxation between the two Parties, or have been raised under such settlement provisions and are not resolved within a reasonable period of time. (emphasis added)

The arbitral tribunal arrived at this conclusion by finding that the dispute essentially was about determining whether the contract limited OEPC's right to VAT refunds under Ecuadorian law, which was a matter concerning the "*observance of an investment agreement*" within the meaning of Article X.2(c) of the BIT.[74]

As to the merits of the case, the arbitral tribunal concluded that the Participation Agreement did not limit OEPC's right to VAT refunds under Ecuadorian law. Since no

72 Occidental Exploration and Production Company v. Ecuador, Award, LCIA Case No. UN 3467, July 1, 2004.

73 In relevant parts Article II.1 reads as follows: "*Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favorable, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Protocol to this Treaty.[. . .]*"

74 *Occidental Exploration and Production Company v. Ecuador*, para. 77.

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VAT refunds had been made, Ecuador was in breach of its obligation (under Article II.1 of the BIT) to accord OEPC treatment no less favorable than that accorded to its own nationals or companies.[75] The arbitral tribunal awarded damages.

The Challenge Proceedings

Ecuador applied to the High Court of Justice of England and Wales to set aside the award under Section 67 of the English Arbitration Act of 1996.[76] Ecuador's main argument was that "matters of taxation" were outside the scope of the arbitral tribunal's jurisdiction pursuant to Article X of the BIT. Moreover, Ecuador argued that even if the exception in Article X.2(c) for matters of taxation with respect to "*the observance and enforcement of terms of an investment agreement or authorization*" would be deemed applicable, the jurisdiction of the arbitral tribunal did not extend beyond the observance and enforcement of terms of such an investment agreement or authorization. In particular,it did not give the arbitral tribunal jurisdiction to hear a claim based on violations of Article II.1 of the BIT. This was the first time that an investment treaty award was brought before the English courts.

Justiciability. OEPC challenged Ecuador's right to bring the claim under Section 67 of the Arbitration Act, arguing that the issue of the arbitrators' jurisdiction was not "justiciable"[77] before the English courts[78] because Ecuador's challenge would require the Court to interpret provisions of an international treaty, contrary to the rule of English law that such a task of interpretation is not justiciable in the English Courts.[79]

The Court accepted the rule, as expressed by the House of Lords in *The Tin Council Case*,[80] that a treaty which has not been incorporated into English law can create no

75 *Ibid.*, paras. 199–200.

76 In relevant parts Section 67 reads as follows: "*Challenging the award: substantive jurisdiction (1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court (a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or (b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.[. . .](3) On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order (a) confirm the award, (b) vary the award, or (c) set aside the award in whole or in part.[. . .].*"

77 The doctrine of nonjusticiability has been defined by the House of Lords in the following manner: "*It is axiomatic that municipal courts have not and cannot have the competence to adjudicate upon or to enforce the rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law.*" (J.H. Rayner (Mincing Lane) Ltd v. Department of Trade and Industry, [1989] 3 All ER 523.)

78 The High Court dealt with such objection in a separate judgment, Ecuador v. Occidental Exploration and Production Company (nonjusticiability), Judgment, [2005] EWHC 774 (Comm), April 29, 2005.

79 *Ecuador v. Occidental (nonjusticiability)*, para. 30.

80 J.H. Rayner Ltd v. Department of Trade, [1990] 2AC 418, at 476 (Lord Templeman) and 499–500 (Lord Oliver of Aylmerton).

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rights or obligations in domestic law.[81] However, the Court found that the rules of nonjusticiability as set out in *The Tin Council Case* did not apply in this case. The reason was, *inter alia*, that, although determining a challenge to the jurisdiction of an arbitral tribunal constituted under a BIT would require the Court to adjudicate upon rights arising out of transactions entered into between independent sovereign states on the plane of international law, they were rights that were intended to be invoked by municipal law entities, i.e., individuals and corporate entities that qualify as investors under the BIT, before arbitral tribunals constituted in accordance with and subject to control of the municipal arbitration laws at the seat of arbitration.[82] The Court therefore found that in this case, unlike *The Tin Council Case*, there was a foothold in domestic law for a ruling to be given on international law, i.e., the right given by Section 67 of the Arbitration Act to a party to an arbitration, whose seat is in England, Wales, and Northern Ireland, to challenge the jurisdictional ruling of the arbitral tribunal.[83] The Court therefore concluded that the doctrine of *"non-justiciability"* could not prevent the Court from entertaining Ecuador's application to challenge the jurisdiction of the tribunal under that section.

The decision of the High Court to admit Ecuador's challenge to the jurisdiction of the arbitral tribunal was appealed by OEPC to the Court of Appeal of England and Wales.[84] The Court of Appeal, however, found that the High Court had reached the correct conclusion.[85]

Jurisdiction. In a second stage of the proceedings, the High Court dealt with Ecuador's challenge of the jurisdiction of the arbitral tribunal.[86] As to the standard of review in case of a challenge to the jurisdiction of an arbitral tribunal under Section 67, the Court found that such challenge proceeds by way of a rehearing of matters before the arbitrators, the test for the Court being whether the arbitral tribunal had been *correct* in its decision on jurisdiction.[87]

The Court first noted that since the dispute that had been before the arbitral tribunal in the present case involved a matter of taxation, it could only come within the jurisdiction of the arbitral tribunal if it was covered by any of the three exceptions in Article X of the U.S.-Ecuador BIT.[88] The Court next turned to the question of whether the arbitral tribunal had been correct in finding that the dispute came within the ambit of matters of taxation with respect to "*observance and enforcement of terms of an investment agreement or authorization*" under Article X.2(c). The Court found that the

81 *Ecuador v. Occidental (nonjusticiability)*, para. 71.

82 *Ibid.*, para. 73.

83 *Ibid.* (nonjusticiability), paras. 73–76.

84 Occidental Exploration and Production Company v. Ecuador, Judgment of the Court of Appeal, [2005] EWCA Civ 1116, September 9, 2005.

85 Occidental Exploration and Production Company v. Ecuador (nonjusticiability), Judgment of the Court of Appeal, paras. 57–58.

86 Ecuador v. Occidental Exploration and Production Company, Judgment, [2006] EWHC 345 (Comm), March 2, 2006.

87 *Ibid.*, para. 7.

88 *Ibid.*, para. 93.

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dispute involved a matter of taxation that "had reference to" the "performance" of the "obligations of the Contract."[89] It gave three reasons: First, the right to a VAT refund had reference to the obligations of OEPC to do all that was necessary to exploit the oil under the contract and because it was paid in respect of purchases made in pursuance of the obligation to build all systems needed for the exploitation of that oil. Second, it had reference to OEPC's contractual obligation to pay all taxes according to Ecuador's laws, the dispute being whether that contractual obligation was concluded on the assumption or understanding that there would be a refund of VAT paid. Third, the underlying assumptions of the parties as to the "economy" of the Contract formed the basis of the bargain contained in the Contract's terms and were fundamental to how the Contract terms were to be observed and enforced.[90]

Finally, as regards Ecuador's argument that even if the exception in Article X.2(c) were to be applied, it did not bring within the jurisdiction of the arbitral tribunal a claim based on Article II with regard to matters of taxation, the Court concluded that, if a "matter of taxation" falls within the scope of any of paragraphs (a), (b), or (c), then the whole BIT applies to that "matter of taxation."[91]

Ecuador appealed the judgment of the High Court to the Court of Appeal of England and Wales.[92] The Court of Appeal, however, upheld the judgment of the High Court.[93]

PETROBART LIMITED V. KYRGYZ REPUBLIC AND KYRGYZ REPUBLIC V. PETROBART LIMITED

The dispute between Petrobart Ltd (Petrobart) and the Kyrgyz Republic has given rise to two separate investment arbitrations and two separate challenge proceedings before the Courts of Sweden.

Petrobart I

The arbitration. Petrobart Ltd (Petrobart), a company registered in Gibraltar, entered into a contract with the Kyrgyz state-owned joint stock company Kyrgyzgazmunaizat (KGM) regarding the supply of stable gas condensate. Petrobart delivered five shipments of gas but was only paid for the first two. At the same time as Petrobart turned to domestic courts for recourse, Kyrgyz authorities—as part of a reform of the system for supply of oil and gas in the Kyrgyz Republic and to deal with the critical financial situation of KGM—took certain measures that made it impossible for Petrobart to

89 *Ibid.*, para. 107.
90 *Ibid.*, para. 108.
91 *Ecuador v. Occidental Exploration and Production Company*, para. 96.
92 Ecuador v. Occidental Exploration and Production Company, Judgment of the Court of Appeal, [2007] EWCA Civ 656, July 4, 2007.
93 *Ibid.*, paras. 57–58.

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enforce its rights under the contract. Petrobart initiated arbitral proceedings against the Kyrgyz Republic under the Law on Foreign Investments in the Kyrgyz Republic. The arbitral proceedings were conducted under the UNCITRAL Arbitration Rules. The seat of arbitration was Stockholm.

The arbitral tribunal found that it lacked jurisdiction to determine Petrobart's claim, since Petrobart had not made an investment in the Kyrgyz Republic that qualified as an "investment" under the Foreign Investment Law. The tribunal therefore dismissed the dispute in its entirety without any determination of the merits.

The Challenge Proceedings. Petrobart challenged the arbitral award before the Svea Court of Appeal in Stockholm in accordance with Section 36[94] of the Swedish Arbitration Act (1999).[95] Parallel to the challenge proceedings, Petrobart commenced new arbitral proceedings under the ECT.[96]

In the challenge proceedings, Petrobart argued that, in order for an arbitral tribunal to have jurisdiction to rule on the merits of a claim, it is generally sufficient that the claimant has invoked circumstances (whether true or not) that—if they were true—would establish jurisdiction (the doctrine of assertion[97]). Applied to the present case, Petrobart argued that this doctrine meant that it was sufficient that Petrobart claimed to have made an "investment" under the Foreign Investment Law in order to establish jurisdiction for the arbitral tribunal to determine the merits of the claim. The question of whether Petrobart actually had made such an investment would be a substantive matter which (unlike matters of jurisdiction) could not be reviewed by national courts. Petrobart also argued that the tribunal in any event had erred in finding that Petrobart was not an "investor" under the Foreign Investment Law, which according to Petrobart, *inter alia*, was evidenced by the fact that the ECT arbitral tribunal in *Petrobart II* had found that Petrobart's investment qualified as an "investment" under the ECT.

The Court of Appeal agreed with the UNCITRAL tribunal that the question whether Petrobart had made an "investment" in accordance with the Foreign Investment Law was a matter of jurisdiction. It also found that, in order for the tribunal to have jurisdiction, it had to be established that the investor actually had made an "investment" in accordance with the Foreign Investment Law. Thus, according to the Court, it was not sufficient that the investor claimed that it had made such an investment. The Court did not consider it persuasive that the ECT Tribunal had found that Petrobart had made an investment, given that the ECT Tribunal had relied on the definition of "investment" in the ECT and not in the Foreign Investment Law. Thus, the Court fully upheld the tribunal's decision on jurisdiction.

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94 Under Section 36 of the Arbitration Act, the Court of Appeal may review (and revise) negative jurisdictional rulings by the arbitral tribunal. In relevant parts, Section 36 reads as follows: *"An award whereby the arbitrators concluded the proceedings without ruling on the issues submitted to them for resolution may be amended, in whole or in part, upon the application of a party.[. . .]."*

95 Petrobart Limited v. Kyrgyz Republic, Judgment of the Svea Court of Appeal of April 13, 2006, Case No. T 3739-03.

96 These proceedings are discussed on pp. 653–54, *infra*.

97 *See also* pp. 644–45, *supra*.

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Despite the fact that Petrobart's claim in the meantime had been partially granted by the ECT tribunal *in Petrobart II*, Petrobart appealed the decision of the Court of Appeal to the Swedish Supreme Court. The Supreme Court found that the arbitral tribunal had been wrong in finding that it did not have jurisdiction.[98] It took the view that, in deciding it did not have jurisdiction, the arbitral tribunal had made a substantive determination that Petrobart had not made a foreign investment within the meaning of the Foreign Investment Law. The Supreme Court held that, when deciding on its jurisdiction, the arbitral tribunal should have assumed that the factual circumstances referred to by the claimant were at hand. If this had been done, the arbitral tribunal would—in the opinion of the Supreme Court—have found that it had jurisdiction.[99]

Petrobart II

The arbitration. As mentioned, subsequent to the negative jurisdictional ruling in *Petrobart I*, Petrobart initiated new arbitral proceedings against the Kyrgyz Republic, this time under the ECT.[100] The circumstances invoked by Petrobart were essentially the same as in *Petrobart I*. The proceedings were conducted under the auspices of the Arbitration Institute of Stockholm Chamber of Commerce. The seat of arbitration was Stockholm. Also, in these proceedings, the Kyrgyz Republic disputed the jurisdiction of the ECT tribunal, *inter alia*, on the ground that Petrobart had not made an "investment" within the meaning of the ECT. The ECT tribunal, however, disagreed and found that Petrobart had made an "investment" within the meaning of the ECT.

The Kyrgyz Republic also argued that the previous decision of the arbitral tribunal in *Petrobart I* was a bar to Petrobart's claim under the ECT on the grounds of res judicata. The arbitral tribunal, however, rejected the res judicata defense as the two arbitrations were based on different arbitration clauses, *viz.*, the first arbitration was based on a clause in the Foreign Investment Law of the Kyrgyz Republic and the other arbitration on a clause in the ECT, and also since the first arbitration dealt with alleged violations of Kyrgyz law, whereas the other dealt with alleged violations of the ECT.[101]

As to the merits of the case, the arbitral tribunal found that the Kyrgyz Government had failed to provide fair and equitable treatment to Petrobart, by transferring assets from KGM to a newly established company to the detriment of KGM's creditors,

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98 Petrobart Limited v. Kyrgyz Republic, Judgment of the Supreme Court of March 28, 2008, Case No. 2113-06.

99 *Ibid.*, pp. 6–7.

100 Petrobart Ltd v. Kyrgyzstan, Award, SCC Case No. 126/2003, March 29, 2005. The *Petrobart* case is also discussed in greater detail in Kaj Hobér, *'The Energy Charter Treaty–Awards rendered'* DISPUTE RESOLUTION INTERNATIONAL 1–22 (2007) and *in* KAJ HOBÉR, INVESTMENT ARBITRATION IN EASTERN EUROPE: IN SEARCH FOR A DEFINITION OF EXPROPRIATION 209–20 (2007).

101 *Ibid.*, pp 65–66.

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including Petrobart, and by intervening in court proceedings regarding the execution of a judgment against KGM to the detriment of Petrobart.[102]

The challenge proceedings. It was then the Kyrgyz Republic's turn to challenge the ECT Award before the Svea Court of Appeal.[103] The Kyrgyz Republic argued that there was no valid arbitration agreement between Petrobart and the Kyrgyz Republic, since the ECT was not applicable with respect to investors of Gibraltar because, while Gibraltar had been included in the United Kingdom's declaration of provisional application upon signature of the ECT, it was not listed in its subsequent instrument of ratification which, they argued, had the effect of terminating the provisional application. The Kyrgyz Republic also argued that there was no valid arbitration agreement in this case since the delivery of gas did not constitute an "investment" under the ECT.

In its determination of whether the ECT applied to investors of Gibraltar, the Court turned to Article 45 of the ECT, which governs the treaty's provisional application in relation to signatory states that have not yet ratified the treaty.[104] Article 45(3)(a)[105] stipulates that a signatory state may terminate its provisional application of the ECT by a special notification to the depository, declaring its intention not to become a contracting party to the treaty. The provisional application of the ECT also ends when a signatory state ratifies the treaty. The Court noted that the ECT does not expressly regulate the situation in the present case where the provisional application of the treaty and the final ratification do not have the same territorial scope. The Court found that, had the intention been to terminate the provisional application with regard to Gibraltar, the United Kingdom should have explicitly declared this when ratifying the treaty. The noninclusion of Gibraltar in the United Kingdom's instrument of ratification meant that Gibraltar was still covered by the provisional application of the ECT and, accordingly, a valid arbitration agreement was in effect between the parties when Petrobart made its investment as well as when Petrobart initiated arbitral proceedings against the Kyrgyz Republic under the ECT. As to the Kyrgyz Republic's second objection, i.e., that Petrobart had not made an "investment" within the meaning of the ECT, the Court simply stated that the term "investment" in the ECT should be given a broad

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102 *Ibid.*, p. 76.

103 Kyrgyz Republic v. Petrobart Limited, Judgment of the Svea Court of Appeal of January 19, 2007, Case No. T 5208-05.

104 The provisional application of the ECT—in particular in relation to the Russian Federatio— is dealt with in greater detail in K. Hobér, 'The Energy Charter Treaty —An Overview'(2007), 8(3) The Journal of World Investment & Trade 323–56. Moreover, the provisional application of the ECT in relation to the Russian Federation is also subject to arbitral proceedings in two of the *Yukos* cases, *viz.*, *Yukos Universal Ltd. (U–Isle of Man) v. Russian Federation*, *Ad Hoc* UNCITRAL Arbitration Rules; and *Hulley Enterprises Ltd. (Cyprus) v. Russian Federation*, *Ad Hoc* UNCITRAL Arbitration Rules.

105 Article 45(3)(a) of the ECT reads as follows: "*Any signatory may terminate its provisional application of this Treaty by written notification to the Depository of its intention not to become a Contracting Party to the Treaty. Termination of provisional application for any signatory shall take effect upon the expiration of 60 days from the date on which such signatory's written notification is received by the Depository.*"

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interpretation and agreed with the conclusion of the arbitral tribunal that Article 1(5)[106] and 1(6)[107] of the ECT must be interpreted such that Petrobart must be deemed to have made an "investment." The request to set aside the award was denied.

THE CZECH REPUBLIC V. SALUKA INVESTMENTS BV

The Arbitration

The arbitration between Saluka Investments BV (Saluka) and the Czech Republic[108] arose out of events consequent upon the reorganization and privatization of the Czech banking sector, in which Saluka, a Netherlands subsidiary of the Japanese Nomura group, acquired shares in IPB, one of the so-called Big Four Czech Banks. Saluka initiated arbitration proceedings against the Czech Republic under the Netherlands-Czech Republic BIT, claiming that IPB was unreasonably excluded from Czech assistance given to the other three major banks to deal with a "systemic" bad debt problem which equally affected all of the Big Four. That exclusion, Saluka claimed, resulted in loss of its investment. The arbitral proceedings were conducted pursuant to the UNCITRAL Arbitration Rules. The seat of arbitration was Geneva. The arbitral tribunal found that the Czech Republic had violated the "fair and equitable treatment" obligation and the "nonimpairment obligation" under Article 3.1 of the BIT by responding to the bad debt problem in the Czech banking sector in a way which accorded IPB differential treatment without a reasonable justification.[109]

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106 Article 1(5) reads as follows: "'*Economic Activity in the Energy Sector' means an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products except those included in Annex NI, or concerning the distribution of heat to multiple premises*."

107 Article 1(6) reads in relevant parts as follows: "'*Investment' means every kind of asset, owned or controlled directly or indirectly by an Investor and includes: (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges; (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise; (c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment; (d) Intellectual Property; (e) Returns; (f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector. [. . .]*"

108 Saluka Investments BV v. Czech Republic, Partial Award, *Ad Hoc* UNCITRAL Arbitration Rules, March17, 2006.

109 Article 3, paragraphs 1 and 2 of the BIT, provided that:

> 1.Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors.
>
> 2. More particularly, each Contracting Party shall accord to such investments full security and protection which in any case shall not be less than that accorded either to investments of its own investors or to investments of investors of any third States, whichever is more favourable to the investor concerned.

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The Challenge Proceedings

The Czech Republic challenged the award before the Federal Court of Switzerland.[110] According to the Czech Republic, the decision on how the financial assistance was to be distributed was finally and conclusively made through a formal and binding governmental decision dated May 27, 1998. This meant, according to the Czech Republic, that even if the provisioning of financial assistance constituted unfair and discriminatory treatment, such violations of the Netherlands-Czech Republic BIT took place on May 27, 1998, i.e., before Saluka made its "investment" on October 2, 1998. The Czech Republic argued that, by finding that the Czech Republic had violated the BIT through acts that took place prior to Saluka's "investment," the arbitral tribunal went beyond the scope of its jurisdiction under the Netherlands-Czech Republic BIT.

The Court agreed that it would be outside the scope of the tribunal's jurisdiction under Article 8.1[111] of the Netherlands-Czech Republic BIT to find that the Czech Republic had violated the BIT through acts that took place prior to the time when Saluka made its investment.[112] However, the Court considered that the arbitral tribunal's finding of a BIT violation was based on the actual provision of the financial assistance during the period 1998–2000, i.e., *after* Saluka had made its investment, not on the May 27, 1998 government decision. The Court therefore concluded that the tribunal had not gone beyond the scope of its jurisdiction.[113]

The Court emphasized that the question of whether the arbitral tribunal was correct in finding that the unfair and discriminatory treatment consisted of the actual provisioning of the financial assistance during the period 1998–2000 or whether the violation of the treaty was final and completed by the governmental decision of May 27, 1998—as argued by the Czech Republic—was part of the merits of the case and could not be reviewed by the Court as part of a challenge to the jurisdiction of the tribunal.[114]

BAYVIEW IRRIGATION DISTRICT #11 AND ORS V. MEXICO

This case arose out of Mexico's capture and diversion to Mexican farmers and municipalities of water allocated to the United States under a treaty signed in 1944 between the United States of America and Mexico,[115] water over which 17 Texas irrigation districts, 24 individuals, and a corporate investor (together the Bayview Applicants) claimed ownership.

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110 The Czech Republic v. Saluka Investments BV, Judgment of the Federal Court of Switzerland, September 7, 2006.

111 In relevant part, Article 8.1 of the BIT relates to "*[a]ll disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter . . . .*"

112 The Czech Republic v. Saluka Investments BV, Section 6.4.

113 *Ibid.*, section 6.5.3.

114 *Ibid.*, Section 6.5.4.

115 Treaty Between the United States of America and Mexico Respecting Utilization of Waters of the Colorado and Tijuana Rivers and the Rio Grande, February 3, 1944, U.S.-Mex., 59 Stat. 1219 (effective November 8, 1945).

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The Arbitration

The Bayview Applicants filed a request for arbitration against Mexico under Chapter 11 of the NAFTA and pursuant to the ICSID Additional Facility Rules. The seat of arbitration was Toronto. The Bayview Applicants argued that their right to water located in Mexico constituted an investment in Mexico and claimed damages because Mexico had violated the NAFTA. Mexico objected to the jurisdiction of the arbitral tribunal on the basis that the water rights did not constitute "investments" under the NAFTA.

The arbitral tribunal agreed with Mexico. It refused to accept that the Bayview Applicants' water rights in Mexico constituted ownership of personal property rights in the physical water of rivers flowing in Mexican territory, since it could not be determined at any given time *who* owned *what* water. The tribunal found that the 1944 treaty was an agreement to apportion water as it arrives in the international river that runs between the two states and was not intended to create property rights amounting to an "investment." The arbitral tribunal therefore found that it did not have jurisdiction to determine the merits of the case.[116]

The Challenge Proceedings

The Bayview Applicants applied to the Ontario Superior Court of Justice[117] to set aside the arbitral award. With reference to the decision of the ICJ in *The Oil Platforms Case*,[118] they argued that the question whether they owned water in Mexico was a question of fact, which the arbitral tribunal should have presumed to be correct for the purposes of determining jurisdiction. They claimed that since they had asserted in the arbitration that they owned water in Mexico, settled practice required the arbitral tribunal to base its jurisdictional decision on the assumption that this was correct. The question whether it was correct should have been deferred to the merits stage of the proceedings. The Bayview Applicants further argued that at the jurisdictional stage, the arbitral tribunal is not equipped to decide the merits because a complete factual record is not before the arbitral tribunal until the merits stage. They claimed that the arbitral tribunal, by not respecting these fundamental legal principles, had failed to give them a fair opportunity to present their case, in violation of Article 18[119] and Article 34(2)(a)(ii)[120] of the UNCITRAL Model Law. They argued that, if they had been given fair opportunity to present their case on the disputed facts, they would have filed a considerable quantity of evidence to prove that they owned water in Mexico.[121]

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116 *Bayview Irrigation District and ors v. Mexico*, Award, para. 122.

117 Bayview Irrigation District #11 and ors v. Mexico, Ontario Superior Court, Judicial Review 07-CV-340139-PD2, Judgment of May 5, 2008.

118 Case concerning oil platforms (Islamic Republic of Iran v. United States of America), ICJ Reports 1996, II, p.856.

119 Article 18 reads:"*The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case*."

120 *See* note 39, *supra*.

121 *Bayview Irrigation District #11 and ors v. Mexico*, paras. 43, 46–47, and 49.

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Mexico argued that, during the arbitral proceedings, it had not disputed the underlying facts but only the legal characterization of such facts made by the Bayview Applicants, *viz.*, that the water rights constitute an "investment." Mexico further argued that the arbitral tribunal had not made any findings of fact but had only decided that, on the basis of the facts as argued by the Bayview Applicants, the Bayview Applicants had not made an investment within the meaning of Chapter 11 of the NAFTA.[122]

The Ontario Superior Court denied the Bayview Applicants' application to set aside the arbitral award. In its reasons, the Court initially made clear that its role on judicial review is not to conduct a hearing *de novo* of the merits of the arbitral tribunal's decision on jurisdiction.[123] The Court went on by stating that:

> . . . while decisions by arbitral tribunals are not immune from challenge, any challenge is confronted with the 'powerful presumption' that the tribunal acted within its authority. An arbitral decision is not invalid because it wrongly decided a point of fact or law.[124]

Turning to the Bayview Applicants' argument that the arbitral tribunal had not allowed them a fair opportunity to present their case, the Court found that nothing in the record of the arbitral proceeding indicated that this was the case. The Bayview Applicants had an opportunity and also used this opportunity to argue their position on the tribunal's jurisdiction, had presented documentary evidence during the oral proceeding, and did not object or ask for an adjournment to allow them to present further evidence.[125]

Regarding the Bayview Applicants' claim that the arbitral tribunal acted contrary to settled international arbitral practice by not presuming that the facts asserted by the Claimants were correct, the Court noted that the arbitral tribunal had decided that its jurisdiction to hear the merits depended on a determination of whether the Bayview Applicants' alleged ownership in water rights constituted an "investment" under Article 1101(1)(b) of the NAFTA. The Court further noted that in making this determination, the arbitral tribunal had held that the Bayview Applicants' water rights in Mexico did not amount to an "investment." The Court concluded that it deferred to the arbitral tribunal's expertise in deciding the substantive and procedural issues before it.[126]

THE CZECH REPUBLIC V. EUROPEAN MEDIA VENTURES SA

European Media Ventures (EMV), a Luxembourg company, claimed compensation under the arbitration provision of the BIT between the Czechoslovak Socialist Republic and the Belgium-Luxembourg Economic Union for loss and damage arising out of the alleged indirect expropriation of its investment in a Czech television station.[127]

122 *Ibid.*, para. 54.
123 *Ibid.*, para. 60.
124 *Ibid.*, para. 63.
125 *Ibid.*, paras. 67–71.
126 *Ibid.*, paras. 75–77.
127 The arbitral award is not in the public domain.

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The arbitral proceedings were conducted pursuant to the UNCITRAL Arbitration Rules. The seat of arbitration was London.

The arbitral tribunal issued its award on jurisdiction on May 15, 2007. At the time of this writing, the tribunal has not rendered its final award. The main issue at the jurisdictional stage of the proceedings was the scope of the tribunal's jurisdiction under Article 8 of the BIT. Article 8 included the following wording commonly found in arbitration clauses in BITs concluded by the Soviet Union or Eastern European states during the communist era:

> 1. Disputes between one of the Contracting Parties and an Investor of the other Contracting Party *concerning compensation due by virtue of Art. 3* Paragraphs (1) and (3) shall be the subject of a written notification, accompanied by a detailed memorandum, addressed by the investor to the concerned Contracting Party. To the extent possible, such disputes shall be settled amicably (emphasis added).
>
> 2. If the dispute is not resolved within six months from the date of the written notification specified in Paragraph (1), and in the absence of any other form of settlement agreed between the parties to the dispute, it shall be submitted to arbitration before an ad hoc tribunal.

Article 3, to which Article 8 refers, is the provision in the BIT prohibiting expropriation without compensation.[128]

The Czech Republic argued that the reference to "*disputes concerning compensation due by virtue of Art. 3*" in Article 8 meant that the arbitral tribunal's jurisdiction was limited to disputes as to the *amount* of compensation to be paid to an investor following expropriation. According to the Czech Republic, the question whether there had been an expropriation, however, was not part of the jurisdiction of the arbitral tribunal. Such questions had to be determined in another forum, i.e., the courts of the Czech Republic. EMV, on the other hand, argued that jurisdiction extended not simply to the amount of compensation, but also to the question whether compensation should be paid to the investor, i.e., to the question whether an expropriation had occurred.

The arbitral tribunal found that the phrase *"concerning compensation"* in Article 8(1) was intended to limit the jurisdiction of a tribunal but not to the extent argued by the Czech Republic. The tribunal stated, "*It would seem to exclude from that jurisdiction any claim for relief other than compensation (e.g., a claim for restitution or a declaration that a contract was still in force).*"[129] The arbitral tribunal therefore concluded that

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128 Article 3 reads in relevant parts as follows: "*1. Investments made by investors of one of the Contracting Parties in the territory of the other Contracting Party may not be expropriated or subjected to other measures of direct or indirect dispossession, total or partial, having a similar effect, unless such measures are: (a) taken in accordance with a lawful procedure and are not discriminatory; (b) accompanied by provisions for the payment of compensation, which shall be paid to the investors in convertible currency and without delay. The amount shall correspond to the real value of the investments on the day before the measures were taken or made public. [. . .] 3. The provisions of paragraphs 1 and 2 are applicable to investors of each Contracting Party, holding any form of participation in any company whatsoever in the territory of the other Contracting Party*."

129 The award is not in the public domain. The citation is taken from the judgment of the High Court.

it had jurisdiction to determine whether expropriation under Article 3(1) or (3) had occurred.

The Challenge Proceedings

The Czech Republic applied to the High Court of England and Wales to set aside the award pursuant to Section 67(1) of the English Arbitration Act on the grounds that the arbitral tribunal lacked substantive jurisdiction.[130] The Czech Republic, *inter alia*, submitted that (i) it was a policy of Communist states at the time to agree to arbitration with private investors only in relation to disputes as to the amount of compensation following expropriation; (ii) the circumstances in which the BIT was concluded showed an intention to confine the right to arbitrate in Article 8 to disputes about the level of compensation awarded; (iii) the terms of Article 7 provide a mechanism for dispute resolution between the contracting states to the BIT and were intended to apply to the determination of liability in a case of expropriation of the investment; and (iv) the terms of Article 8(1) confirm the limited scope of the Contracting Parties' consent to arbitration. If the Contracting Parties had intended that an arbitral tribunal constituted under Article 8 should have jurisdiction to determine the liability of a Contracting Party for an expropriation, the words "*compensation due by virtue of*" would have been omitted.

In response, EMV argued that the object of the BIT was the promotion and protection of investments. A key element of effective protection was the provision of a direct and effective right to arbitrate. EMV further argued that—as a matter of ordinary meaning—the phrase "*concerning compensation due by virtue of*" covered both the amount of compensation in case of expropriation and the question whether any compensation was due pursuant to Article 3(1) and/or 3(3). EMV also submitted that there was no immutable policy of the Czechoslovak Socialist Republic to confine arbitration agreements to the amount of compensation to be paid. EMV further argued that Article 7 of the BIT did not assist in the interpretation of Article 8. Article 7 was concerned with disputes between the contracting parties to the BIT and was not intended to apply to the determination of liability in a case of expropriation of the investments protected by the BIT.[131]

As to the standard of review in case of a challenge to the jurisdiction of an arbitral tribunal, the Court referred to the test summarized in *Ecuador v. Occidental*,[132] i.e., that the test the court must make is whether the tribunal was *correct* in its decision on jurisdiction?[133] The Court also concluded that, since the BIT was governed by international law, the rules of interpretation to be used were Articles 31 and 32 of the Vienna Convention.[134]

130 Czech Republic v. European Media Ventures SA, Judgment, [2007] EWHC 285 (Comm), December 5, 2007.

131 *Ibid.*, para. 12.

132 *See* p. [], *supra*.

133 *Czech Republic v. European Media Ventures SA*, para. 13.

134 *Ibid.*, para. 14.

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The Court summarized its approach to the interpretation in the present case in four points. First, it stressed the importance of making an *"independent"* interpretation without color taken from distinctive features of the legal system of any contracting state. Second, the arbitral jurisdiction is the same whether the *"concerned Contracting Party"* referred to in Article 8 is the Czech Republic or Belgium/Luxembourg. Third, the *"ordinary meaning"* is the meaning attributed to those terms at the time the treaty was concluded. Fourth, as a normal principle of interpretation, a court or tribunal should endeavor to give a meaning to each of the words being interpreted.[135] In light of the above considerations, the Court found that it was unable to accept that the phrase *"concerning compensation"* must be read as meaning *"relating to the amount of compensation"* as a matter of ordinary meaning.

On the other hand, the Court also found that the use of the word *"compensation"* clearly limits the scope of jurisdiction of the tribunal to one aspect of expropriation.[136] The Court went on to focus on the meaning of the word *"concerning,"* which, said the Court, is broad; its ordinary meaning is to include every aspect of its subject, in this case *"compensation due by virtue of Paragraphs (1) and (3) of Art. 3."* The Court concluded that, as a matter of ordinary meaning, this covers issues of entitlement as well as quantification.[137] The Court also found that the wording *"due by virtue of"* connects entitlement to compensation to events specified in Articles 3(1) and (3): since the arbitral tribunal does not have jurisdiction unless the asserted right to compensation arises out of events specified in Articles 3(1) and (3), the tribunal must necessarily consider whether such events have occurred, i.e., whether there has been an expropriation.[138]

The Court therefore concluded that the tribunal had jurisdiction to determine the question whether compensation should be awarded.[139] The application of the Czech Republic was accordingly dismissed.

DISCUSSION

As stated at the outset, this chapter focuses on three issues: (i) do municipal courts have jurisdiction to determine challenges of investment treaty awards, (ii) is it appropriate for municipal courts to review investment treaty awards, and (iii) what standards of review do municipal courts adopt when they review challenges to the jurisdiction of the arbitral tribunal? Caution is called for in drawing general conclusions from the cases summarized, which are relatively few—about a dozen—and involve municipal court judgments from a handful of jurisdictions dealing with challenges of investment treaty awards. The cases are in fact too disparate to make it possible to draw any general conclusions at all. Some preliminary observations nevertheless come to mind.

135 *Ibid.*, paras. 34–37.
136 *Ibid.*, para. 44.
137 *Ibid.*, para. 44.
138 *Ibid.*, para. 45.
139 *Ibid.*, para. 47.

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DO MUNICIPAL COURTS HAVE JURISDICTION TO DETERMINE CHALLENGES OF INVESTMENT TREATY AWARDS?

Investment treaty awards involve the adjudication of treaty obligations entered into between independent sovereign states on the plane of international law. The *jurisdiction* of the arbitral tribunal is based on, and defined by, the provisions of the applicable treaty which are to be interpreted in accordance with the rules of public international law applicable to treaty interpretation. *Liability* of the host State is premised on a finding by the arbitral tribunal that the host State has breached treaty obligations or obligations under customary international law. *Remedies* available to the investor, *standards of compensation*, etc. are also governed by public international law.

Thus, in investment treaty arbitration, jurisdiction, liability, and quantum are determined on the basis of treaty obligations and/or customary international law in accordance with arbitral procedures designated in the investment treaty. Although arbitral tribunals in investment treaty arbitration also have to determine many questions of municipal law, ultimately, investment treaty arbitration is about determining the potential liability of the host state under the applicable treaty and under public international law.

The question therefore naturally comes to mind whether municipal courts have jurisdiction to determine challenges of investment treaty awards and, if so, whether they are suitable *fora* for such challenges. The first question will be addressed in this section; the latter question is addressed below.[140]

Of the cases reviewed, only one, *The Russian Federation v. Sedelmayer*,[141] involved an objection by the respondent in the challenge proceedings that municipal courts do *not have jurisdiction* to determine challenges of investment treaty awards. In *Ecuador v. Occidental*, Occidental claimed that Ecuador's claim that the arbitral award should be set aside due to lack of jurisdiction was *not justiciable* before the courts of England,[142] but the case did not involve an objection to the *jurisdiction* of the High Court.

In *The Russian Federation v. Sedelmayer*, the Stockholm District Court emphasized that it was a well-established principle of Swedish arbitration law that an arbitral award issued in arbitral proceedings having its seat in Sweden can be challenged before the Swedish courts, even if neither of the two parties has any connection to Sweden. The fact that the arbitration was based on a treaty concluded between two sovereign states did not call for a different conclusion. At least this was the case where one of the parties to the arbitration, Mr. Sedelmayer, was a subject of municipal law and not a sovereign state.[143]

The decision of the Stockholm District Court is not surprising. The significance of public international law notwithstanding, by the inclusion of an ICSID Additional Facility, UNCITRAL, or SCC arbitration clause in the BIT, or in the ECT, the arbitral procedure is ultimately anchored in the national legislation applicable at the seat of arbitration. If a party to an investment treaty arbitration, be it the host State or the

140 *See* pp. 663–64, *infra*.
141 *See* pp. 643–45, *supra*.
142 *See* pp. 649–50, *infra*.
143 *The Russian Federation v. Sedelmayer*, p. 16.

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investor, is making use of explicit statutory remedies available to such Party at the seat of arbitration, municipal courts will be reluctant to decline jurisdiction to determine challenges of arbitral awards with reference to the fact that the award was based on an investment treaty. For instance, Section 34[144] and Section 36[145] of the Swedish Arbitration Act give parties to an arbitration conducted under the Swedish Arbitration Act the right to have the jurisdiction of the arbitral tribunal ultimately determined by a court of law. The same principles apply under the UNCITRAL Model Law.[146]

IS IT APPROPRIATE FOR MUNICIPAL COURTS TO REVIEW INVESTMENT TREATY AWARDS?

A more difficult question is whether it is *appropriate* that municipal courts at the seat of arbitration exercise their jurisdiction to review investment treaty awards. As has been amply illustrated by the discussion on nonjusticiability in *Ecuador v. Occidental*,[147] there are many arguments that could be raised against such court review.

In case of challenges of investment treaty awards, municipal courts at the seat of arbitration must adjudicate upon treaty provisions entered into by independent sovereign states. Moreover, only one of the contracting state parties to the investment treaty, i.e., the host State against which the claim in the arbitration was made, will be a party to the challenge proceedings. For the municipal court hearing the challenge, the abovementioned considerations may raise issues of noninterference with the affairs of other states, since the municipal court must rule upon transactions between two or several sovereign states without having the benefit of hearing all parties to the transaction.

Another concern is that municipal courts typically do not have sufficient knowledge and experience with respect to the issues of public international law which may arise in challenges of investment treaty awards. Another potential issue is whether national courts will take any particular considerations because a sovereign state is a party to the proceedings. The investor may fear—rightly or wrongly—that the court will apply a lower threshold for the setting aside of the award to ensure that there will be no doubt as to the legitimacy of an arbitral award issued against a sovereign state. The State party, on the other hand, may fear that it will not get a fair hearing due to possible political bias against it at the seat of arbitration.

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144 Section 34 of the Swedish Arbitration Act (1999) provides, in relevant parts: "An award which may not be challenged in accordance with section 36 shall, following an application, be wholly or partially set aside upon motion of a party: 1. if it is not covered by a valid arbitration agreement between the parties; 2. if the arbitrators have made the award after the expiration of the period decided on by the parties, or where the arbitrators have otherwise exceeded their mandate [. . .]."

145 *See* note 94, *supra*.

146 *See* Articles 16(3) and 34 of the UNCITRAL Model Law as well as the Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration, A7CN.9/264, UNCITRAL Yearbook, vol. XVI.

147 *See* pp. 649–50, *supra*.

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Thus, municipal court review of investment treaty awards raises several questions and concerns not present with respect to commercial arbitration. The self-contained review regime under the ICSID Convention offers solutions to some of these concerns. The fact remains, however, that many States are not party to the ICSID Convention. Due to this and the fact that, even if ICSID jurisdiction is available, investors do not always choose ICSID arbitration, a considerable number of investment arbitrations will continue to be governed by the municipal arbitration law of the seat of arbitration.

As shown in *Ecuador v. Occidental*, where a party to an investment arbitration is making use of its statutory right under the applicable arbitration act to challenge an arbitral award, a municipal court will usually be reluctant not to exercise its jurisdiction to review the award, even if the court must adjudicate upon the obligations of other sovereign states under treaties. The fact that municipal courts, when exercising such jurisdiction, sometimes will have to adjudicate upon international law obligations of other sovereign States is part of the package accepted by the contracting parties to the investment treaty when they include an ICSID Additional Facility, UNCITRAL, or SCC arbitration clause in the BIT or the MIT. It is also part of the package accepted by the investor when making use of its right to arbitration under the applicable investment treaty. If the Contracting State Parties to investment treaties do not want to subject arbitral awards issued under such treaty to review by municipal courts at the place of arbitration, they have the possibility of including a provision to that effect in the treaty. Whether or not such *exclusion agreements* are recognized as valid and binding depends, of course, on the law applicable at the seat of arbitration. In Sweden, for instance, Section 51 of the Arbitration Act expressly provides that the parties may agree to exclude the applicability of the grounds for setting aside arbitral awards contained in Section 34 of the Arbitration Act, provided that none of the parties is domiciled or has its place of business in Sweden. This condition would be fulfilled in most investment arbitrations conducted in Sweden.[148]

Based on the cases reviewed for this chapter, however, none of the courts have taken decisions that raise any particular cause for serious concern. We have not come across any challenge of an investment treaty award in which the courts attempted to review the merits of the challenged award. In general, the decisions show a high degree of deference for the decisions of the arbitral tribunal. The only case in which the arbitral award was set aside was *Petrobart I*,[149] where the Swedish Supreme Court found that the arbitral tribunal was wrong in *declining* jurisdiction.

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148 The UNCITRAL Model Law does not regulate the validity of agreements that exclude the applicability of the grounds in Article 34 for the setting aside of an arbitral award. However, one Canadian decision (Noble China Inc. v. Lei Kat Cheong, Ontario Court of Justice, November 13, 1998) has found that the parties may agree to exclude any rights they may otherwise have to apply to set aside an award under Article 34 as long as their agreement does not conflict with any mandatory provisions of the Model Law or does not confer powers on the arbitral tribunal contrary to public policy. *See also* Jernej Sekolec and Nils Eliasson, *The UNCITRAL Model Law on Arbitration and the Swedish Arbitration Act: A Comparison*, *in* HEUMAN & JARVIN, THE SWEDISH ARBITRATION ACT OF 1999, FIVE YEARS ON: A CRITICAL REVIEW OF STRENGTHS AND WEAKNESSES 241–42 (2006).

149 *See* pp. 652–53, *supra*.

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WHAT STANDARDS OF REVIEW DO MUNICIPAL COURTS ADOPT WHEN THEY REVIEW CHALLENGES TO THE JURISDICTION OF ARBITRAL TRIBUNALS IN INVESTMENT TREATY ARBITRATION?

Almost all the cases reviewed here have involved challenges to the jurisdiction of the arbitral tribunals. Challenges of investment treaty awards more frequently appear to involve challenges to the jurisdiction of the arbitral tribunal than challenges of awards in traditional international commercial arbitration. This is not surprising given the relative complexity of arbitration clauses in investment treaties compared to standard arbitration clauses in commercial contracts. Also, in investment treaty arbitration, there are usually high jurisdictional thresholds which the claimant must overcome in order to come within the scope of the relevant investment treaty. This typically means that jurisdictional issues are more complicated in investment arbitration than in commercial arbitration.

Rulings on jurisdiction in international commercial arbitration are often limited to determining whether the dispute "*arose out of or in connection with*" the contract containing the arbitration clause. Arbitral tribunals in investment treaty arbitration, on the other hand, frequently must rule on issues of public international law, including treaty interpretation, such as whether the claimant qualifies as an "investor" as defined in the treaty, whether the claimant has made an "investment" as defined in the treaty, whether the dispute is covered by the dispute resolution clause of the treaty, etc. Ruling conclusively on these issues often requires the arbitral tribunal to determine complex issues of facts and law. In addition, such issues are often closely connected to the merits of the case.

To avoid dealing with contentious factual issues during the jurisdictional stage of the proceedings, arbitral tribunals occasionally merge their rulings on jurisdiction with the merits. Other tribunals[150]—influenced by the test proffered by Judge Higgins in her separate opinion in the *Oil Platforms Case*[151]—might, for the purposes of establishing jurisdiction, "*accept pro tem the facts as alleged by [Claimant] to be true and in that light . . . interpret [the relevant provisions of the treaty] for jurisdictional purposes. . . .*"[152] It must be added, however, that this test was developed for the determination of the jurisdiction of the International Court of Justice and is not necessarily automatically transferable to jurisdictional rulings in an investment treaty arbitration.

However, regardless of the approach chosen by the arbitral tribunal when it is ruling on its jurisdiction, a municipal court ruling on a challenge to the jurisdiction of the arbitral tribunal must determine what *standard of review* it should apply when reviewing the arbitral tribunal's jurisdictional decision. At a first glance, the answer might seem obvious. The host State's consent to arbitration does not extend beyond the limits

150 *See, e.g.*, Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction, February 8, 2005, and Kardassopoulos v. Georgia, ICSID Case No. ARB/05/18, Decision on Jurisdiction, July 6, 2007.

151 Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America), 1996, ICJ Reports 803, at 810.

152 Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction, February 8, 2005, para. 118.

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of the arbitration clause in the applicable investment treaty. This would call for a full hearing *de novo* of all issues of fact and law that form part of the arbitral tribunal's decision on jurisdiction. The standard of review would be *correctness* in the sense that the arbitral award shall be set aside if the court finds that the decision of the arbitral tribunal was incorrect.

However, given the fact that jurisdictional determinations in investment arbitration involve mixed questions of facts and law, which often are closely connected to the merits of the case, it may prove difficult for the reviewing court—in particular if the arbitral tribunal's ruling on jurisdiction was merged with the merits—to maintain a clear distinction between jurisdiction and merits when determining the challenge to the jurisdiction of the tribunal. In order not to review the merits of the case, the reviewing court might therefore refuse to review the arbitral tribunal's determination of jurisdictional preconditions, which also have bearing on the merits of the case, such as whether the investor has made an "investment."[153]

Based on the cases discussed in this chapter, the following observations come to mind concerning the standard of review adopted by courts. On a scale reflecting the degree of court review, the two judgments of the English High Court, *Ecuador v. Occidental*[154] and *Czech Republic v. EMV*,[155] must be placed at one end. As clearly stated by the High Court in *Ecuador v. Occidental*—and repeated in *Czech Republic v. EMV*—a challenge to the jurisdiction of the arbitral tribunal proceeds by way of a rehearing by the court of the matters that had been before the arbitrators, i.e., a hearing *de novo* of the host state's jurisdictional objection. The test for the Court is, in its view: was the arbitral tribunal correct in its decision on jurisdiction?[156] The underlying

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153 In the case *Nagel v. Czech Republic* (SCC Case 49/2002), the arbitral tribunal dismissed Mr Nagel's claim, since it found that Mr Nagel had not made an "investment" within the meaning of the UK-Czech BIT. The arbitral award is not in the public domain, but excerpts from the arbitral award have been published in Stockholm Arbitration Report 2004:1.What is interesting about this award, however, is that the arbitral tribunal, rather than dealing with this objection as part of its ruling on jurisdiction, decided to "*deal with this question in a later part of this award where the facts relevant to the merits of [Mr X]'s claim are analysed*" (p. 150). In the view of the arbitral tribunal, the question as to whether or not [Mr X] was an investor who made an investment within the meaning of the BIT ". . . *involves the determination of certain factual issues that are also in dispute in connection with the substantive issues between the parties in relation to the merits of [Mr X]'s claim. It is therefore not an issue which can be easily decided as a preliminary question of jurisdiction but one which requires a more detailed analysis both of the Treaty and of the facts of the case*" (p. 150). Mr Nagel challenged the arbitral tribunal's finding that he had not made an investment within the meaning of the UK-Czech BIT before the Svea Court of Appeal (Mr Nagel v. The Czech Republic, Decision of the Svea Court of Appeal of May 30, 2005, Case No. T 9059-03). The Court, however, decided not to review the arbitral tribunals, finding that Mr Nagel had not made an investment under the BIT, with the explanation that the arbitral tribunal had found that the question whether the investor's rights qualified as an "investment" under the BIT was a matter of substance rather than a matter of jurisdiction. For an English translation of the Decision, *see* 2 STOCKHOLM INTERNATIONAL ARBITRATION REVIEW 2006, p. 139.

154 *See* pp. 649–51, *supra*.

155 *See* pp. 660–61, *supra*.

156 *Ecuador v. Occidental Exploration and Production Company*, para. 7.

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philosophy is that Parties always are entitled to have jurisdictional rulings by arbitral tribunals ultimately reviewed by a court of law.[157]

A similar approach was taken by the Svea Court of Appeal in the two Swedish cases, *Petrobart I*[158] and *Petrobart II.*[159] In both of these cases, the Court of Appeal made a *de novo* determination of the jurisdictional issues that had been before the arbitral tribunal. In particular, the judgment in *Petrobart II* involved a full review of complex issues of treaty interpretation with regard to the provisional application of the ECT in relation to Gibraltar as well as factual issues with regard to the United Kingdom's ratification of the ECT.

A slightly different approach, however, was taken by the Stockholm District Court, as confirmed by the Svea Court of Appeal, in *The Russian Federation v. Sedelmayer*[160] and by the Swedish Supreme Court in *Petrobart I* (reversing the abovementioned decision of the Court of Appeal) based on the so-called "doctrine of assertion."[161]

If the two English cases are placed at one end of the scale reflecting the degree of court review, the decision of the Ontario Superior Court in *Bayview Irrigation District #11 and ors v. Mexico*[162] must be placed at the other end. In this case, the Ontario Superior Court emphasized that its role on judicial review was *not* to conduct a hearing *de novo* of the merits of the arbitral tribunal's decision on jurisdiction. The Court further stated that "*while decisions by arbitral tribunals are not immune from challenge, any challenge is confronted with the 'powerful presumption' that the tribunal acted within its authority. An arbitral decision is not invalid because it wrongly decided a point of fact or law.*"[163]

Another case that should be mentioned is *Canada and the United Mexican States v. S.D. Myers Inc.*[164] In this case, Canada and Mexico claimed that, since the arbitration involved a sovereign State and the State only had consented to arbitration to the extent provided by the NAFTA, the appropriate standard for the Canadian Court to apply when reviewing the present case was "correctness." The Court did not agree. It emphasized that it had to respect the autonomy of the arbitration forum selected by the parties and that all three members of the arbitral tribunal were knowledgeable, experienced, and distinguished in international law, international trade law, and international arbitration. The Court concluded that the arbitration mechanism in Chapter 11 of the

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157 In Sweden, for instance, in addition to the right to challenge an arbitral award for want of jurisdiction (Section 34 of the Arbitration Act (1999)), parties also have an explicit statutory right under Section 36 of the Arbitration Act (1999) to court review of negative jurisdictional rulings. Examples of other jurisdictions where such rights to court review of negative jurisdictional rulings are recognized are Belgium, England & Wales, France, India, Italy, New Zealand, Northern Ireland, Scotland, and Switzerland (*see, e.g.*, S Kröll, *Recourse Against Negative Decisions on Jurisdiction*, 20 Arb Int'l (2004) and LGS Boo, *Ruling on Arbitral Jurisdiction*, 3 Asian Internat'l Arb. J.(2007)

158 *See* pp. 652–53, *supra*.

159 *See* pp. 654–55, *supra*.

160 *See* pp. 644–45, *supra*.

161 *See* p. 653, *supra*.

162 *See* pp. 657–58, *supra*.

163 *Bayview Irrigation District #11 and ors v. Mexico*, para. 63.

164 *See* pp. 646–47, *supra*.

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NAFTA consequently ensured that the parties had confidence in the persons who had been called to adjudicate the claim.[165]

Despite the fact the different standards of court review have been adopted by courts in different jurisdictions, based on the cases reviewed in this chapter, it is fair to conclude that none of the courts has taken decisions that raise any particular cause for concern and that the jurisdictions involved in the reviewed cases all appear to offer predictable court review mechanisms of investment treaty awards. This is not surprising since many of these jurisdictions already have a good track record in international commercial arbitration.

CONCLUDING REMARKS

Investment treaty arbitration is different from traditional international commercial arbitration, primarily due to the public international law element of the former. This creates particular challenges for municipal courts faced with reviewing investment treaty awards. This chapter has focused on three such challenges for municipal courts: (i) do municipal courts have jurisdiction to determine challenges of investment treaty awards, (ii) is it appropriate for municipal courts to review investment treaty awards, and (iii) what standards of review do municipal courts adopt when they review challenges to the jurisdiction of the arbitral tribunal?

In none of the cases discussed did the court decline jurisdiction to determine a challenge of an investment treaty award. This is not surprising. By including an ICSID Additional Facility, UNCITRAL, or SCC arbitration clause in the BIT, or in the ECT, the arbitral procedure is ultimately anchored in the national legislation applicable at the seat of arbitration. If a party to an investment treaty arbitration, be it the host State or the investor, is making use of explicit statutory remedies available to such party at the seat of arbitration, municipal courts will be reluctant to decline jurisdiction to determine challenges of arbitral awards with reference to the fact that the award was based on an investment treaty.

A more difficult question is whether it is *appropriate* that municipal courts review investment treaty awards. However, in none of the cases discussed have the courts taken decisions that raise any particular cause for serious concern regarding municipal court review of jurisdictional rulings in investment treaty arbitrations. Overall, the cases we have reviewed express a high degree of deference for the decision of the arbitral tribunal.

Jurisdictional issues are typically more complicated in investment arbitration than in traditional international commercial arbitration. To rule conclusively on the jurisdictional preconditions in investment arbitration often requires the arbitral tribunal to determine complex issues of facts and law, which often are closely connected to the merits of the case. This creates particular challenges for municipal courts determining challenges to the jurisdiction of such arbitral tribunals. In particular, it may prove

165 *Canada and the United Mexican States v. S.D. Myers Inc.*, para. 16.

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difficult for the courts to maintain a clear distinction between jurisdiction and merits when reviewing the jurisdiction of the arbitral tribunal.

In the cases discussed, the municipal courts have taken slightly different approaches concerning the standard of review of the jurisdiction of the arbitral tribunal. Courts in certain jurisdictions have made a *de novo* hearing of the host State's jurisdictional objection, whereas courts in other jurisdictions have adopted a more restrictive standard of review based on a "*powerful presumption*" that the tribunal acted within its jurisdiction.[166] Regardless of the approach taken by the municipal courts, they usually express a high degree of deference for the decisions of the arbitral tribunal.

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166 *See* p. 658, *supra*.

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Chapter 25

Enforcement of Investment Awards

August Reinisch

INTRODUCTION

It is frequently asserted that, in the majority of investment disputes, the parties voluntarily comply with arbitration awards.[1] There are indeed only few cases where successful claimants have had to resort to national courts for judicial enforcement of their awards.[2] This may largely be due to the special political embarrassment factor, the threat of economic retaliation, and the reluctance to send a wrong message to potential future investors. However, host States may also be very cautious about not honoring arbitral awards because the rules provide for a very effective system for their enforcement. It is important to analyze the available enforcement instruments from a legal perspective in order to understand this "deterrence" factor and its contribution to the high level of voluntary compliance with investment awards.

Investment arbitration between States and private parties is currently pursued either according to the ICSID Convention[3] or under various institutional or *ad hoc* arbitration rules leading to arbitral awards which are regarded as foreign arbitral awards in the sense of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards [hereinafter New York Convention].[4] The following analysis will distinguish between enforcement possibilities offered by the New York Convention for

1 *Cf.* A. Boralessa, *Enforcement in the United States and United Kingdom of ICSID Awards Against the Republic of Argentina: Obstacles that Transnational Corporations May Face*, 17 N.Y. Int'l L. Rev. 53, 66 *et seq*. (2004).

2 *See* Z. Douglas, *The Hybrid Foundations of Investment Treaty Arbitrations*, 74 British Yearbook of International Law 151, 227 (2003).

3 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, March 18, 1965, 575 UNTS 159; 4 ILM 532 (1965).

4 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, 330 UNTS 38; 7 ILM 1046 (1968).

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non-ICSID awards and the special enforcement regime for ICSID awards laid down in the ICSID Convention.

ENFORCEMENT OF NON-ICSID AWARDS

The awards rendered pursuant to *ad hoc* investment arbitrations, mostly under the UNCITRAL Rules,[5] as well as those administered by arbitration institutions, such as the International Chamber of Commerce,[6] the Stockholm Chamber of Commerce,[7] or the London Court of International Arbitration,[8] are usually treated as foreign arbitral awards in the sense of the 1958 New York Convention.[9] This guarantees that they are enforceable in a large number of States—subject only to the limited exceptions provided within the Convention. Though voluntary compliance with awards seems to prevail in commercial arbitration as well,[10] the potential of enforcement pursuant to the New York Convention is an important factor inducing such compliance.

Foreign Arbitral Awards

The New York Convention provides for the recognition and enforcement of foreign arbitral awards, which it defines as “arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal.”[11]

Investment awards are often considered to fall under the category of so-called a-national or denationalized awards since their relationship to a specific country and its arbitration rules may be very weak. Though it has sometimes been questioned whether such awards would qualify as “foreign arbitral awards” for enforcement purposes of the New York Convention,[12] the fact that Article I(1) New York Convention also

5 UNCITRAL Arbitration Rules 1976, 15 ILM 701 (1976), *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html.

6 ICC Rules of Arbitration 1998, in ICC (ed.), ICC Rules of Arbitration, Publication No 808 (2001) 6, *available at* http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf.

7 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce 2007, *available at* http://www.sccinstitute.com/filearchive/2/21686/2007_arbitration_rules_eng.pdf.

8 London Court of International Arbitration, Arbitration Rules 1998, 37 ILM 669 (1998), *available at* http://www.lcia-arbitration.com/.

9 *See* A.J. van den Berg, The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation (1981); D. di Pietro/Platte, Enforcement of International Arbitration Awards–The New York Convention of 1958 (2001).

10 *Cf.* P. Sarcevic, *Dispute Settlement: UNCITRAL 5.7 Recognition and Enforcement of Arbitral Awards: The New York Convention*, *in* Course on Dispute Settlement (UNCTAD ed., 2005), UNCTAD/EDM/Misc.232/Add.37, 4.

11 Article I(1) New York Convention, *supra* note 4.

12 *Cf.* A. J. van den Berg, *Recent Enforcement Problems under the New York and ICSID Conventions*, 5 Arb. Int’l 2, 7 *et seq.* (1989).

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encompasses "arbitral awards not considered as domestic awards"[13] indicates that international, a-national, or denationalized awards are covered by the New York Convention.[14]

Investment Awards as Commercial Disputes

The New York Convention permits States to make a reservation to the effect that they apply the Convention "only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration."[15] One might question whether investment awards can be qualified as awards in "commercial disputes" for these purposes, since—as a form of mixed arbitration between States and private parties—BIT arbitration in particular often touches upon sovereign interests and in effect leads to judicial review of State acts.

When dealing with this question, one has to take notice of the fact that a number of investment treaties expressly refer to the "commercial" nature of claims that may be brought on the basis of their provisions.[16] It is also significant that, while the New York Convention does not define the term "commercial," the 1985 UNCITRAL Model Law on International Commercial Arbitration[17] does contain a wide definition of the notion

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13 Article I(1) New York Convention, *supra* note 4, provides in full: "This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."

14 *See* G. R. Delaume, *Enforcement of State Contract Awards: Jurisdictional Pitfalls and Remedies*, 8 ICSID Rev.—Foreign Inv. L.J. 29, 48 *et seq*. (1993); G. R. Delaume, *Reflections on the Effectiveness of International Arbitral Awards*, 12 J. Int'l Arb. 5, 17 (1995); S. Choi, *Judicial Enforcement of Arbitration Awards Under the ICSID and New York Conventions*, 28 N.Y.U. J. Int'l L. & Pol. 175, 190 *et seq.* (1995–1996).

15 Article I(3) New York Convention, *supra* note 4.

16 For instance, Article 1136(7) North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States, and the Government of the United States of America (NAFTA), December 17, 1992, 32 ILM 289 (1993), provides: "A claim that is submitted to arbitration shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention and Article I of the Inter-American Convention." Similarly, Article 26(5)(b) Energy Charter Treaty**,** 34 ILM 381 (1995), provides: "Any arbitration under this Article shall at the request of any party to the dispute be held in a state that is a party to the New York Convention. Claims submitted to arbitration hereunder shall be considered to arise out of a commercial relationship or transaction for the purposes of article I of that Convention."

17 1985 UNCITRAL Model Law on International Commercial Arbitration, adopted by UNCITRAL on June 21, 1985, and amended by UNCITRAL on July 7, 2006, UN docs. A/40/17, annex I and A/61/17, annex I; *available at* http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

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"commercial arbitration" which expressly includes a reference to "investment."[18] Thus, for the purposes of the Model Law, investment awards should be viewed as awards in "commercial disputes." This view was shared by national courts in set-aside proceedings concerning investment awards rendered pursuant to the UNCITRAL Arbitration Rules.

In the proceedings before Canadian courts challenging the *Metalclad* award,[19] the Supreme Court of British Columbia held that NAFTA Chapter 11 arbitration was to be qualified as "commercial arbitration" in the sense of the UNCITRAL Model Law.[20] It expressly rejected the Mexican argument that the "relationship between Mexico and Metalclad was not commercial in nature but, instead, was a regulatory relationship."[21] This approach was followed by subsequent Canadian court decisions concerning challenges brought against NAFTA Chapter 11 awards. In proceedings aimed at the setting aside of the ICSID Additional Facility award in *Feldman* v. *Mexico*,[22] the Ontario Court of Appeal found that "NAFTA tribunals settle international commercial disputes by an adversarial procedure under which they determine legal rights in a manner not dissimilar to the courts."[23] Similarly, the Swedish Svea Court of Appeal qualified the BIT arbitration between CME and the Czech Republic[24] as "an international commercial arbitration."[25]

These cases strongly suggest that, in the field of recognition and enforcement governed by the New York Convention, a possible reservation limiting its application to "commercial" arbitration should not impede the actual enforcement of investment awards.

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18 Article I(1) UNCITRAL Model Law provides that it "applies to international commercial** arbitration." The double asterix is explained as follows: "The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road."

19 Metalclad Corporation v. Mexico, Case No. ARB(AF)/97/1, Award, August 30, 2000; 40 ILM 36 (2001).

20 United Mexican States v. Metalclad, Canada, Supreme Court of British Columbia, May 2, 2001, [2001] BCSC 664, 5 ICSID Reports 236.

21 United Mexican States v. Metalclad, Canada, Supreme Court of British Columbia, May 2, 2001, *supra* note 20, 5 ICSID Reports 236, 247, para. 44.

22 Feldman v. Mexico, Case No. ARB(AF)/99/1, Award, December 16, 2002, 42 ILM 625 (2003); 7 ICSID Reports 341.

23 United Mexican States v. Feldman Karpa, Canada, Ontario Court of Appeal, January11, 2005, 9 ICSID Reports 508, 516, para. 41.

24 CME Czech Republic B.V. (The Netherlands) v. Czech Republic, Partial Award, September 13, 2001, 9 ICSID Reports 121.

25 Czech Republic v. CME Czech Republic BV, Sweden, Svea Court of Appeal, May 15, 2003, 9 ICSID Reports 439, 493.

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Investment Treaty Arbitration and the Requirement of a Written Arbitration Agreement

Article II(1) New York Convention requires "an agreement in writing" for purposes of recognition and enforcement under the Convention.[26] Modern investment arbitration is to a large extent not based on direct contractual stipulations between investors and host States, but rather on dispute settlement provisions contained in BITs or other international investment agreements between sovereign States. One might question whether such treaty clauses constitute "agreements in writing" for purposes of the New York Convention. For this reason, some investment instruments expressly clarify that this is exactly how consent based on treaty clauses should be interpreted.[27] Also, national courts do not appear to have any problems with accepting that treaty arbitration is covered by the New York Convention.

For instance, the English Court of Appeal in proceedings challenging the UNCITRAL investment award in *Occidental* v. *Ecuador*,[28] discussed the applicable BIT's provision that the consent of the host State to investment arbitration with investors for the other contracting State constituted "an agreement in writing."[29] In the court's view, "[t]he application of the New York Convention depends on such an agreement, and the provisions of the Arbitration Act 1996 (ss.100–104) relating to the enforcement of foreign arbitral awards give effect to this requirement in English law."[30] It concluded that the BIT Article providing for mixed arbitration must have been "intended to give rise to a real consensual agreement to arbitrate, even though by a route prescribed in the Treaty."[31]

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26 Article II(1) New York Convention, *supra* note 4, provides: "Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."

27 For instance, Article 26(5)(a) Energy Charter Treaty, 34 ILM 381 (1995), provides: "The consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall be considered to satisfy the requirement for: [. . .] (ii) an "agreement in writing" for purposes of article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 [hereinafter referred to as the New York Convention]. *See also* Article 25(2)(b) US Model BIT 2004 and Article 28(2)(b) Canadian Model BIT 2004.

28 Occidental Exploration and Production Company v. Republic of Ecuador, LCIA Case No. UN 3467, July 1, 2004, 12 ICSID Reports 59.

29 Republic of Ecuador v. Occidental Exploration and Production Company, England, Court of Appeal, September 9, 2005, [2005] EWCA 1116, 12 ICSID Reports 129.

30 *Ibid*., 12 ICSID Reports 129, 145, para. 32.

31 *Ibid*.

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Obligation of National Courts to Enforce Investment Awards

The core provision of the New York Convention is the obligation to recognize and enforce foreign arbitral awards[32] which do not suffer from some grave defects as outlined in the Convention itself.[33] In order to have an investment award recognized and enforced in the national courts of a Contracting Party of the New York Convention, a party to the arbitration proceedings only has to supply the original or duly certified copies of the award and the arbitration agreement,[34] as well as translations if these documents are not in an official language of the country where recognition and enforcement is sought.[35]

OBSTACLES TO THE RECOGNITION AND ENFORCEMENT OF INVESTMENT AWARDS

The principal obligation to enforce foreign awards, including international investment awards, is qualified by a limited number of specific grounds for refusing such enforcement under the New York Convention. These relate either to serious defects of the arbitral process or to fundamental values of the State where enforcement is sought. More specifically, recognition and enforcement may be refused if the opposing party can prove (a) the invalidity of the arbitration agreement; (b) lack of notice or violation of due process; c) excess of power by the arbitral tribunal; (d) irregular composition of the arbitral tribunal; or (e) that the award has not yet become binding, or was set aside or suspended in the country of origin.[36] In addition, the recognition and enforcement of an award may be refused if the subject matter of the dispute is considered "not capable of settlement by arbitration" (lack of arbitrability), or if it would be contrary to the public policy of the country of enforcement.[37]

These obstacles to the enforcement of arbitral awards are common features found in many national arbitration laws and, while some jurisdictions may be more restrictive, others are less so with regard to their interpretation.

It is further generally accepted that the standard of review to be used by national courts called upon to enforce foreign awards should be a deferential one, permitting refusal only in exceptional situations. This was expressly acknowledged by the Svea Court of Appeal in the *CME* case when it found that Swedish law "has adopted a restrictive approach towards the possibilities to successfully have an arbitration award

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32 Article III New York Convention, *supra* note 4, provides: "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."

33 See *infra* text at note 36.

34 Article IV(1) New York Convention, *supra* note 4.

35 Article IV(2) New York Convention, *supra* note 4.

36 Article V(1) New York Convention, *supra* note 4.

37 Article V(2) New York Convention, *supra* note 4.

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declared invalid or set aside based on a challenge" and that the "same approach" characterizes the rules in the New York Convention.[38] Also, the European Court of Justice has acknowledged that "it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible only in exceptional circumstances."[39]

The Article V(1) Grounds for Refusing Enforcement of Investment Awards

Article V(1) New York Convention provides:

> Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
>
> (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
>
> (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
>
> (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
>
> (e) The award has not yet become binding, on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

These grounds are essentially mirrored in Article 34(2)(a) UNCITRAL Model Law as reasons for the setting aside of arbitral awards.[40] In a number of challenge procedures before national courts, host States have tried to invoke such procedural deficiencies in order to attack investment awards. In general, courts have been reluctant to exercise strict review.

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38 Czech Republic v. CME Czech Republic BV, Sweden, Svea Court of Appeal, May 15, 2003, 9 ICSID Reports 439, 493.

39 Case C-126/97, Eco Swiss China Time Ltd v. Benetton International NV, [1999] ECR I-3055, para. 35.

40 This parallel was acknowledged by the Canadian court hearing the challenge against the *Metalclad* award. United Mexican States v. Metalclad, Canada, Supreme Court of British Columbia, May 2, 2001, *supra* note 20, 5 ICSID Reports 236, 265, para. 127.

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In challenge proceedings directed against the ICSID Additional Facility award in *Feldman* v. *Mexico*,[41] the Ontario Court of Appeal held that "[n]otions of international comity and the reality of the global marketplace suggest that courts should use their authority to interfere with international commercial arbitration awards sparingly."[42] Thus, it concluded that "the applicable standard of review in this case is at the high end of the spectrum of judicial deference."[43] On this basis, the Canadian appellate court rejected Mexico's argument that it was unable to present its case during the arbitral proceedings and that such proceedings were not in accordance with the agreement of the parties[44]—two grounds for annulment laid down in Article 34(2)(a)(ii) and (iv) UNCITRAL Model Law.[45]

The Article V(2) Grounds for Refusing Enforcement of Investment Awards.

In commercial arbitration, Article V(2) New York Convention has often proved to be a veritable hurdle to the successful enforcement of awards. It provides:

> Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
>
> (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Lack of arbitrability. In many countries, certain legal issues are perceived to be of such public interest that any disputes concerning them should be settled only before the regular courts. Thus, in many jurisdictions, competition law, intellectual property law, family law, or consumer protection law are considered nonarbitrable.[46] Over the years, however, national courts have reduced the scope of issues that might be regarded as not "arbitrable."

Given the "hybrid" nature of investment arbitration,[47] involving both public and private interests, it is conceivable that States may invoke the nonarbitrability defense

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41 Feldman v. Mexico, Case No. ARB(AF)/99/1, Award, December 16, 2002, 42 ILM 625 (2003); 7 ICSID Reports 341 (2005).

42 United Mexican States v. Feldman Karpa, Canada, Ontario Court of Appeal, January 11, 2005, 9 ICSID Reports 508, 515, para. 34.

43 *Ibid.*, 9 ICSID Reports 508, 517, para. 43.

44 *Ibid.*, 9 ICSID Reports 508, 520, para. 61.

45 These grounds correspond to the reasons for nonenforcement laid down in Article V(1)(b) and (d) New York Convention, *supra* note 4.

46 *See* Sarcevic, *supra* note 10, at 37; A. Redfern & M. Hunter, Law and Practice of International Commercial Arbitration 138 *et seq* (4th ed., 2004).

47 *Cf.* Z. Douglas, *The Hybrid Foundations of Investment Treaty Arbitrations*, *in* 74 British Yearbook of International Law 151 (2003).

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of Article V(2)(a) New York Convention. However, the fact that it is often express treaty provisions, e.g., in BITs, which oblige host States to submit to arbitration, would considerably weaken their argument that the substance of expropriation or other alleged violations of investment standards is nonarbitrable.

The lack of arbitrability was, however, successfully raised in U.S. enforcement proceedings concerning an award resulting from arbitration under an oil concession. In the *LIAMCO* case,[48] the District Court for the District of Columbia declined to recognize and enforce the award rendered against Libya[49] specifically invoking Article V(2)(a) New York Convention. The District Court found that the subject matter of the difference was Libya's nationalization of LIAMCO's assets, an issue that would not have been justiciable under the U.S. act of State doctrine.[50] The precedential value of this decision is diminished by the fact that after the parties' settlement, the Court of Appeals vacated the decision.[51]

In general, the lack of arbitrability does not appear to have posed serious problems in the enforcement practice concerning investment awards. A related issue was brought up in challenge proceedings before the English courts—though with reversed roles. In *Ecuador* v. *Occidental*, it was not the host State trying to oppose enforcement but rather the successful investor trying to oppose the challenging of an investment award[52] which raised the nonjusticiability of the underlying dispute as a preliminary objection to the set-aside proceedings in English courts.[53] Occidental argued that the UNCITRAL arbitration seated in London was based on the U.S.-Ecuador BIT which should be viewed as a "transaction between foreign sovereigns" which was nonjusticiable in English law. In rejecting this argument, the English courts discussed the nature of investment treaty claims. They found that also BIT claims were not mere inter-State rights, which for the sake of convenience could be claimed by individual investors on behalf of their home States, but rather were their "own rights".[54] Pursuant to the Court of Appeal, the case was justiciable since it

> concern[ed] a Treaty intended by its signatories to give rise to rights in favour of private investors capable of enforcement, to an extent specified by the Treaty wording, in consensual arbitration against one or other of its signatory States.[55]

48 LIAMCO v. Libya, U.S. District Court, District of Columbia, January 18, 1980, 482 F. Supp. 1175 (1980), 62 ILR 220.

49 LIAMCO v. Libya, Mahmassani, Sole Arbitrator, April 12, 1977, 62 ILR 141.

50 LIAMCO v. Libya, *supra* note 48, 482 F. Supp. 1175, 1178 (1980), 62 ILR 220, 223.

51 LIAMCO v. Libya, U.S. Court of Appeals, D.C. Circuit, May 6, 1981, 62 ILR 224.

52 Occidental Exploration and Production Company v. Republic of Ecuador, LCIA Case No. UN 3467, July 1, 2004, 12 ICSID Reports 59.

53 Republic of Ecuador v. Occidental Exploration and Production Company, England, High Court, Queen's Bench Division, April 29, 2005, [2005] EWHC 774 (Comm), 12 ICSID Reports 101; Court of Appeal, September 9, 2005, [2005] EWCA 1116, 12 ICSID Reports 129.

54 Republic of Ecuador v. Occidental Exploration and Production Company, England, Court of Appeal, September 9, 2005, [2005] EWCA 1116, 12 ICSID Reports 129, 138, para. 20.

55 *Ibid*., 12 ICSID Reports 129, 148, para. 37.

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On this basis, it appears unlikely that a court would uphold a potential challenge to the enforcement of an investment award based on the allegation that investor rights derived from BITs or other treaties should be considered "nonarbitrable."

Public policy. The "public policy defense" is generally considered as the most serious threat to the effective enforcement of arbitral awards under the New York Convention. Depending on the scope of what might be covered by a State's *ordre public*, the obligations under the Convention may be considerably limited. Thus, Article V(2)(b) New York Convention is also sometimes regarded as the "safety valve" under the Convention, preventing a totally unrestricted obligation to recognize and enforce foreign arbitral awards.

Over the years, however, many national courts have developed a more deferential attitude toward international arbitration and have restricted their public policy filter. Some countries actually distinguish between national and international public policy. With regard to the latter standard, U.S. courts have held that enforcement would be denied only where such enforcement would violate "the forum state's most basic notions of morality and justice."[56] A Canadian court held that the purpose of the public policy defence was "to guard against enforcement of an award *which offends our local principles of justice and fairness in a fundamental way* [. . .]."[57] According to the ILA Committee on International Commercial Arbitration:

> The international public policy of any State includes: (i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned; (ii) rules designed to serve the essential political, social or economic interests of the State, these being known as "*lois de police*" or "public policy rules"; and (iii) the duty of the State to respect its obligations towards other States or international organisations.[58]

In some challenge procedures concerning investment awards, a conflict with the public policy of the forum state has been raised by respondent States. For instance, in the *Feldman Karpa* case, Mexico argued that the ICSID Additional Facility award in *Feldman* v. *Mexico*[59] was contrary to Canadian public policy. The tribunal had found that the investor was entitled to damages equivalent in amount to rebates that it did not receive while domestic exporters were receiving such rebates. In Mexico's view, the rebates given to domestic exporters were illegal and thus the foreign investor should not be entitled to the same illegal advantages. According to the Ontario Court of

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56 Parsons & Whittemore Overseas Co v. Societé Generale de l'Industrie du Papier, 508 F.2d 969, 974 (2d Cir. 1974); Revere Copper & Brass Inc. v. Overseas Private Inv. Corp., 628 F.2d 81, 83 (D.C. Cir.).

57 United Mexican States v. Feldman Karpa, Canada, Ontario Court of Appeal, January 11, 2005, 9 ICSID Reports 508, 521, para. 66 (emphasis in original).

58 ILA Committee on International Commercial Arbitration, International Law Association Recommendations on the Application of Public Policy as a Ground for Refusing Recognition or Enforcement of International Arbitral Awards, Resolution 2/2002, New Delhi Conference, Recommendation 1(d).

59 Feldman v. Mexico, Case No. ARB(AF)/99/1, Award, December 16, 2002, 42 ILM 625 (2003); 7 ICSID Reports 341 (2005).

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Appeal, however, the "award of damages [was] not contrary to public policy. There [was] nothing fundamentally unjust or unfair about the award. It [was] rationally connected to the discriminatory conduct found by the tribunal and [sought] to redress the effect of the discrimination. The award [was] a logical quantification of the harm caused to CEMSA by the discriminatory conduct."[60]

Another Canadian court refused to set aside a NAFTA Chapter 11 UNCITRAL award in the *S.D. Myers* v. *Canada* case on public policy grounds.[61] The Federal Court of Canada found that the arbitral tribunal's decision did not "breach fundamental notions and principles of justice so that that the decision [was] not in conflict with the public policy of Canada."[62] Pursuant to the court, "'Public policy' does not refer to the political position or an international position of Canada, but refers to 'fundamental notions and principles of justice.'"[63]

In addition to a more stringent or more lenient *ordre public* filter, the additional layer of European Community law may impede the effective enforcement of investment awards. According to the ECJ, the supremacy of EC law must be respected at the enforcement stage of arbitral awards. In the *Eco Swiss* Case, this has been put beyond doubt with regard to European competition law,[64] but it may apply also to other fields of EC law. Thus, arbitral awards disregarding binding Community law may be threatened by nonenforceability.

State Immunity as an Additional Hurdle

Though the New York Convention regulates recognition and enforcement in general, the obligation contained in its Article III to recognize and enforce foreign arbitral awards does not exclude obstacles to enforcement measures as a result of general international law, such as the rules on State immunity.[65]

This view was affirmed in the *Sedelmayer* case, where the German Federal Supreme Court held that adherence to the New York Convention did not amount to a waiver of immunity from execution. The Court found that Article III merely required that Contracting States recognize and enforce arbitral awards "in accordance with national rules of procedure." In the Court's view, the reference to "domestic rules of procedure"

60 United Mexican States v. Feldman Karpa, Canada, Ontario Court of Appeal, January 11, 2005, 9 ICSID Reports 508, 521, para. 67.

61 S.D. Myers, Inc. v. Government of Canada, Partial Award on Liability, November 13, 2000, Second Partial Award on Damages, October 21, 2002; Final Award on Costs, December 30, 2002; 8 ICSID Reports 18.

62 Attorney-General of Canada v. S.D. Myers, Inc. and United Mexican States (Intervener), Canada, Federal Court, January 13, 2004, 8 ICSID Reports 194, 213, para. 76.

63 *Ibid*., 8 ICSID Reports 194, 208, para. 55.

64 Case C-126/97, Eco Swiss China Time Ltd v. Benetton International NV, [1999] ECR I-3055, para. 37 ("[. . .] where its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article 85(1) of the Treaty.").

65 Redfern & Hunter, *supra* note 10, at 463.

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included the general principles of international law as part of German federal law.[66] These general principles, in turn, encompassed the rules on State immunity.

Immunity rules may be effectively bypassed where investment award creditors can successfully attach funds owned by State-enterprises.

This happened in the case of *Walker International Holdings* v. *Société nationale des pétroles du Congo (SNPC)*, where the attachment of funds held by French banks on the account of the national oil company of the Congo in order to satisfy an investment award debt owed by the Republic of the Congo was upheld by French courts. The Cour de Cassation confirmed the finding of the Cour d'Appel de Paris that "SNPC according to its Statute did not possess sufficient functional independence to take autonomous decisions in its own interest and to be considered to enjoy legal and factual autonomy vis-à-vis the Congolese State."[67] It should be noted, however, that, in other cases, the Cour de Cassation and other national courts have been reluctant to permit enforcement measures against assets owned by legal persons which were distinct from host States.[68]

Thus, the rules on enforcement immunity applicable in the forum State where an investment award is sought to be enforced will ultimately decide whether such attempts will be successful or not.

National rules on enforcement immunity are often contained in specific immunity legislation as, for instance, in the United States,[69] the UK,[70] Canada,[71] and Australia.[72]

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66 Sedelmayer v. Russian Federation, German Federal Supreme Court, Order VII ZB 9/05, October 4, 2005, NJW-RR 2006, 198, *available at* http://www.bundesgerichtshof.de/entscheidungen/entscheidungen.php; para. 25. ("[. . .] Das UN-Vollstreckungsübereinkommen bestimmt, dass beim Vorliegen bestimmter Voraussetzungen Schiedssprüche nach den inländischen Verfahrensregeln zur Vollstreckung zugelassen werden müssen und die Vollstreckung weder wesentlich strengeren Verfahrensvorschriften noch wesentlich höheren Kosten unterliegen darf als inländische Schiedssprüche (Art. 3 des UN-Vollstreckungsübereinkommens). Die Bezugnahme auf das inländische Verfahrensrecht schließt als Bestandteil des Bundesrechts die allgemeinen Regeln des Völkerrechts ein, zu denen die Beachtung der diplomatischen Schutzrechte gehört.").

67 Walker International Holdings v. Société nationale des pétroles du Congo (SNPC), Cour d'Appel de Paris, January 23, 2003; Cour de cassation, February 6, 2007, 04-13107 (« la cour d'appel a pu déduire, sans encourir les griefs des moyens, que, dès lors que la SNPC n'était pas dans une indépendance fonctionnelle suffisante pour bénéficier d'une autonomie de droit et de fait à l'égard de l'Etat et que son patrimoine se confondait avec celui de l'Etat, elle devait être considérée comme une émanation de la République du Congo; que le moyen n'est pas fondé »).

68 *See* Benvenuti & Bonfant Srl v. Banque Commercial Congolaise, Cour de cassation Paris, July 21, 1987, 1 ICSID Reports 373; AIG Capital Partners Inc. and Another v. Republic of Kazakhstan (National Bank of Kazakhstan Intervening), High Court, Queen's Bench Division (Commercial Court), October 20, 2005, [2005] EWHC 2239 (Comm), 11 ICSID Reports 118. See *infra* text at note 144.

69 Foreign Sovereign Immunities Act 1976, 28 USC §§ 1330, 1602–11, 15 ILM 1388 (1976), as amended in 1988, 28 ILM 396 (1989) and in 1996/7, 36 ILM 759 (1997).

70 State Immunity Act 1978, 17 ILM 1123 (1978).

71 State Immunity Act 1982, 21 ILM 798 (1982). Canada is not a Party to the ICSID Convention.

72 Foreign States Immunities Act 1985, 25 ILM 715 (1986).

Alternatively, they may stem from directly applicable international agreements, such as the European Convention on State Immunity of 1972[73] or result from customary international law incorporated into the domestic legal order. In 2004, the United Nations Convention on Jurisdictional Immunities of States and Their Property,[74] based on a draft elaborated by the International Law Commission, was adopted. Subject to the required number of ratifications, it is to be expected that the rules contained in this Convention, which are also regarded as widely reflecting customary international law, will provide important guidelines for the enforcement of investment awards against assets owned by respondent States.

Assets immune from enforcement. Though the rules on enforcement immunity are still much more protective of the interests of sovereign States than those concerning immunity from jurisdiction, certain trends in the law can be identified: the most important criterion to distinguish between property which may be subject to enforcement measures and property that is exempt from such measures is still the purpose of the property in question. Property serving governmental purposes is generally regarded immune from enforcement, while enforcement measures may be taken against property serving commercial purposes.[75]

In addition, some jurisdictions like Switzerland require a significant link between the dispute and the *forum* State. In the enforcement proceedings concerning the *ad hoc* award in the *LIAMCO* case,[76] the Swiss Federal tribunal held that the seat of the tribunal in Switzerland did not furnish a sufficient jurisdictional link to Switzerland to justify enforcement.

The 1976 U.S. Foreign Sovereign Immunities Act (FSIA)[77] provides, among others, for an exception from enforcement immunity for property of a foreign State located in the United States and used for commercial activity in the United States.[78] Also, the 1978 UK State Immunity Act (SIA)[79] provides for an exception from enforcement immunity "[. . .] in respect of property which is for the time being in use or intended for use for commercial purposes."[80]

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73 European Treaty Series No. 74, 11 ILM 470 (1972).

74 United Nations Convention on Jurisdictional Immunities of States and Their Property, adopted by the UN General Assembly on December 2, 2004, UN, GAOR, 59th Session, Supp. No. 22 (A/59/22), 44 ILM 803 (2005); *see also* G. Hafner/U. Köhler, *The United Nations Convention on Jurisdictional Immunities of States and Their Property*, 35 Netherlands Yearbook of International Law 3 (2004); D. P. Stewart, *The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 Am. J. Int'l L. 194 (2005).

75 *Cf.* H. Fox, The Law of State Immunity (2nd ed. 2008); A. Reinisch, *European Court Practice Concerning State Immunity from Enforcement Measures*, 17 Eur. J. Int'l L. 803 (2006), C. Schreuer, State Immunity: Some Recent Developments (1988).

76 Socialist People's Libyan Arab Jamahiriya v. LIAMCO, Switzerland, Federal Tribunal, June 19, 1980, 20 ILM 151 (1981), BGE 106 Ia 142.

77 15 ILM 1388 (1976).

78 28 USC § 1610.

79 17 ILM 1123 (1978).

80 Section 13(4) UK SIA.

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The basic distinction between assets serving governmental purposes and those serving other purposes is retained in the 2004 UN Convention which exempts from immunity "property [. . .] specifically in use or intended for use by the State for other than government non-commercial purposes."[81] In an attempt to further clarify this distinction, Article 21 UN Convention lists diplomatic, military, central bank as well as cultural assets, as types of property which should be normally regarded as serving governmental purposes.[82] Since the UN Convention is not yet in force, no cases have been decided applying its provisions. However, there are already a number of national court cases interpreting and relying on provisions of the UN Convention, such as a Munich Court relying on the exception of Article 19(c) UN Convention concerning the distinction between property serving governmental purposes and property serving commercial purposes,[83] or a Berlin Court relying on the ILC Commentary on the UN

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81 Article 19 UN Convention, *supra* note 74, provides:

> No post-judgment measures of constraint, such as attachment, arrest and execution, against property of a Stare may be taken in connection with a proceeding before a court of another State unless and except to the extent that:
>
> (a) the State has expressly consented to the taking of such measures as indicated:
>
> (i) by international agreement;
>
> (ii) by an arbitration agreement or in a written contract; or
>
> (iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen;
>
> (b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or
>
> (c) it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed.

82 Article 21 UN Convention, *supra* note 74, provides:

> 1. The following categories, in particular, of property of a State shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes under article 19 subparagraph (c):
>
> (a) property, including any bank account, which is used or intended for use for the purposes of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences;
>
> (b) property of a military character or used or intended for use in the performance of military functions;
>
> (c) property of the central bank or other monetary authority of the State;
>
> (d) property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale;
>
> (e) property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale.

83 However, in one of the cases resulting from the enforcement attempts of Mr. Sedelmayer, a Munich appellate court held that claims for rent payment by a foreign state against a private

Convention as a subsidiary source of international law[84] when interpreting the scope of a waiver of immunity and affirming that an unspecified and general waiver of enforcement immunity does not encompass property protected by the Vienna Convention of Diplomatic Relations.[85]

The distinction between property serving governmental purposes and property serving commercial purposes as the crucial question to determine whether enforcement measures against foreign States are permissible is widely adhered to in national court practice. Recently, a number of German courts had the opportunity to elaborate on it as a result of various enforcement attempts by the successful investment claimant in the *Sedelmayer* case. This series of enforcement litigation arose from an investment award *Sedelmayer* v. *Russian Federation*,[86] rendered by a tribunal sitting in Stockholm, which had been unsuccessfully challenged before Swedish courts[87] and declared provisionally enforceable in Germany by a Berlin court.[88]

The successful claimant had tried to enforce this award in a number of ways, among them by a third-party garnishment order directed against a German airline owing flight

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party would fall under the exception of Article 19(c) UN Convention. Thus, the claimant successfully demanded an order of attachment and transfer of garnished rent claims. Sedelmayer v. Russian Federation, Regional Court Munich (Landgericht München), Az. 20 T 8856/07, February 21, 2008. ("Aus dem Übereinkommen der Vereinten Nationen über die Immunität der Staaten und ihres Vermögens von der Gerichtsbarkeit vom 2. Dezember 2004 kann die Schuldnerin gegenüber der Gläubigerin keine weiteren Rechte herleiten. Es liegt jedenfalls die Ausnahme gemäß Art. 19 lit. c) des Übereinkommens vor. ").

84 Sedelmayer v. Russian Federation, Higher Regional Court Berlin (Kammergericht Berlin), Az. 25 W 15/03, December 3, 2003, SchVZ (2004) 102, para. 65 ("Die Arbeiten der Völkerrechtskommission und der International Law Association dienen der Feststellung von völkerrechtlichen Normen und sind deshalb Erkenntnisquelle des Völkerrechts (vgl. Art. 38 Abs. 1 des Statuts des Internationalen Gerichtshofes, [. . .])").

85 *Ibid.*, para. 64 ("Entsprechendes ergibt sich aus den Artikeln 18 und 19 des Entwurfs der Völkerrechtskommission der Vereinten Nationen (International Law Commission) zur Staatenimmunität (Artikelentwürfe der ILC über die gerichtlichen Immunitäten der Staaten und ihres Eigentums, in YILC 1991 II (2), 12 ff) und dem dazu ergangenen Bericht der Völkerrechtskommission der Vereinten Nationen. Danach ist grundsätzlich ein Verzicht auf Vollstreckungsimmunität möglich. Allerdings gelten für die Annahme eines derartigen Verzichts strenge Voraussetzungen; dies folgt aus der amtlichen Erläuterung zu Art. 19 des Entwurfs der Völkerrechtskommission (Report of the International Law Commission on the work of ist 43rd Session, Document A/46/10, Yearbook of the International Law Commission 1991, vol. 2, 9, 59). Darin heißt es ausdrücklich, dass ein allgemeiner Verzicht oder ein Verzicht in Bezug auf sämtliches in dem Territorium belegene Vermögen nicht ausreichend wäre, um Zwangsvollstreckungsmaßnahmen gegen Vermögen zuzulassen, das dem besonderen Schutz der Wiener [Diplomatenrechts-]Konvention unterliegt.").

86 Sedelmayer v. Russian Federation, Award, July 7, 1998, *available at* http://ita.law.uvic.ca/documents/investment_sedelmayer_v_ru.pdf.

87 Sedelmayer v. Russian Federation, Stockholms tingsrätt, Az. T 6-583-98, December 18, 2002, *available at* http://ita.law.uvic.ca/documents/Sedelemyer-StockholmTingsrat-il18-12-02.2-doc.doc; affirmed by Stockholm Svea Court of Appeal, T 525-03, June 15, 2005, *available at* http://ita.law.uvic.ca/annulment_judicialreview.htm.

88 Sedelmayer v. Russian Federation, Higher Regional Court Berlin (Kammergericht Berlin), Az. 28 Sch 23/99, February 16, 2001, SchVZ (2004) 109.

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charges to the host State stemming from over-flight, transit, and landing rights. A Cologne court[89] and, on appeal, the German Federal Supreme Court[90] disallowed this enforcement measure because it considered that the public law claims to flight charges served governmental purposes. It found that the proceeds of the charges were immediately used for aviation regulation purposes which it characterized as a public function.[91]

Mr Sedelmayer was equally unsuccessful when he tried to enforce the award by attaching VAT refunds payable by the German tax authorities to the Russian Federation. A Berlin court decided that enforcement measures against assets of a foreign State which served official purposes and were specifically protected by diplomatic law would require a waiver of immunity.[92] Since the court found that pursuant to official information of the Russian Embassy, the VAT refund claims in dispute exclusively served the maintenance of diplomatic and consular relations of the Russian Federation in Germany and that it had always been a part of the Embassy budget,[93] it disallowed any enforcement measures.[94]

The claimant, however, did not give up. Instead, he tried a number of other enforcement measures against the Russian Federation,[95] some of which proved ultimately successful.

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89 Sedelmayer v. Russian Federation, Higher Regional Court Cologne (Oberlandesgericht Köln), October 6, 2003, SchVZ (2004) 99.

90 Sedelmayer v. Russian Federation, German Federal Supreme Court (Bundesgerichtshof), Order VII ZB 9/05, October 4, 2005, *available at* http://www.bundesgerichtshof.de/entscheidungen/entscheidungen.php.

91 *Ibid.*, para. 20. ("Nach diesen Maßstäben dienen die gepfändeten Ansprüche hoheitlichen Zwecken. Das Beschwerdegericht hat festgestellt, dass der Erlös aus den Ansprüchen unmittelbar für Zwecke der Luftverkehrsverwaltung verwendet werden soll. Gegen diese Feststellung hat die Rechtsbeschwerde nichts erinnert. Die Luftverkehrsverwaltung ist, wie bereits dargelegt, eine hoheitliche Aufgabe.").

92 Sedelmayer v. Russian Federation, Higher Regional Court Berlin (Kammergericht Berlin), Az. 25 W 15/03, December 3, 2003, SchVZ (2004) 102, para. 44 ("Eine Zwangsvollstreckung sowohl in Vermögensgegenstände eines fremden Staates, die hoheitlichen Zwecken dienen als auch insbesondere die Zwangsvollstreckung in vom Diplomatenrecht besonders geschützte Vermögensgegenstände setzt einen entsprechenden Immunitätsverzicht des fremden Staates voraus.").

93 *Ibid.*, para. 48 ("Entgegen der Ansicht des Gläubigers ist hier von einem unzulässigen Eingriff in nach diesem Sinne geschütztes Vermögen auszugehen, denn es ist nach der entsprechenden Auskunft des Botschaftsrates im Auftrag des Botschafters mit Mitteilung vom 25. Oktober 2002 zugrunde zu legen, dass die streitgegenständlichen Umsatzsteuerrückerstattungsansprüche ausschließlich der Aufrechterhaltung der Funktionen der diplomatischen Missionen und der konsularischen Vertretungen der R. F. in der Bundesrepublik Deutschland und deren bevorrechtigten Mitgliedern sowie der Erfüllung ihrer dienstlichen Aufgaben dienen. Die Schuldnerin hat ferner vorgetragen, dass die Umsatzsteuerguthaben stets fester Bestandteil des Budgets der Botschaft wären. ").

94 *See also* S. Kröll, Die Pfändung vom Forderungen des Russischen Staats gegen deutsche Schuldner 223 (IPrax 2004).

95 See, for an interesting account on the part of the claimant himself: Franz J. Sedelmayer, *Franz J. Sedelmayer vs. The Russian Federation: The Tribulations of an Arbitral Award Winning Party, in* 3(5) Transnational Dispute Management (December 2006).

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One of the successful third-party garnishment attempts was directed against the Deutsche Bundesbank and a commercial bank where the Russian Federation held bank accounts serving commercial purposes. An appellate court in Frankfurt upheld the third-party garnishment orders of a lower Frankfurt court.[96] What is remarkable in this case is the fact that the Frankfurt appellate court appeared to modify the State-friendly approach of the German Constitutional Court in the famous *Philippine Embassy Bank Account Case*.[97] In that case—widely relied upon by courts even outside Germany[98]—the Court found that:

> [t]here is a general rule of international law that execution by the State having jurisdiction on the basis of a judicial writ of execution against a foreign State, issued in relation to non-sovereign action *(acta iure gestionis)* of that State upon that State's things located or occupied within the national territory of the State having jurisdiction, is inadmissible without assent by the foreign State, insofar as those things serve sovereign purposes of the foreign State at the time of commencement of the enforcement measure.[99]

In addition, the German Constitutional Court placed a high burden on plaintiffs by endorsing a quasi-presumption in favor of the sovereign purposes of an embassy account.[100] The Frankfurt appellate court, however, demanded that the State claiming enforcement immunity substantiates and does not only allege the sovereign purpose of property claimed immune from execution. In the case at hand, involving among others Russian accounts with the Deutsche Bundesbank, the court found that while the debtor had claimed the sovereign purpose of its bank accounts with the third-party debtor, it had merely argued that that the latter was no private law credit institution which held an ordinary account in favour of the debtor. Because the court did not hear any substantiated submissions with regard to a sovereign purpose, it found that the enforcement immunity of the debtor did not exist.[101]

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96 Sedelmayer v. Russian Federation, Amtsgericht Frankfurt, 83 M 12303/2001, Pfändungs- und Überweisungsbeschluss, January 22, 2002.

97 Philippine Embassy Bank Account Case, Federal Constitutional Court (Bundesverfassungsgericht), December 13, 1977, 46 BVerfG 342; 65 ILR 146.

98 See A. Reinisch, *European Court Practice Concerning State Immunity from Enforcement Measures*, 17 Eur. J. Int'l L. 803 (2006).

99 *Philippine Embassy Case*, *supra* note 97, 65 ILR 146, at 164, confirmed in the *NIOC Revenues Case*, Federal Constitutional Court (Bundesverfassungsgericht), April 12, 1983, BVerfGE 64, 1; 65 ILR 215, at 242. *See also* Spanish Consular Bank Accounts Case, Regional Court Stuttgart (Landgericht Stuttgart), Sept. 21, 1971, 65 ILR 114, at 117.

100 *Philippine Embassy Case*, *supra* note 97, 65 ILR 146, at 186, 189 ("Because of the difficulties of delimitation involved in judging whether that ability to function is endangered, and because of the potential for abuse, general international law makes the area of protection enjoyed by the foreign State very wide and refers to the typical, abstract danger, but not to the specific threat to the ability of the diplomatic mission [. . .] for the executing authorities of the receiving State to require the sending State, without its consent, to provide details concerning the existence or the past, present or future purposes of funds in such an account would constitute interference, contrary to international law, in matters within the exclusive competence of the sending State.").

101 Sedelmayer v. Russian Federation, Higher Regional Court Frankfurt a.M. (Oberlandesgericht Frankfurt a.M.), Beschluss, 26 W 101/2002, October 4, 2002. ("Die Schuldnerin hat zwar die

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Another successful third-party garnishment was directed against tenants of the Respondent in a central Berlin shopping district at Friedrichstraße. Different German courts permitted the garnishment of rent payments owed to instrumentalities of the Russian Federation and ordered the tenants as third-party debtors to directly pay to the Claimant Sedelmayer. One court expressly found that the claims to be garnished resulted from the renting of business premises. In the court's view, "such claims do not stem from the execution of sovereign purposes but from the debtor's participation in normal business life in Germany."[102] Sedelmayer was similarly successful with regard to real property in Cologne which was owned by the Russian Federation. German courts regarded the forced administration and forced sale of such real property not serving sovereign purposes but rented on commercial terms as lawful.[103]

Waiver of enforcement immunity. Most immunity regimes permit not only waivers of jurisdictional immunity but also of immunity from enforcement measures. Such enforcement waivers must be separate and are generally not considered implied in a waiver of jurisdictional immunity.[104] This is firmly established in the judicial practice of most States.[105] The 1980 Swedish appellate court decision in the *LIAMCO* case[106]

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hoheitliche Zwecksetzung von Guthaben auf Konten der Schuldnerin bei der Drittschuldnerin zu 1.) behauptet; sie hat sich insofern jedoch darauf beschränkt, zur Begründung auszuführen, die Drittschuldnerin zu 1.) sei kein privatrechtlich verfasstes Kreditinstitut, das "ein gewöhnliches Konto" für die Schuldnerin führe. [. . .] Auch in den Ausführungen der Schriftsätze [. . .] finden sich keine substantiierten Darlegungen zu einer hoheitlichen Zwecksetzung. Eine Vollstreckungsimmunität der Schuldnerin besteht danach nicht. ").

102 Sedelmayer v. Russian Federation, Regional Court Hagen (Landgericht Hagen), Beschluss, 3 T 405/07, January 16, 2008. ("Die Forderung, deren Pfändung und Überweisung der Gläubiger beantragt hat, resultiert nicht aus der Wahrnehmung hoheitlicher Zwecke, sondern aus der Teilnahme der Schuldnerin am normalen Wirtschaftsleben auf dem Gebiet der Bundesrepublik Deutschland. Der zu pfändende angebliche Anspruch der Schuldnerin gegen die Drittschuldnerinnen entspringt der Vermietung bzw. Verpachtung von Ladenlokalen in dem Gebäude Friedrichstraße [. . .].")

103 Sedelmayer v. Russian Federation, Regional Court Cologne (Landgericht Köln), Beschluss, May 11, 2007, Oberlandesgericht Köln, Az. 22 U 98/07, March 18, 2008; Russian Federation v. Sedelmayer, German Federal Supreme Court (Bundesgerichtshof), Order IX ZR 64/08, November 6, 2005.

104 *Cf.* Article 20 UN Convention which states that "consent to the exercise of jurisdiction [. . .] shall not imply consent to the taking of measures of constraint." *See also* Sec 13 (3) UK SIA which provides that "[. . .] a provision merely submitting to the jurisdiction of the courts is not to be interpreted as a consent for the purposes of this subsection."

105 *See, e.g.*, Socialist Federal Republic of Yugoslavia v. Societé Européenne d'Etudes et d'Entreprises, Tribunal de grande instance of Paris, July 6, 1970, 65 ILR 46, at 49; *République Islamique d'Iran et consorts c/ sociétés Eurodif et Sofidif*, Cour d'appel de Paris, April 21,1982, 65 ILR 93, at 97; Socifros c/ URSS, Cour d'appel d'Aix, November 23,1938, 9 Ann. Dig. (1938–40), 236, at 237. *See also* A. Reinisch, *European Court Practice Concerning State Immunity from Enforcement Measures*, 17 Eur. J. Int'l L. 803, 817 *et seq*. (2006).

106 Libyan American Oil Company v. Libya, Sweden, Svea Court of Appeal (Svea hovrätt), June 18, 1980, 62 ILR 225.

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as well as the 2000 French Cour de Cassation decision in the *Creighton* case,[107] in which submissions to *ad hoc*/ICC arbitration were interpreted to amount to implicit waivers of enforcement immunity appear to have remained exceptional rulings. In the *Sedelmayer* case, for instance, the German Federal Supreme Court insisted that consent to arbitration contained in a BIT did not amount to a waiver of immunity from execution.[108]

ENFORCEMENT OF ICSID AWARDS

The enforcement of ICSID awards is directly regulated by the ICSID Convention which provides that awards shall be enforced in all Contracting States like judgments of their own domestic courts. This excludes even the exceptions, most importantly, the "public policy defense," that would be available under the New York Convention. The only remaining obstacle to a quasi-automatic enforcement of ICSID awards are the rules on State immunity from execution which are expressly reserved in Article 55 of the ICSID Convention.[109]

ICSID Additional Facility arbitration is not governed by the ICSID Convention.[110] Additional Facility awards have to be enforced pursuant to the national law applicable and thus in many cases pursuant to the rules laid down in the New York Convention.[111] This is one of the reasons why the ICSID Additional Facility Arbitration Rules provide that proceedings shall be held in States parties to the New York Convention.[112]

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107 Société Creighton c/ ministre des finances de l'Etat du Qatar et autre, Cour de cassation (1re chambre civile), 6 juillet 2000, Bulletin civil I, n 207, *Revue de l'arbitrage* (2001) 114. ("L'engagement pris par un Etat signataire de la clause d'arbitrage d'exécuter la sentence dans les termes de l'article 24 du règlement d'arbitrage de la chambre de commerce international implique renonciation de cet Etat à l'immunité d'exécution.").

108 Sedelmayer v. Russian Federation, German Federal Supreme Court, Order VII ZB 9/05, October 4, 2005, para. 23.

109 See, on the enforcement of ICSID awards in general, E. Baldwin et al., *Limits to Enforcement of ICSID Awards*, 23(1) J. INT'L ARB. 1 (2006); A. Broches, *Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution*, 2 ICSID REV.—FOREIGN INV. L.J. 287 (1987); A. Boralessa, *Enforcement in the United States and United Kingdom of ICSID Awards Against the Republic of Argentina: Obstacles that Transnational Corporations May Face*, 17 N.Y. INT'L L. REV. 53 (2004); G. Cane, *The Enforcement of ICSID Awards: Revolutionary or Ineffective?* 15 AM. REV. INT'L ARB. 439 (2004); S. Choi, *Judicial Enforcement of Arbitration Awards under the ICSID and New York Conventions*, 28 N.Y. U. J. INT'L L. & POL. 175 (1995); G. R. Delaume, *Enforcement of State Contract Awards: Jurisdictional Pitfalls and Remedies*, 8 ICSID REV.—FOREIGN INV. L.J. 29 (1993); C. SCHREUER, THE ICSID CONVENTION: A COMMENTARY 1076 *et seq*. (2001).

110 See Article 3 Additional Facility Rules: "Since the proceedings envisaged by Article 2 are outside the jurisdiction of the Centre, none of the provisions of the Convention shall be applicable to them or to recommendations, awards, or reports which may be rendered therein."

111 *See* C. SCHREUER, THE ICSID CONVENTION: A COMMENTARY, Article 53, para. 8 (2001).

112 Article 20 ICSID Additional Facility Rules, entitled "*Limitation on Choice of Forum*," provides: "Arbitration proceedings shall be held only in States that are parties to the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards."

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The Autonomous International Law Obligation to Comply with ICSID Awards

The legal regime governing the enforcement of ICSID awards is very different from the one applied in the case of non-ICSID awards which may be enforced pursuant to the New York Convention in the domestic courts of the Convention's Contracting Parties. The ICSID Convention contains not only a special and even very strict enforcement obligation of national courts but also a genuine international law obligation to comply with the outcome of ICSID proceedings.

Article 53 of the ICSID Convention provides for the binding force of awards and requires that the parties "shall abide by and comply with the terms of the award."[113] This obligation is independent of any potentially available defense to enforcement measures in domestic courts. The nonobservance of the ICSID Convention obligation to comply with ICSID awards may revive the right of diplomatic protection of the home State of the prevailing investor,[114] and it could even lead to proceedings being brought before the ICJ pursuant to Article 64 of the Convention.[115] The possibility of such consequences was expressly contemplated by the *ad hoc* Committee in the *MINE* v. *Guinea* case[116] and reaffirmed by the *ad hoc* Committee in the *Mitchell* v. *Congo* case which stated:

> The immunity of a State from execution (Article 55 of the Convention) does not exempt it from enforcing the award, given its formal commitment in this respect following signature of the Convention. If it does not enforce the award, its behaviour is subject to various indirect sanctions. Precisely, reference is made to Articles 27 and 64 of the Convention. The investor's State has the right, according to Article 27, to exercise diplomatic protection against the State which does not respect its obligation to enforce an arbitral award of the Centre; but also, according to Article 64, to have recourse to the International Court of Justice. Moreover, a State's refusal to enforce an ICSID award may have a negative effect on this State's

113 Article 53(1) ICSID Convention, *supra* note 3, provides: "The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention."

114 Article 27(1) ICSID Convention, *supra* note 3, provides: "No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute."

115 Article 64 ICSID Convention, *supra* note 3, provides: "Any dispute arising between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by the application of any party to such dispute, unless the States concerned agree to another method of settlement."

116 MINE v. Guinea, Interim Order No. 1 on Guinea's Application for Stay of Enforcement of the Award, August 12, 1988, 4 ICSID Reports 115, 116, para. 25.

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> position in the international community with respect to the continuation of international financing or the inflow of other investments.[117]

Exclusivity

The exclusive nature of the enforcement rules of the ICSID Convention also implies that the grounds for nonrecognition and nonenforcement available under the New York Convention cannot be raised before national courts where the enforcement of ICSID awards is sought. Procedural defects that may attach to an investment award which could lead to a denial of recognition and enforcement under Article V(1) New York Convention may not be invoked before national courts. However, the annulment procedure under Article 52 of the ICSID Convention provides a functional equivalent to correct certain grave deficiencies of arbitral proceedings governed by the ICSID Convention.[118] This exclusive nature of the control mechanisms of the ICSID Convention was confirmed by the *ad hoc* Committee in the *MINE* v. *Guinea* case which held:

> Article 53 of the Convention provides that the award shall be binding on the parties 'and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.' The post-award procedures (remedies) provided for in the Convention, namely, addition to, and correction of, the award (Art. 49), and interpretation (Art. 50), revision (Art. 51) and annulment (Art. 52) of the award are to be exercised within the framework of the Convention and in accordance with its provisions. It appears from these provisions that the Convention excludes any attack on the award in national courts.[119]

Instead of the diverse grounds for nonrecognition available under Article V(1) New York Convention, the ICSID Convention provides for a strict obligation to recognize and enforce ICSID awards.

This was recognized by the French Cour de Cassation in the *SOABI* case, which held that

> the Washington Convention of 18 March 1965 has instituted in its Articles 53 and 54 an autonomous and simplified regime for recognition and enforcement which excludes that provided for in [national law].[120]

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117 Patrick Mitchell v. Democratic Republic of the Congo, Decision on the Stay of Enforcement of the Award, November 30, 2004, para. 41.

118 *See* C. Schreuer, The ICSID Convention: A Commentary, Article 53, para. 18 (2001), referring to the "self-contained and exhaustive nature of review procedures under the ICSID Convention."

119 MINE v. Guinea, Decision on Annulment, December 22, 1989, 4 ICSID Reports 79, 84, para. 4.02.

120 SOABI v. Senegal, France, Cour de Cassation, June 11, 1991, 2 ICSID Reports 341. This decision reversed a court of appeal judgement which had denied recognition of an ICSID award as contrary to French public policy. SOABI v. Senegal, Cour d'appel, Paris, December 5, 1989, 2 ICSID Reports 338.

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An obiter dictum to the same effect can be found in the English *Occidental* case where the Court of Appeal found:

> In the case of an ICSID arbitration, no recourse to the English court is currently possible under the Arbitration Act 1996: see the Arbitration (International Investment Disputes) Act 1966 s.3(2). The ICSID scheme also differs in having its own enforcement mechanism, so that the New York Convention is inapplicable." [121]

The Strict Obligation to Recognize and Enforce ICSID Awards

The obligation to recognize and enforce ICSID awards is basically an unrestricted one that excludes any substantive review on the part of national courts by requiring States Parties to the ICSID Convention to treat such awards like final judgments of their own national courts. It is expressly laid down in Article 54(1) ICSID Convention which provides:

> Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. [. . .]

Though this requirement is limited to the "pecuniary obligations" contained in awards, in practice this duty leads to a very high level of enforceability of awards.

However, the fact that Article 54(1) assimilates ICSID awards to final judgments of domestic courts implies that enforcement may be resisted in countries where national rules provide for the exceptional refusal to enforce a final judgment.[122] Though this possibility was acknowledged during the drafting of the Convention,[123] it does not seem to have been relied upon in practice in order to refuse recognition and enforcement of ICSID awards. One should note, however, that in the course of the recent wave of ICSID cases brought against Argentina, this State announced its intention to challenge the constitutionality of ICSID awards under its domestic law based on an interpretation of Articles 53 and 54 ICSID Convention which would allow domestic review.[124] Argentina further argued that "an investor seeking recognition and enforcement of an ICSID award against Argentina has to follow the procedures provided for

121 Republic of Ecuador v. Occidental Exploration and Production Company, England, Court of Appeal, September 9, 2005, [2005] EWCA 1116, 12 ICSID Reports 129, 148, para. 38.

122 *See* E. Baldwin et al., *Limits to Enforcement of ICSID Awards*, 23(1) J. Int'l Arb. 1, 9 *et seq.* (2006), who give examples from U.S. and French law providing for exceptional grounds to refuse enforcement of domestic judgments.

123 According to Aron Broches, "treating awards in the same way as court judgments implied that exceptional grounds only could be invoked to prevent recognition and enforcement." A. Broches, *Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution*, 2 ICSID Rev.—Foreign Inv. L.J. 287, 312 (1987).

124 *See* G. Bottini, *Recognition and Enforcement of ICSID Awards*, Transnational Dispute Management (May 2008); S. Alexandrov, *Enforcement of ICSID Awards: Articles 53 and 54 of the ICSID Convention*, Transnational Dispute Management (September 2008).

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in the laws concerning the enforcement of judgments in force in Argentina."[125] This view was strongly rejected by other ICSID Contracting Parties.[126]

Past attempts to resist enforcement of awards relied upon rules concerning State immunity from execution.

State Immunity Rules on Enforcement Measures as Remaining Obstacles

While the ICSID Convention's assimilation of ICSID awards to domestic courts' judgments, coupled with its obligation to recognize and enforce such awards, effectively eliminated the limited review powers national courts enjoy under the regime of the New York Convention, Article 55 ICSID Convention makes clear that State immunity rules may still constitute a bar to enforcement of ICSID awards. This Article expressly provides:

> Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.[127]

Assets immune from enforcement. The basic distinction between property serving governmental purposes which is generally regarded immune from enforcement and property serving commercial purposes against which enforcement measures may be taken[128] can be identified in most cases involving attempts to enforce ICSID awards in national courts.

The enforcement immunity enjoyed by foreign State property serving governmental purposes, as contained in the 1976 U.S. FSIA,[129] was relied upon in the *LETCO* case where a successful ICSID claimant tried to enforce an award.[130] The District Court for the Southern District of New York found that the property in question was not "used for a commercial activity in the United States." The assets were registration fees and other taxes due from ships flying the Liberian flag. The Court held that these were revenues for the support and maintenance of government functions. Therefore, Liberia's motion to vacate the executions was granted.[131] Also a subsequent attempt to attach Liberian-owned bank accounts for enforcement purposes remained unsuccessful. Though the accounts served mixed purposes, partly the running of the embassy

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125 Letter of Argentina, dated April 7, 2008, cited in: Letter from United States Department of State to Ms. Claudia Frutos-Peterson, Secretary of the *Ad Hoc* Committee (*Siemens*), May 1, 2008, *available at* http://ita.law.uvic.ca/documents/Siemens-USsubmission.pdf.

126 Letter from United States Department of State, May 1, 2008, *supra* note 125, at 2.

127 Article 55 ICSID Convention, *supra* note 3.

128 *See supra* text, at note 75.

129 28 USC § 1610.

130 LETCO v. Liberia, March 31, 1986, 2 ICSID Reports 343.

131 LETCO v. Liberia, District Court, S.D.N.Y., December 12, 1986, 2 ICSID Reports 385, 388–09.

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and partly commercial ones, the U.S. courts refused to allow enforcement steps. The DC District Court held:

> The Court presumes that some portion of the funds in the bank accounts may be used for commercial activities in connection with running the Embassy, such as transactions to purchase goods or services from private entities. The legislative history of the FSIA indicates that these funds would be used for a commercial activity and not be immune from attachment. The Court, however, declines to order that if any portion of a bank account is used for a commercial activity then the entire account loses its immunity. [. . .] On the contrary, following the narrow definition of "commercial activity," funds used for commercial activities which are "incidental" or "auxiliary," not denoting the essential character of the use of the funds in question, would not cause the entire bank account to lose its mantle of sovereign immunity.[132]

Another statutory immunity provision was the subject of enforcement proceedings in English courts. The 1978 UK State Immunity Act (SIA)[133] provides, *inter alia*, that "[p]roperty of a State's central bank or other monetary authority shall not be regarded [. . .] as in use or intended for use for commercial purposes."[134] This statutory definition of the noncommercial nature of assets owned by a central bank was crucial in the decision of the High Court in *AIG Capital Partners* v. *Kazakhstan*,[135] where successful ICSID claimants failed to enforce an ICSID Award[136] against assets of the National Bank of Kazakhstan. Though the rejection was mainly based on the fact that the court considered the National Bank of Kazakhstan to be a separate legal person whose assets could not be regarded as assets of the State of Kazakhstan,[137] it was also based on what the English court termed the "complete immunity" of a foreign State's central bank property from the enforcement process in UK courts:

> Given the wording of Sec. 14(4), then the property of a State's central bank (or other monetary authority) must enjoy complete immunity from the enforcement process in the UK courts. [. . .] If the central bank (etc.) has an interest in the property concerned, but the State of the central bank has another interest in the same property, then in my view the effect of Sec. 14(4) is that the relevant property is immune from enforcement in respect of a judgment against that State, whether the property concerned is in use or intended for use for commercial purposes or not.[138]

The distinction between property designated for commercial purposes—and thus not immune from enforcement measures—and property serving governmental

132 LETCO v. Liberia, District Court, D.C., April 16, 1987, 2 ICSID Reports 390, 395.

133 17 ILM 1123 (1978).

134 Section 14(4) UK SIA.

135 AIG Capital Partners Inc. and Another v. Republic of Kazakhstan (National Bank of Kazakhstan Intervening), High Court, Queen's Bench Division (Commercial Court), October 20, 2005, [2005] EWHC 2239 (Comm), 11 ICSID Reports 118.

136 AIG Capital Partners Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan, Award, October 7, 2003, 11 ICSID Reports 7.

137 *See infra* text, at note 146.

138 AIG Capital v. Kazakhstan, 11 ICSID Reports 118, 141.

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purposes—and thus immune from enforcement—has also been relied upon by French courts. In the context of attempts to enforce the ICSID award in the *SOABI* case,[139] the Paris Cour d'appel held:

> Considering that the immunity from enforcement [exécution] enjoyed by a foreign State in France is a matter of principle; that in exceptional circumstances it can be set aside when the assets against which enforcement is sought have been assigned by the State to an economic and commercial activity governed by private law; [. . .][140]

Waiver of Enforcement Immunity

The possibility to waive enforcement immunity[141] prompted ICSID to supply model clauses involving waivers from enforcement measures. For instance, Clause 15 of the 1993 Model Clauses provides:

> The Host State hereby waives any right of sovereign immunity as to it and its property in respect of the enforcement and execution of any award rendered by an Arbitral Tribunal constituted pursuant to this agreement.[142]

It has been suggested, however, that—given the restrictive approach of many national courts—such clauses could be interpreted to apply only to a State's nonsovereign, commercial property. Thus, it may be advisable to receive a broader waiver expressly extending to "any property regardless of its commercial or non-commercial nature."[143]

Other Failed Attempts to Enforce ICSID Awards

Attempts to enforce ICSID awards against assets owned by entities that may be related to respondent States but are not identical with them have proven futile in the past. This is exemplified by the unsuccessful legal proceedings instituted before French courts trying to attach funds owned by the Banque Commerciale Congolaise in order to enforce the ICSID award in *Benvenuti & Bonfant v. Congo*.[144] The Cour de Cassation found that this bank, though dependent upon the State of the Congo, was distinct from it and could not be regarded as its emanation.[145] Similarly, in *AIG Capital Partners*

139 SOABI v. Senegal, Award, February 25, 1988, 2 ICSID Reports 190.
140 SOABI v. Senegal, Cour d'appel, Paris, December 5, 1989, 2 ICSID Reports 338, 340.
141 *See supra* text, at note 104.
142 Doc. ICSID/5/Rev. 2, 4 ICSID Reports 366.
143 C. Schreuer, The ICSID Convention: A Commentary, Article 55, para. 91 (2001).
144 Benvenuti & Bonfant v. Congo, Award, August 15, 1980, 1 ICSID Reports 330.
145 Benvenuti & Bonfant Srl v. Banque Commercial Congolaise, Cour de cassation Paris, July 21, 1987, 1 ICSID Reports 373, 374; 115 Journal du Droit International 108 (1988).

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v. *Kazakhstan*,[146] the investors failed to enforce an ICSID Award[147] against assets of the National Bank of Kazakhstan. The English High Court deemed the fact that the Republic of Kazakhstan may have ultimately had a beneficial interest in the assets concerned irrelevant and disallowed attachment proceedings against assets not directly owned by the respondent State.

ALTERNATIVE ENFORCEMENT MECHANISMS

In addition to the assistance of national courts with the enforcement of investment awards through the procedural means available under the New York Convention or the ICSID Convention, there are a number of other more informal mechanisms which may be relied upon in order to secure compliance with arbitral awards in the investment field.

In particular, the role or maybe only the threat of diplomatic protection should not be underestimated. While ICSID arbitration clearly aims at the elimination of the involvement of home states of investors into investment disputes in order to ensure a certain depoliticization of such conflicts,[148] it clearly permits diplomatic protection to be used "again" in case a State fails to comply with an award.[149] Thus, political pressure may add to the reputational issues deriving from noncompliance with awards.

In the field of foreign investment which is widely influenced by competition among potential host States concerned about their investment climate as an attraction to foreign investors and thus to the influx of foreign capital, such specific forms of political and economic cost-benefit analyses of States play an important though hardly measureable role.

In addition to the concerns of host States about how their "investment climate" is perceived by potential investors, it is sometimes suggested that the institutional link of ICSID to the IBRD may create additional pressure for investment receiving States to comply with ICSID awards.[150] Recently, an ICSID *ad hoc* Committee shared this concept, stating that "a State's refusal to enforce an ICSID award may have a negative effect on this State's position in the international community with respect to the

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146 AIG Capital Partners Inc. and Another v. Republic of Kazakhstan (National Bank of Kazakhstan Intervening), High Court, Queen's Bench Division (Commercial Court), October 20, 2005, [2005] EWHC 2239 (Comm), 11 ICSID Reports 118.

147 AIG Capital Partners Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan, Award, October7, 2003, 11 ICSID Reports 7.

148 *See* I. F. I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1 ICSID Rev.—Foreign Inv. L.J. 1 (1986).

149 This follows from Article 27(1) ICSID Convention, *see supra* note 114, which permits diplomatic protection if a "Contracting State shall have failed to abide by and comply with the award rendered in such dispute."

150 *Cf.* S. Franck, who argues that with arbitration "before ICSID, an entity affiliated with the World Bank, there may be institutional gravitas that creates an incentive for sovereigns to comply with ICSID awards, lest they have difficulty securing future World Bank financing." S. Franck, *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law*, 19 Pac. McGeorge Global Bus. & Dev. L.J. 337, 372 (2007).

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continuation of international financing or the inflow of other investments."[151] In fact, the World Bank Operational Manual foresees under "Disputes over Defaults on External Debt, Expropriation, and Breach of Contract" that under such circumstances, no new loans may be made to the countries concerned.[152] It is hard to assess, however, whether this option has been relied upon in practice.

CONCLUSION

The booming "industry" of investment arbitration of the last two decades has resulted in a multitude of arbitral awards under both ICSID and other arbitration rules. In the majority of that fraction of cases in which host States were found to have incurred liability, the awards seem to have been voluntarily complied with. Enforcement in national courts appears to be a rare phenomenon. At least the investment arbitration boom has not yet led to a substantial case law before national courts concerning enforcement issues. This relative lack of judicial practice should not be interpreted as evidence of an ineffective system. It may, quite to the contrary, signify that, because of the high likelihood of effective enforcement, States prefer to comply with arbitral awards "voluntarily." Precise knowledge of the potential and of the limits of the enforcement regimes available to investment awards is thus crucial for a correct assessment of the effectiveness of investment arbitration.

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151 Patrick Mitchell v. Democratic Republic of the Congo, Decision on the Stay of Enforcement of the Award, November 30, 2004, para. 41.

152 World Bank Operational Manual Vol. II, BP 7.40, provides: "When a dispute over default, expropriation, or governmental breach of contract comes to the attention of a Bank staff member, the staff member informs the country department (CD) director and the Legal Department (LEG). In consultation with LEG, the CD director recommends a Bank position to the Regional vice president (RVP). If, on this basis, the RVP decides not to make any new loans to the country, the RVP informs the relevant managing director and the Senior Vice President and General Counsel."

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Chapter 26

The Role of Precedent in Investment Arbitration

*Jan Paulsson**

THE ANTI-ARBITRARINESS VACCINE

The Salutary Impulse

Consistency in arbitral decision making is doubtless useful in the development of norms, but saying that it is indispensable would be an overstatement. After all, there is no international rule of *stare decisis*. Each international tribunal has the responsibility to decide the particular case before it but no duty to be bound by what was decided in another case involving different parties. In the improbable event that a World Civil Code were to see the light of day, it would more plausibly contain something like Article 5 of the French model, which explicitly forbids judges from laying down general rules when making a decision, than embrace the common-law tradition.

Moreover, to say that prior awards may be considered for their persuasiveness carries the corollary implication that unconvincing awards may be discounted. Indeed they are. (Discounted, as we shall see, should not mean ignored.) Even in national legal systems that recognize the binding character of cases decided by higher courts, ways are found to marginalize judgments that do not stand the test of time, with the effect that they are consigned to oblivion—sometimes with surprising speed.[1]

Inconsistent decisions are not excluded from playing a role in the development of the law. Especially in the international realm, issues arise that are the subject of intense and legitimate debate. Reasonable judges and arbitrators may differ. Yet cases mature

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* Freshfields Bruckhaus Deringer; Professor, University of Miami Law School; Centennial Professor, London School of Economics.

1 The House of Lords' decision in *Anderton v. Ryan* (1985) AC 560, interpreting the Criminal Attempts Act 1981, survived but a single year before the self-overruling case of *R. v. Shivpuri*, (1987) AC 1.

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for decision and cannot wait indefinitely until someone—who?—announces that a particular proposition has emerged victorious. Collegial judgments and awards are often more valuable than personal commentary, which may be brilliant but also excessive and idiosyncratic, distorted by the tendency to oversimplify competing analyses or indeed to misrepresent them. Intensely well-argued cases show the true complexity of the debate; well-reasoned decisions following full deliberations reveal the fine balances to be struck; and in due course, the thousand voices of the sea of international criticism—including most notably those of future decision makers—provide the ultimate test of worthiness. The first decision to be made is not necessarily the right one; it is fortunate that no coercive rule of precedent holds sway.[2]

But the importance of the pursuit of consistency is undeniable in rendering justice in the individual case. Recurring controversies in connection with the merits of claims brought in investment arbitration involve the evaluation of facts. If similar facts have been considered by a number of prior tribunals, and their decisions are subsequently invoked by a party, a tribunal cannot ignore the prior awards without running the risk of seeming arbitrary. This does not mean that the same outcome is mandated; the later tribunal may well explain that supposed precedents, upon analysis, have critical distinguishing features—or more starkly that they are unconvincing (for reasons which merit being articulated).[3]

Hence, respect for putative precedents may be viewed as a type of anti-arbitrariness vaccine. The observation that there is no international rule of *stare decisis* should not be given exaggerated effect. For the maxim—literally "maintain what has been decided"[4]—has universal appeal, no less so in countries where it is sought to be achieved by comprehensive codes rather than by the rule of precedent. Even in the country where that rule has historically been the most rigid, as the authors of *Precedent in English Law* put it: "it must not be forgotten that the rules of precedent are subsidiary to, and far less important than, the obligation of judges to consider case-law." Cross and Harris immediately go on to assert that if it came to be accepted that judges

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2 This refers not only to reversal or repudiation but also to the more nuanced mechanisms of refinement and limitation. Karl Llewellyn preferred to speak of a "distinction between the ratio decidendi, the court's own version of the rule of the case, and the true rule of the case, to wit, what *it will be made to stand for by another later court*." KARL LLEWELLYN, THE BRAMBLE BUSH 50 (Oxford University Press 2008). Rules, it seems, may thus become truer and truer yet never—like Zeno's arrow—come to rest. (Indeed the precise paradox whereby Zeno "abolished motion" may be seen as applying to the common law: "What is in motion moves neither in the place it is nor in the one in which it is not.")

3 In matters of jurisdiction and treaty interpretation the *ratio decidendi* is less likely to be fact-specific; disregard of prior awards will therefore likely be more obvious and give rise to greater disquiet.

4 No fundamental insight is produced by refining the expression to *stare rationibus decidendis* ("follow the decisive principle of past decisions"). True, it may be cited as an explanation for upholding past judgments. But in countries of the code, where judgments tend to be elliptical, it will equally be said that the best way to ensure consistency with the general body of judgments is to give primacy to the unifying code rather than to individual judgments.

In any event, the short expression *stare decisis* cannot be understood literally lest it be confused with the rule of *res judicata* which binds only the particular litigants in the prior case.

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could disregard case law, "the English legal system would have undergone a revolution of the highest magnitude."[5] This is not a matter of treating precedents as a *source of law*, but of the duty as a matter of *due process* to consider putative authorities which parties have invoked to support their case.

Limitations

But of course cases are rarely identical. The facts are often different. The sets of relevant legal texts are seldom the same—and a single word may change everything. The applicable law may be different; in investment arbitration, international law alone does not hold sway; national law may be decisive; and even in cases where the relevant national law may be the same, a particular statute or regulation may be applicable in one case but not the other.

Even if the relevant instruments, facts, and law were identical, no two cases are ever articulated in an identical fashion. Those who present the case may have different inspirations and limitations—not to mention different access to evidence. (Even if the lawyers and witnesses are the same persons, their presentations on different occasions and before different tribunals will not be the same.) And so in the second case, the decision makers may scratch their heads as much as they will; they may still find themselves simply incapable of understanding how their predecessors came to a particular outcome. They would violate their convictions, and the trust which has been placed in them, if they align themselves mechanically with an alleged precedent.

A more obvious limitation is that with respect to the most difficult issues—where the need to demonstrate an absence of arbitrariness is particularly acute—the body of prior cases is likely to include cases that are ambiguous or contradictory.

The reality of investment arbitration is that the quality of advocacy varies greatly from case to case. Some speculative claims are prosecuted on a wing and a prayer by inexperienced pleaders, perhaps hoping to startle the other side into a quick settlement rather than truly intending to go through with the arduous task of presenting a substantive case before an international tribunal. Such parties may find themselves confronting knotty and fundamental issues which they do not have the resources to deal with. There are limits to *jura novit curia*. Silk purses are not readily produced from a sow's ears. And so major issues may be decided in the context of a mediocre debate. Once the decision is handed down, the disappointed party may lose heart and decline to pursue available means of recourse (such as the ICSID *ad hoc* Committee mechanism). What is left may be a decision by an inexpert sole arbitrator further handicapped by artless pleadings. This is a matter of reality which commentators often ignore when they express concerns about perceived inconsistencies of awards. Arbitrators do not answer exam questions tidily articulated by the finest academics; they decide cases as they are presented, whatever the imperfections of the pleadings and the inconvenient messiness of the factual record.

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5 4th ed., p. 7 (Oxford University Press 1991).

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THE LEGAL STATUS OF PRECEDENTS

General Considerations

It is important to understand that the status of precedents in international law is a matter of considerable delicacy. Jealous sovereign states tend to resist any suggestion that arrangements other than those to which they have consented may be invoked against them. This explains their disinclination to submit to the elaboration of international law by anything resembling the accretion of binding precedents known as the common law. And so even the judgments of the International Court of Justice are expressly subject to the caveat of Article 59 of that Court's Statute, which reads:

> The decision of the Court has no binding force except as between the parties and in respect of that particular case.

Similarly, the drafters of the Statute defined the sources of international law with great caution. Treaties—the preeminent source of international law—may be invoked against a state only if they establish rules "expressly recognized" by that State. This formulation, which all international lawyers recognize as part of the definition of the first of the sources of international law acknowledged by Article 38 of the ICJ's Statute,[6] reflects the reluctance of States to consider themselves bound by compacts made by other States. This is why the very notion of "law-making treaties" is controversial; like resolutions of the UN General Assembly or those of other gatherings of States, even treaties are unlikely to assume the status of law unless they can be said to reflect or conform to "international custom," or "general principles of law." These are indeed two other sources of applicable norms recognized by Article 38. But they are woolly categories—enshrined in paragraphs (b) and (c) of Article 38(1)—and in many cases unlikely to produce specific answers to precise questions. Lawyers naturally search for more precise authority. And so we come to Article 38(1)(d):

> subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Is this fourth category of sources of law the poor cousin in the list of Article 38(1)? Such a possibility springs naturally to mind given that paragraph (d) both begins and ends with a qualification, the first being (by the reference to Article 59) that decisions have no binding effect on third parties, the second that this fourth category is but a "subsidiary means for the determination of rules of law." Indeed, one might say that the very wording of the second qualification includes a third limiting factor, as it refers to the *determination* of norms rather than their *establishment*.

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6 Article 38 binds only the ICJ; the international community can devise other approaches outside the domain of cases before the ICJ. Yet ICSID arbitrators, who are authorized to apply international law under the 1965 Washington Convention, find in para. 40 of the Report of the Executive Directors of the World Bank the explicit statement that the term "international law" as used in Art. 42(1) of that Convention should be "understood in the sense given to it by Article 38(1) of the ICJ Statute."

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It is perhaps more accurate to recognize the in-built limitations of subparagraph (d) as a tribute to its potential potency. Treaties do not affect nonsignatories, and "customs" and "general principles" mostly evolve with glacial speed and at a level of considerable generality. The first three paragraphs of Article 38(1) are therefore relatively unthreatening. Precedents and commentary, on the other hand, may provide immediate and bold answers to highly specific questions. That is why, no doubt, they are regarded with circumspection.

And so we find that even judgments of the ICJ do not, as such, create binding jurisprudence, but only a "subsidiary means" to determining the norms of international law.

International arbitral awards, it would seem, are of an equal—and equally limited—dignity, as the functional if not terminological equivalent of "judicial decisions." And in many cases, depending on the composition of the tribunal, they are also exceptionally well-considered pronouncements of "the most highly qualified publicists" (assisted, one might add, by detailed and skilled legal argument).

So much for the theory. The reality, of course, is that effective advocates before the ICJ, and indeed before the ever-expanding variety of other international courts and tribunals, must be steeped in the precedents of the World Court; it is fundamental to their art, because international adjudicators themselves rely on other international judgments. Advocates must also be familiar with important arbitral awards. One of the most often quoted international awards was rendered by a sole arbitrator, Max Huber, whose decision in the *Islands of Palmas* case was referred to by the Permanent Court of International Justice itself in the *Eastern Greenland* case. And it raised no eyebrows when the ICJ, in the *Gulf of Maine* case, quite naturally referred to the prior analysis of the tribunal in the *UK-France Continental Shelf* arbitration which had faced similar quandaries of maritime geography.[7]

It is thus a fact of life before international courts and tribunals that precedents generate norms of international law. What is more pertinent is to understand that the influence of international awards and judgments—even those emanating from *the same court*—is highly variable. This is quite unlike the traditional concept of some common-law systems, where the precedent of the highest court is binding, no matter how unpersuasive it may seem to lower court judges, until it is abandoned above. International courts and tribunals, on the other hand, are not part of a hierarchical system. This may result in some untidiness; there is no catalogue where one might locate a reference to the judgment of the PCIJ in the *Lotus* case and see at a glance the word "reversed" beside it; one must simply *know* that it has long been discredited.[8] And much in the

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7 *See generally* Mohamed Shahabuddeen, Precedent in the World Court 35–39 (Grotius 1996).

8 As should be clear from the discussion above, international arbitral tribunals are just as free to resist the influence of judgments of the World Court. Thus, investment arbitration tribunals have been unenthusiastic about extending *Barcelona Traction* to deny the standing of foreign shareholders seeking to recover derivatively on account of prejudice suffered by local corporations; *see* CMS Gas Transmission Company v. The Argentine Republic, ICSID Case No. ARB/01/8, Decision on Jurisdiction, July 17, 2003 and GAMI Investments, Inc. v. Mexico, Final Award, November 15, 2004.

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same way, while hierarchically undistinguishable, there are awards and awards, some destined to become ever brighter beacons, others to flicker and die near-instant deaths.[9]

In his introductory chapter on "Sources of the Law," Professor Brownlie put it concisely:

> The literature of the law contains frequent reference to decisions of arbitral tribunals. The quality of arbitral tribunals has varied considerably, but there have been a number of awards which contain notable contributions to the development of the law by eminent jurists sitting as arbitrators, umpires, or commissioners.[10]

This passage echoes the words of Hersch Lauterpacht, written half a century ago, in the revised edition of his classic monograph *The Development of International Law by the International Court*, where he wrote:

> It is in the interest of international justice that its continuity should not be confined to the jurisprudence of the Court itself. International arbitral law has produced a body of precedent which is full of instruction and authority. Numerous arbitral awards have made a distinct contribution to international law by reason of their scope, their elaboration, and the conscientiousness with which they have examined the issue before them.[11]

The corpus of decided cases in the field of international investment arbitration is of recent vintage, but it has developed with remarkable speed. Its legal status as a source of law is in theory equal to that of other types of international courts or tribunals. In practice, it will also doubtless turn out to be subject to the same Darwinian imperative: the unfit will perish.

Against this background, one can hardly fail to remark that among the most frequently appointed members to international investment tribunal panels may be found former Presidents of the International Court of Justice (Guillaume, Schwebel, Bedjaoui), a former President of the WTO Appellate body and member of his country's Supreme Court (Feliciano), a former President of the UN Security Council (Fortier), the Rapporteur of the International Law Commission's draft Articles on State Responsibility (Crawford), and the present and immediate past Presidents of the leading international arbitral institution: the International Court of Arbitration of the International Chamber of Commerce (Briner, Tercier). Indeed, the immediate past President of the International Court of Justice (Higgins) chaired the oft-cited ICSID tribunal which decided the second *Amco v. Indonesia* case. The list could be extended to include numerous scholars and practitioners of international renown, but no more is needed, it seems, to conclude that among the authors of these awards are those who must surely qualify for consideration as "the most highly qualified publicists of the various nations."

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9 This is not the place to discuss the considerable difficulties of the proposals, much discussed just after the turn of the century, of a standing body with plenary authority to review investment awards. *See* J. Paulsson, *Avoiding Unintended Consequences*, *in* Appeals Mechanism in International Investment Disputes 241 (K. Sauvant ed., Oxford University Press 2008).

10 Ian Brownlie, Principles of Public International Law 19 (6th ed. 2003).

11 1958, pp. 17–18.

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The Core Concepts

The passage quoted from Lauterpacht's *Development of International Law* contains an implicit message of ever greater pertinence given the accelerating pace of developments in international arbitration: if "numerous" awards make a "distinct contribution," others evidently do not. As arbitral practice expands, and as the field of international law itself expands in breadth of coverage and complexity, its caliber of output is liable to greater unevenness. What is it that makes one award influential—and another best forgotten?

It is surely essential to read putative precedents with critical discernment and to study the difference between *rationes decidendi* and incidental observations. The decision-making function is exercised when a tribunal upholds or denies a claim. The normative basis of that decision is of particular interest because that is where judges or arbitrators carry out their responsibility. The rejection of a claim on the grounds that the plaintiff has failed to take an obvious step to avert prejudice is a clear precedent for the proposition that there is a duty to mitigate. But if a claim is upheld, the basis is a finding of liability. An incidental statement to the effect that "recovery to claimants may be compromised if they fail to mitigate damages, but no proof of such failure was presented here," is *not* the basis for the decision. It may be persuasive of the existence of the norm, but it is of lesser weight—and not at all, properly speaking, a precedent.[12]

To take another example: an investment award may say that claimants before ICSID must cumulatively satisfy the ICSID Convention definition as well as any BIT definition of the notion of "investment," but that is not the *ratio* of the decision if the tribunal decides that both definitions are satisfied. The *ratio* is rather that both definitions are in fact satisfied; the outcome would be the same without considering what would happen if only one definition were met. The proposition that both *must* be satisfied is properly understood as a *ratio* only in a case where a claimant is sent packing because it failed under one definition, and the tribunal said it did not matter if it could have succeeded under the second.

The preceding paragraph may not immediately have won the reader's assent. It must indeed be admitted that there is no fixed definition of *ratio decidendi*—the reason for deciding—that would lead everyone to the same conclusion. Lawyers tend to be confident about their ability to zero in on it, but this conceit may be no less vain than pride in being able to hold one's liquor or to achieve amorous exploits. Ask a number of lawyers to define the *ratio* of a complex case (the exercise is uninteresting if the case is simple), and a number of answers emerge. Still, it may be observed that it is relatively easy to determine what is *not* the *ratio* by focussing on a proposition endorsed in the course of the exposition and asking whether it would have made any difference

12 For an illustration of a curt and proper dismissal of a party's reliance on an incidental remark found in *Loewen*, see The Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, April 18, 2008, para. 109.

if that proposition had been put in the negative. If the outcome would be the same, that proposition obviously is not the *ratio*.[13]

We are however still left to ponder the difficulty of a positive identification of the *ratio*. We can agree that it must be the factor which is necessary to the outcome; yet reasonable—even astute—lawyers will not see it in the same way. Perhaps some observations on the periphery of the problem will assist.

The general speed limit in a town may be 50 km/h, yet a court could find that a defendant was negligent in careering through a particularly narrow blind curve at 35 km/h. This is not a precedent; no legal principle was involved, merely an evaluation of factual circumstances. The next case may involve a different curve, different conditions of illumination, a driver of different age, a vehicle having different characteristics, and who knows what else. The first decision is not a precedent for anything at all, save perhaps the proposition that the existence of a higher general speed limit does not insulate a negligent driver from liability. That proposition was not *decisive*; it was not the *ratio*. The reason for the outcome was not a principle but a finding of fact: the driver was negligent.

In some cases, the distinction between pronouncements of law and findings of fact is difficult. Cross and Harris[14] give the example of an employer's duty to provide a safe working environment. If a court determines that it is not enough to make protective clothing available, but necessary to ensure that it is worn, does it establish a principle to be followed in subsequent cases? In *Qualcast Ltd. v. Haynes*,[15] the House of Lords made clear that it was pointless to search for the *ratio* of such cases; they are not general propositions of law applicable to future cases.

That case concerned a molder who was injured by a splash of molten metal. His employers had made available protective spats which would have prevented the injury but did not order them to be worn. He therefore sued for negligence. The county court judge who decided the case at first instance stated that in his view the work experience of the molder was such that there was no negligence on the part of the employer in failing to insist, but that he nevertheless felt constrained by precedent to decide otherwise.

The House of Lords held that this was a misunderstanding of the rule of precedent: "In the sphere of negligence where circumstances are so infinite in their variety it is rarely, if ever, that one case can be binding precedent for another." Their Lordships observed that modern negligence cases tended to be decided by judges, which made analysis less convenient than in the past, since findings of jurors were by definition not normative: "One jury would attribute to the reasonable man a greater degree of prescience than would another. The jury's decision did not become part of our law citable as precedent." As Lord Somervell archly put it: ". . . if the reasons given by a judge for arriving at the conclusion previously reached by a jury are to be treated as 'law' and citable, the precedent system will die from a surfeit of authorities."

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13 An example of this test is given in footnote 22 below in relation to a putative stream of precedents dealing with ICSID jurisdiction.

14 At p. 40.

15 [1959] AC 743.

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For his part, Lord Denning observed that a judicial pronouncement to the effect that "if a person rides in the dark he must ride at such a pace that he can pull up within the limits of his vision" had once been viewed in subsequent cases as a proposition of law; but that view had since been properly and firmly rejected on appeal. Agreeing with Somervell, Denning too warned of being "crushed under the weight of our own reports."

Does the English discipline of the rule of precedent suggest any useful insights for the field of investment arbitration? Even if it were possible to draw a red line between findings of fact and propositions of law, have we not seen that even in England, all materials relied upon by a party must be given consideration? Does this not mean that even prior awards dominated by factual determinations may turn out to be decisive when another case presents a highly similar fact pattern?

To this last question one must, it seems, answer in the affirmative. Arbitrators are very likely to consider a factual determination to be decisive, without even having to identify, let alone resolve, a controversy as to legal principle. In international arbitration, the sole duty of a tribunal is to decide a particular case in accordance with its mandate—not to develop a "common law" for international investments. Yet it is natural for arbitrators to be influenced by factors which in prior cases have proved decisive, and this means that the treatment by one tribunal of certain facts as outcome-determinative may inspire subsequent tribunals to rationalise the prior decision by deducing an explanatory rule.

The key word is "decisive." The essential distinction is between decisive considerations and incidental observations. The difference between *ratio* and *obiter* endures with undiminished importance. *Obiter dicta* are nothing more than opinions which happen to find themselves in a judgment or an award rather than in a scholarly publication; they are a species of legal literature, not a source of law.

Arbitrators' opinions are no more or less interesting than opinions of commentators. Of course there have been instances where unique insights offered by way of *dictum* or academic commentary have commanded great respect and become lodestars for future decision makers. But in most cases, the reader of an alleged precedent is most likely to be influenced by the reasons which he understands as decisive with respect to the outcome for which arbitrators have taken personal responsibility *ex officio*. That is where, one reasonably surmises, they exhibit particular care. And so while future arbitrators may and do consider everything put before them, it is clear that the greater weight they intend to signify when they prefer to "precedents" should be limited to matters of *ratio*.[16]

An example may be useful. The BIT entered into by Germany and the Philippines provides in Article 1(1) that "[t]he term 'investment' shall mean any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State." This provision of law cannot be the *ratio decidendi* of a subsequent precedent

16 There are further refinements beyond the scope of this short exposition, such as the role of so-called "judicial *dicta*" (decisions on points fully argued, especially if they would have been decisive if different facts had been found; these might as well be called quasi-*rationes*) or that of judicial interpretation by which prior *rationes* are extended or restricted in scope.

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because it is what it is: an abstract rule to be respected now and until it is abrogated. The value of a precedent is that it may provide authority for how such a rule is to be understood. Accordingly, a *ratio* can be understood as a syllogism in which the rule (or some contextually useful rephrasing of it) is the major premise, leaving the reader to discern the minor premise which leads to the conclusion.

The minor premise comprises the finding or findings which the decision maker considered to be material in reaching the conclusion. To reconstruct the minor premise is often a matter of some difficulty. The original decision makers seldom articulate the propositions they consider as decisive in the form of a handy syllogism, because their duty is to decide their case, not to imagine themselves as legislators. And even if they did set down their *ratio*, that formulation would not be the precedent unless the beholder agrees with it. A precedent stands for the *ratio* later seen to be decisive given the premises and the conclusion, not for what the original decision maker declares as decisive.

It is thus with full awareness that the formulation is open for discussion that the syllogism of *Fraport v. Philippines* may be described as the following:

> *Major premise*: Investments effected in a manner contrary to the laws and regulations of the host signatory State are not entitled to protection under the BIT.
>
> *Minor premise*: The investor improperly structured its investment in such a way as to evade mandatory provisions of the law of the host State pertaining to minimum local ownership of certain businesses.
>
> *Conclusion*: The claim must be dismissed because the investor is not entitled to invoke the BIT.

These formulations (imperfect as they may be) illustrate the evolutionary potential of precedents. This potential is inherent both in considering how the examined decision may be distinguished or how it may be refined (whether by extension or restriction). For example, it may be suggested that the *Fraport* outcome should be different if the illegality arose not when the investment was made (leading to forfeiture of the BIT protection, including access to ICSID) but in the performance of operations subsequent to the investment (being a matter for the merits—whether leading to a denial of liability or a reduction in quantum—rather than jurisdiction). That would be a matter of distinguishing. Or it may be suggested that an illegality should not be given weight if the law violated had in fact fallen into desuetude, or was implemented in an arbitrary or discriminatory fashion. That would be a matter of refinement.

With these considerations in mind, it should not be difficult to see the importance of the use of the word *solutions*—and not *reasoning*—in the oft-quoted sentence from paragraph 67 of the *Saipem v. Bangladesh* decision on jurisdiction, to the effect that the tribunal "believes that subject to compelling grounds, it has a duty to adopt solutions established in a series of consistent cases." By contrast, the WTO Appellate Body, which cited *Saipem* with approval and in all likelihood was intending to send the same message, was less sure of its language when it stated, in *U.S.-Final Anti-Dumping Measures on Stainless Steel*,[17] that "absent cogent reasons, an adjudicatory body will *resolve the same legal questions* in the same way in a subsequent case."

17 WT/DS344/AB/R (30 April 2008).

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Life and Death of Precedent in a Decentralized System

One must be aware of the perils of conflating the learning to be derived from the great variety of courts and tribunals which coexist in the modern world. This is not the place to consider the complex issue of cross-fertilization between areas of international law where great issues overlap, such as the notion of "discrimination" in WTO parlance and in bilateral investment treaties. To take another particularly salient example, property rights are protected under human rights conventions as well as under BITs. Yet one must surely recognize a potential difference between treaties intended to promote investments and to cause investors to rely on undertakings made with the direct and explicit intent of creating incentives, on the one hand, and, on the other, the minimum treatment as understood in terms of human rights, applying even to investments which the State may not have desired.

An important question appears not yet to have been considered in the depth it obviously deserves: whenever they are created by treaties which refer to the applicability of international law, are international tribunals in investment disputes organs of the international legal system and therefore bound to apply international law *whether or not it is pleaded by the parties?* The parallel with the ICJ and Article 38 of its Statute is obvious, and the implications are equally clear, as the ICJ put it in the *Fisheries Jurisdiction* cases:

> The Court . . . as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required. . . to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties for the law lies within the judicial knowledge of the Court.[18]

In other words, a tribunal in an investment dispute which views itself as an international judicial organ cannot content itself with inept pleadings and simply uphold the least implausible of the two. Furthermore, as the PCIJ put it in *Brazilian Loans*, an international tribunal "is deemed itself to know what [international] law is,"[19] and this thought should be a sobering one to parties making appointments of arbitrators, and to arbitrators accepting appointment. There have indeed been some questionable decisions in investment arbitrations, which suggest that the arbitrators had an insufficient grounding in international law. Yet this comment must be seen in perspective; the PCIJ and the ICJ themselves have authored discredited judgments, and the normative influence of those judgments simply dissipates over time. We are in an early phase of dramatic extension of investment arbitration, and the fact that so many investment arbitrators are of a premier rank as international lawyers—as indicated by the very partial enumeration at the end of the "General Considerations" section above — suggests that there is no cause for alarm. The intense attention of the international

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18 *ICJ Reports* (1974) pp. 3, 9 (para. 17) and pp. 175, 181 (para. 18).

19 PCIJ Series A, No. 21, p. 124.

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community of scholars and practitioners will undoubtedly have a salutary effect: good awards will chase the bad and set standards which will contribute to a higher level of consistent quality.

To overrule a decision is a serious matter; to say that a lower-tier decision maker decided wrongly is likely to undercut general confidence in that tier. This concern is all the greater in the field of investment arbitration where the levels of jurisdiction are limited and where full appellate review is at any rate generally unavailable. Those who examine applications for the annulment of investment awards would do well to reflect on the attitude toward overruling precedents exhibited by the highest court of the country where the rule of precedent has always been the most coercive, as exemplified by this pronouncement of Lord Reid in *Ross-Smith v. Ross-Smith*:

> Before holding that the decision should be overruled I must be convinced not only that the *ratio decidendi* is wrong but that there is no other possible ground on which the decision can be supported.[20]

In other words, a precedent was allowed *to stand as law* although the House of Lords disagreed with its reasoning, on the footing that the outcome could be justified on other grounds. By a parity of reasoning, it would seem even more appropriate to allow a decision *to stand as outcome* even if the proper *ratio* must be supplied by the higher reviewing authority. To do otherwise unnecessarily undermines the perceived legitimacy of the system.

EVALUATION

What is the Value of Precedents?

It might be said that precedents command respect only when the propositions they uphold are so clear that they would have carried the day in any event—with the result that precedents are useless.

Yet the meaningful test is perhaps not so much that a precedent commands respect but rather that a precedent is useful. Even when it is controversial, perhaps *especially* when it is controversial, a well-reasoned judgment or award by respected jurists can be of immense benefit as subsequent decision makers, working against time and in the fog produced by crafty partisan pleaders, seek to discern the crucial elements of intricate balances.

In other words, the interesting inquiry is not whether precedents are norms in and of themselves (in the international field the debate may be cut short by answering with one word: "no") but how they may contribute to the development of norms—generation as well as refinement. Moreover, the practice of extensive references to alleged precedents seems to be here to stay, and those references cannot be ignored by a tribunal paying proper respect to due process.

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20 [1963] AC 280, at 294.

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Above all, attention to precedents is commanded by the basic objective of doing justice in the particular case and to be seen as doing so. It might be acceptable to rely on first principles and the basic instruments of international law (such as the text of relevant treaties or compacts) without referring to past awards if none have been invoked by the parties—but that is seldom so. Tribunals owe it to the litigants to explain how their arguments fared with respect to decisive matters.

A discrete objective relates to the "recognition function" (sustaining belief in the system's legitimacy) which has been well described by Tai-Heng Cheng[21] and will not be further examined except to make the following observation.

It is often suspected that after considering the facts, judges and arbitrators yield to a temptation to proceed immediately to take a view of the intuitively appealing outcome, and only afterward seek to justify it by ratiocination and references to authority. What is perhaps less often appreciated is that there is nothing scandalous here—as long as the view is *provisional*. Experienced and trusted arbitrators frequently rise from deliberations with the comment "let us see if it writes" only to report to their colleagues later: "I thought we were on the right path *but it just won't write*." This is where sustained perusal of legal principle comes to exercise its dominion over intuition. This is where arbitrators should earn their reputation, properly analyzing the authorities before them so as to *confront* their provisional views rather than producing an array of cherry-picked quotations designed solely to *confirm* them.

Toward More Rigorous Reasoning by Precedent

Awards come in many forms which may affect their degree of persuasiveness. There are awards which have been annulled and awards which have resisted annulment applications. There are awards which have not been tested at all. There are awards by three member tribunals and awards rendered by sole arbitrators. There are awards rendered by eminent persons careful of their reputation in the field and awards rendered by one-time arbitrators who might be surprised by their nomination, and go through the experience like curious tourists without a realistic expectation of ever returning. There are awards rendered by a majority and awards rendered unanimously. Some awards record the merest indication of disagreement, while others are rendered over an impressive dissent. Some dissents are powerful and elegant and make the majority look fragile; others are partisan diatribes with quite the opposite effect. Some awards are linguistic horrors; others are textbook models of drafting. Some are highly disciplined texts which avoid any excursions from what is strictly necessary to decide the dispute; others bring to mind Shakespeare's loquacious Polonius. There are awards which seem to be the product of inexorable reasoning and others which seem nothing

21 Tai-Heng Cheng, *Precedent and Control in Investment Treaty Arbitration*, 30 Fordham Int'l L.J. 1014 (2007). It need hardly be recalled that the great expositor of the notion of rules of recognition called for the examination of those features of a proposed rule (e.g., one appearing as the *ratio* of a decision) which indicate that it is a rule of law; H.L.A. Hart, The Concept of Law (1961).

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but the result of a vote. There are awards signed by arbitrators who maintain impressive consistency from one case to the next, and awards signed by arbitrators who seem not to remember what they put their names to the previous year. Even Homer nods, so even arbitrators entitled to the greatest respect occasionally find themselves in cases where, one might say, the particularities of the matter seem to defeat their acumen and their patience.

Awards are there to be evaluated and criticized—relentlessly criticized—in the interest of improving international legal systems. Without criticism, the law becomes hostage to power, influence, clientilism. Clear thinking and robust debate is the sole path not only to a *jurisprudence constante*, but to a *jurisprudence légitime*.

So how do we separate the wheat from the chaff? The normative influence of an award can be due, it appears, either to cumulative effect or inherent persuasiveness.

The cumulative effect is the less interesting. If a constant stream of cases have articulated the same proposition—such as the relevance of the Vienna Convention to the interpretation of BITs; or the idea that if sunken costs are recouped, they must be deducted from any award of lost future income in order to avoid double recovery—the odds are that the conclusions would have been the same even if no participant in the arbitration had spotted any precedents.[22]

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22 Any alleged cumulative effect should naturally be examined critically. An ICSID award (Malaysian Historical Salvors, SDN, BHD v. Malaysia, ICSID Case No. ARB/05/10, (UK/Malaysia BIT), rendered in 2007 and annulled in 2009, declared that there were seven "decided cases of importance" supporting the proposition that a claimant must cumulatively satisfy a so-called "objective" definition of investment under the ICSID Convention as well as a so-called "subjective" definition in a relevant contract or BIT. (Why the ICSID Convention's famous nondefinition should be called "objective" while the BIT's explicit definition is called "subjective" is something of a mystery.) Apparently this award considered itself the eighth precedent in an irresistible stream of cases. The fact is that there are other arbitral pronouncements that go the other way. (*See e.g.*, the succinct statements by the ICSID tribunals in *Generation Ukraine* (para. 8.2) and *Fraport* (para. 305); and by the *ad hoc* Committee in *CMS v. Argentina* (para. 71).) Moreover, the purported stream of precedents, if one actually consults those cases, turns out to include no less than five cases where jurisdiction was upheld. That means that comments found in those decisions about restrictions on jurisdiction are pure *obiter dicta*. And that is only literature. They might persuade, like any literature, but could not bind courts even in systems where the undiluted rule of precedent reigns supreme. The general proposition which the sole arbitrator in *MHS* conceived of as supported by his analysis of the seven "decided cases of importance" may be stated as follows: *An objection to jurisdiction is valid if the claim fails to satisfy either of the definitions of investment contained respectively in the ICSID Convention and in the relevant BIT*. For that proposition to have been the *ratio* of the prior decisions, the claim must have failed at least one of the two tests. That did not happen in five of these cases. Since the tribunals went on to examine the merits, there was no need for them to examine the consequences of a hypothetical failure of compliance with one of the definitions. Under this straightforward analysis, only one case cited in *MHS v. Malaysia* (namely *Joy Mining*) may be said to have been founded on this *ratio*. The English case of *Re State of Norway's Application (no. 2)*, (1990) AC 723, is illustrative of proper mental discipline. There, the Court of Appeal was considering an appeal by a witness who resisted an order to give oral evidence before an examiner in London with respect to a tax case pending in Norway. The witness argued that the order was improper for two reasons: (i) lack of statutory jurisdiction and (ii) overbroadness of the request. The Court of Appeal initially concluded that

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With respect to the matter of inherent persuasiveness, it is important to bear in mind an important exception to the rule of *stare decisis*, namely that decisions rendered *per incuriam* are not entitled to binding effect. A judgment is defective in this sense if a statute or a binding precedent was not put before the court, and if the force of that ignored authority was such that it would have commanded another outcome. If this is an exception even in systems which uphold the rule of binding precedents, so a *fortiori* are international awards rendered in ignorance of decisive authorities.

The *per incuriam* exception has a cousin: a prior decision bereft of a discernible explanation of a proposition inherent in the outcome. An illustration was provided by the English Court of Appeal in 1975, when it was faced with the issue whether the Arbitration Act 1950 entitled a judge to appoint an arbitrator in circumstances where the appointing authority specified in the arbitration clause (the Confederation of British Industry) declined to make the appointment.[23] A similar situation had arisen in a prior case in which the Court of Appeal by inference assumed that the judge did have such a power.[24] The necessity of this premise was evident from the fact that the first-instance judge had agreed to appoint an arbitrator upon the refusal of the appointing authority to do so, and his order was upheld. But "the only issue raised in the appeal" was whether there had been an arbitration agreement at all. (There was a difficulty with respect to the incorporation of a standard-form arbitration clause.) There was no discussion of the specific point being frontally challenged in the second case, and so the High Court judge there denied that he was bound by precedent and refused to make the appointment as a matter of construing the Arbitration Act 1950, which he found to create judicial authority to appoint only if the parties had agreed to make joint appointment and had failed to do so. The Court of Appeal agreed, accepting the following submission by Robert MacCrindle Q.C.: "Although a decision could not have been arrived at unless the court had been prepared to assume a certain view of the law, it does not follow that the latter was a ground of the decision." The sense of the Act was thus held to be that a party who agrees to possible arbitration by someone named by a specific appointing authority in which it has confidence should not be deemed to have accepted arbitration even if that authority declines to appoint.

An issue which would be within the purview of the trier of fact (archetypically the jury in the common-law system) cannot be disposed of in a way which creates a

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there had been a jurisdictional basis for the order but that it was overbroad. The Norwegian request was resubmitted with greater specificity. It was heard again by the Court of Appeal, this time composed of different judges. The amended request was specific enough. The Court of Appeal generally regards itself as bound by its own prior judgments. Still, the second panel felt free to contradict the previous decision, thus finding for the witness on ground (i), on the footing that the jurisdictional finding made in the prior decision was unnecessary since the request had in any event been overbroad. Indeed, the prior decision was obviously not made because the Court had jurisdiction—how can an acknowledgement of jurisdiction be the *ratio* for dismissal?—but because of the overbroad request.

23 National Enterprises v. Racal Communications [1974] 3 *All E.R.* 1010.

24 Davies Middleton & Davies Ltd. v. Cardiff Corp. (1964) 62 *L.G.R.* 134.

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precedential norm.[25] Inconsistent outcomes may be regrettable but do not evidence a disregard of precedent.

Another exception to *stare decisis* may be relevant in the field of international arbitration, namely obsolescence. When the environment which commended a certain *ratio* has been significantly altered, a departure from precedent may be warranted. In one conception of common-law systems, which is still that of England, this is a possibility open only to the highest court. Since an international tribunal has no higher court, the restrictions in this respect on lower or intermediary courts have no relevance in the international context. (Equally, one can hardly expect that a tribunal looking at the complex environment and a well-established body of decided cases will be quick to conclude that the world has changed.)

To conclude this topic of reasoning by precedent, it seems worthwhile to consider in some detail the potential effect of dissenting opinions on the weight of awards as putative precedents.

Why is it that we have no difficulty with judicial dissents, while *arbitral* dissents immediately put us on guard? The answer is that judges are not named by the parties, so if a judge dissents, it will not be because he has a bias in favor of the unsuccessful party. That is not true in arbitration; as Alan Redfern noted in his 2003 Freshfields lecture, of 22 dissenting opinions submitted in ICC arbitrations in 2001 where it was possible to identify the dissenter, the dissent on every occasion favored the party having nominated that arbitrator. As Redfern commented dryly: "It would have been comforting if one or two of the dissenting opinions had gone against the appointing party." And the last words of his lecture asked whether "the present leniency towards dissenting opinions . . . has gone too far."[26]

Eduardo Silva Romero was interested in Redfern's report, so he verified the ICC statistics for 2003. It turned out that there had been 31 dissenting opinions, 30 of which had been submitted by the arbitrator nominated by the losing party.[27] (The thirty-first was a presiding arbitrator in what Silva Romero referred to as a "rather pathological" case.)

Due to the fact that investment arbitrations tend to generate precedents in a way quite unfamiliar to routine commercial arbitration, is there a greater justification for dissenting opinions in the former?

There are certainly instances of excellent dissenting opinions which present a legitimate point of view well worth considering. Looking at investment cases in recent years, one might cite Jorge Covarrubias Bravo, Keith Highet, Francisco Orrego Vicuña,

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25 The prior *Lauder v. Czech Republic* decision (September 3, 2001), could not have been regarded by the arbitrators who issued the CME *Czech Republic B.V. v. Czech Republic* award, (Partial Award, September 13, 2001), rendered 10 days later following extraordinary maneuvers on the part of a dissenting arbitrator, as a precedent which they chose to ignore. The second tribunal took a different view of the factual reality of causation—but so may two juries. And it is hardly satisfactory to think that the winners of a race to finalize an award thereby trump other arbitrators.

26 Alan Redfern, *Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly*, 20 Arb. Int. 223, 234 (2004).

27 *Brèves observations sur l'opinion dissidente, in* Les Arbitres Internationaux 179 (J. Rosell ed., Société de Législation Comparée 2005).

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and Horacio Grigera Naón as authors of worthwhile dissents. "Worthwhile" does not mean *necessarily correct*, but *intellectually unavoidable*. An astute dissent should, it seems, actually benefit the majority; if the other arbitrators maintain their views in the face of such opposition, their reasoning ought to be improved, and their confidence in making the decision strengthened. Such high-quality dissents do not detract from the legitimacy of the process. To the contrary, they constitute a transparent exposition of the emergence of an issue about which irreductibly opposed views may legitimately be maintained. Most adults know that such questions exist. It does not mean that the law is a farce. It means that the law deals with subjects which make reasonable people hesitate, and it means that it is applied by human beings.

Now for the counterargument. If the culture of any system of arbitration gives rise to habits or expectations of individual expression of disagreement at every turn, the practice may degenerate and the legitimacy of the process suffer. This is true even with respect to jurisdictions where no decision maker is appointed by individual parties, such as national courts.

An institution's ethos, whether it is one of easy tolerance of dissents, or to the contrary of ingrained resistance to them, has a profound effect on the psyche not only of the doubter, but also of the majority. Consider the experience of the World Bank Administrative Tribunal, comprised of seven judges from various continents, which has rendered nearly 400 judgments since its creation in 1980 without a single dissent. This is not because its judges are notoriously diffident. Two of them were former Presidents of the ICJ. The cases are sufficiently complex that each Judge would doubtless have written a quite different text if he or she had been alone. Yet this tribunal has invariably decided by consensus. This does not mean that each judge agrees with every aspect of any particular judgment.

The experience of the WBAT should make one doubt that dissents are more appropriate in investment arbitrations than in commercial arbitration. It is said that the former are more likely to be invoked as precedents, and therefore an arbitrator who believes that a legal principle is being misstated has a very good reason to express dissent. This is a respectable position to take, but the dynamic of decision making suggests another approach which has for 30 years avoided a single dissenting opinion in the WBAT. Although WBAT judges are explicitly allowed to issue dissents, and although their own judgments are constantly cited to them as precedent for the simple reason that it is their task to interpret the Bank's Staff Rules which is the principal normative source for decisions, and there is no other source of precedent as to the interpretation of those Rules, there is some pressure not to be the first judge since 1980 to dissent, and also pressure *on the majority* not to push other judges into an intellectual corner where they see no other way out but to dissent. The solution does not lie in unprincipled compromise. The fruitful approach is rather to use familiar techniques of accommodation, such as seeking the narrowest possible point that will resolve the particular grievance and avoiding unnecessary pronouncements which are likely to be divisive.[28]

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28 There is naturally a significant distinction between standing organs such as the WBAT (or, more notably, the WTO Appellate Body) and more ephemeral arbitral tribunals. But this

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In sum, there are circumstances where a sober and thoughtful dissent contributes to a mature understanding of the law; it enables both parties to see that their arguments were fully heard, and lawyers and scholars to realize that a particular issue will continue to merit close attention and perhaps refinement or indeed reconsideration. But arbitrators should not quickly conclude that they find themselves in this situation. Nor should the majority spare any effort at intellectual accommodation, by judicious employment of the deliberative methods just mentioned.

In most commercial arbitrations, there is no reason for dissent. Arbitrators' signatures on the award certifies no more than that they participated in the deliberations and now confirm that this is the decision of the tribunal. There is no need to indicate that there was a 2-1 vote, if that was the case. Certainly there is no assumption that each arbitrator has agreed to every observation or logical construct set down in the award. In many if not most investment arbitrations, there is no reason to take a different approach.

This discussion should serve to underscore the importance of the *ratio/obiter* distinction. A unanimous award may contain incidental observations which have sprung from the mind of the drafter and been more tolerated than embraced by the other arbitrators; their joint endorsement may be assumed only with respect to what was decisive.

Is a Synthesis Possible?

Alain Pellet's authoritative 115-page contribution on Article 38 in the Oxford University Press *Commentary* on the Statute of the International Court of Justice contains the following important observation:

> in practice, Art. 38, while a useful directive, has not prevented the Court from deciding on the basis of other sources of international law, the theory of which it has greatly advanced.[29]

It would be fatuous to quarrel with the words "useful directive," and to insist that Article 38 lays down a mandatory restriction. For there is no appeal from the decisions of the ICJ; nor is there from most international tribunals. This observation underscores the importance of *self-restraint* on the part of international adjudicators. The judicious application of evolving sources of law is at the heart of the process of building an international *system* where perceptions of legitimacy are often more important than the elusive "proof" of abstract legal propositions.

One of the reasons for the inescapable fuzziness of the formal sources of law identified in Article 38(1) is that it was intentionally worded in such a way as to give the

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difference should not be exaggerated. Standing bodies experience significant turnover, and some investment arbitrators achieve *de facto* tenure well in excess of that of the "permanent" bodies.

29 *Op. cit.* p. 700.

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World Court sufficient flexibility to avoid *non liquet*.[30] This proposition should apply to ICSID tribunals as well; and there is every reason to presume that a BIT which gives an option to select either ICSID or another mechanism (such as the UNCITRAL Rules) is intended to create a uniform regime in this regard.[31] The ICJ Statute does not allow the judges to conclude that they cannot reach a decision because they have not found an applicable norm. Such a *duty to decide*, in the public-international law field, is inconceivable unless international adjudicators are free to devise new solutions within the interstices[32] of established norms which are too general or too abstract to yield a definite answer. When the PCIJ was created, it should be noted, a respectable minority were not opposed to *non liquet*.[33] Had they won the day, judicial creativeness would have been curtailed and international law deprived of room for development.[34]

Jurisprudence is all the more likely to evolve in a realm where historical precedents tend to be both rarefied and outdated. As Francisco Orrego Vicuña observed in his Lauterpacht Lectures in 2001, "questions relating to major areas of international law, such as those dealing with trade, finance and investments, are never brought" before the International Court of Justice.[35] *Never* was perhaps too strong a word, since international lawyers working in the economic field will immediately think of *Barcelona Traction* and *ELSI*, but in fact those two unique exceptions serve to make the point even stronger: two cases in half a century is a starvation diet.[36] Based on the experience of the last decade, it is hardly an understatement that major disputes between investors

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30 Hersch Lauterpacht, The Function of Law In the International Community 134–35 (1933).

31 The Model Rules on Arbitral Procedure adopted by the ILC in 1958 (reprinted in [1956-II] YBILC 83) expressly precluded the possibility of *non liquet*: Article 11. It was thought that this rule itself reflected a mandatory general principle of law; *see* ILC Secretariat, *Commentary on the Draft Convention on Arbitral Procedure* (1955) pp. 49–52 and the references.

32 Thus said the incomparable Holmes, in *Southern Pacific Co. v. Jensen* (244 U.S. 205, at 221 (1917)): "I recognise without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motion. A common law judge could not say, I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court."

33 A leading member of this group, the former U.S. Secretary of State Elihu Root, explained his position by stating that the "Court must not have the power to legislate," Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920), Annexe No. 3, p. 309.

34 Hersch Lauterpacht wrote of "the animated, but highly unreal, controversy as to whether judges create the law or whether they merely reveal the rule already contained *in gremio legis*" and "the paradoxical assertion that judges are at the same time docile servants of the past and tyrants of the future." His point was that "the distinction between the evidence and the source of many a rule of law is more speculative and less rigid than is commonly supposed." The Development of International Law by the International Court 21 (rev. ed. 1958; first published as The Development of International Law by the Permanent Court of International Justice in 1934).

35 International Dispute Settlement in an Evolving Global Society 19 (Cambridge University Press 2004).

36 Most cases that predate the foundation of the ICJ—from *Oscar Chinn* to *Chorzów Factory*—are a mixed bag, of little use today except with respect to the most general of propositions. A newer case has emerged as the first occupant of the first half of the twenty-first century: *Ahmadou Sadio Diallo* (Guinea v. Democratic Republic of the Congo), Judgment, May 24, 2007.

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and States are being resolved by adjudication every month. This pace requires resources beyond those of a single world court, and expertise of quite a different kind.

The notion of leading cases in specialized areas of international law seems likely to become an ever more familiar element of our mindset, regardless of the fact that tribunals which render such decisions are not bodies formally constituted by treaties. (In that sense, investment awards may be said to occupy a higher, perhaps intermediate, level, for they are frequently rendered pursuant to a treaty.) Indeed the expression "leading case" was used—and properly so—by Professor Orrego Vicuña in relation to the *de Merode* judgment of the World Bank Administrative tribunal in defining the scope of review of the administrative policies of an international organization.[37] The same, to give just one additional example, may be said of the award rendered under the rules of the Court of Arbitration for Sport in *Aanes*,[38] often cited for its approach to the fundamental distinction between disqualification and suspension in relation to the policing of doping offenses by international sports federations.

These inquiries will continue to challenge us. The effort is worthwhile, as suggested by the concluding words of the chapter on "Law Applicable by International Tribunals" in Manley Hudson's *International Tribunals: Past and Future*, written in 1944, which are perhaps more plausible today than they were in the bitter wake of global war:

> . . . international tribunals applying the law which regulates the conduct of States can play an important role in world affairs. More than this, the judgments of such tribunals tend to become important sources for the development of international law.[39]

In the end, there is no contradiction between the task of deciding an individual case—in principle the sole duty of ephemeral tribunals—and consciousness of contributing to the accretion of international norms. The drafter of an award should resist any temptation to cite stray observations, found when perusing the literature, only because they seem to lend support for a decision already taken. And arbitrators asked to give weight to a prior award should be discerning enough to see that such passages are unlikely to be authoritative.

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37 *See supra* note 29, at p. 78. *De Merode*, WBAT Decision No. 1 (1981), was decided by the tribunal in a noteworthy composition, presided by Jiménez de Aréchaga and also including Elias, Weil, Lauterpacht, Abul-Magd, Gorman, and Kumarayya.

38 Aanes v. FILA, CAS 2000/A/317.

39 Manley O. Hudson, International Tribunals: Past and Future 107 (1944). Hudson was a Judge of the Permanent Court of International Justice (elected in 1936).

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A Practical Guide

Research Tools in International Investment Law

*Julien Fouret**

This chapter aims at assisting the new investment arbitration practitioner in identifying and finding the main legal sources for dealing with international investment law issues.

International investment law has been referred to as a *ménage à trois*: the State, the foreign investor, and international law.[1] Indeed, and as opposed to "pure" commercial arbitration, the sources for the law and the applicable norms are mostly grounded in the rules deriving from public international law, sometimes supplemented by the domestic law of the host State.

Three different topics need to be addressed in order to cover, as extensively as possible, the legal issues generally raised during an arbitration based on a bilateral investment treaty (BIT).

First, even though the *stare decisis* rule does not exist in international arbitration, including investment arbitration, previous rulings are often used and analyzed by arbitrators. As put by one tribunal, it "is not bound by earlier decisions, but will certainly carefully consider such decisions whenever appropriate."[2] Hence, the first section will be devoted to listing the tools to retrieve arbitral and public international case law.

Second, when dealing with investment arbitration, it is likely that the claim will be treaty based. For example, in the first semester of 2009, the ICSID Secretariat registered 12 new cases, all of them based on either a BIT or a multilateral conventional instrument.[3] Therefore, the second section will be devoted to the relevant aspects of

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* Julien Fouret is a member of the Paris Bar and an associate at Derains & Gharavi, Paris.

1 The expression is borrowed from Prosper Weil, "L'Etat, l'investisseur étranger et le droit international: la relation désormais apaisée d'un ménage à trois" *in* Prosper Weil, *Ecrits de droit international*, 2000, Doctrine Juridique–PUF, at 411.

2 Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Decision on Jurisdiction, November 14, 2005 at ¶ 76. *See also* on the issue of precedents in arbitration, and in international investment law in particular, *The Precedent in International Arbitration* (E. Gaillard & Y. Banifatemi eds., Juris Publishing 2008).

3 *News from ICSID*, Summer 2009, No. 26.1, at 3.

the law of treaties, such as the principles of interpretation, as well as sources to identify relevant BITs or multilateral investment treaties (MITs).

Finally, but most importantly, in international investment disputes, arbitral tribunals rely on all the different sources of public international law as identified in Article 38(1) of the Statute of the International Court of Justice (ICJ):

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Principally relying on the first source of international norms, as their jurisdiction is often based on BITs or MITs, these tribunals also need to apply norms deriving from customary international law to define certain general principles which are not usually mentioned in the treaty. The third section will thus be entirely devoted to this source of public international law.

I. ARBITRAL CASE LAW AND PUBLIC INTERNATIONAL CASE LAW

The present section lists the main sources for investment arbitration case law, as well as in public international law in general. Then, in a second table, it identifies the main law journal reviews for this arbitral case law.

Case Law

Source and Content	**Web site Address**
Investment Arbitration	
<u>ICSID</u>: – Historical data concerning all the cases since the creation of the Centre, including a list of all the pending and concluded cases with the composition of the tribunals. – Text of the ICSID awards when both Parties have accepted their publication.	http://icsid.worldbank.org
<u>Investment Arbitration Reporter:</u> – A reporting service provided via an investment newsletter, edited by a team under the supervision of Luke Peterson. – Provides factual elements related to past, pending, and future proceedings in international investment arbitration and international investment law in general. – Provides concise analysis of each of the reported cases and in-depth analysis of the most important ones.	http://www.iareporter.com

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Source and Content	Web site Address
Investment Claims (Oxford University Press): – Text of all publicly available investment arbitration decisions and awards: ICSID, UNCITRAL, SCC, OPIC, and ICC. – Text of annulment and challenge decisions before National Courts.	http://www.investmentclaims.com
Investment Treaty Arbitration (operated by Prof. Andrew Newcombe – University of Victoria): – Text of all publicly available investment arbitration decisions and awards based on investment treaties only: ICSID, UNCITRAL, SCC, and ICC. – Text of annulment and challenge decisions before National Courts. – Database of publicly available Expert legal opinions, Statements, and Affidavits.	http://ita.law.uvic.ca
Investment Treaty News: – A reporting service provided via an investment newsletter, edited by the *International Institute for Sustainable Development.* – Provides factual elements related to past, pending, and future proceedings in international investment arbitration and international investment law in general. – Document Centre with awards and documents pertaining to pending investment arbitrations.	http://www.investmenttreatynews.com
Iran-United States Claims tribunal: – Comprehensive database of the published decisions rendered by the tribunal, established on the basis of the Algiers Accord of 1981.	http://www.iusct.com
NAFTA Claims (operated by Todd Grierson-Weiler): – Text of all publicly available investment arbitration decisions and awards based on NAFTA. – Text of all the pleadings, statements, expert opinions, submitted to the tribunals. – Text of annulment and challenges decisions before National Courts.	http://www.naftaclaims.com
UNCTAD Database of Treaty-based Investor-State Dispute Settlement Cases: – Database providing, among other things, updated information on pending and concluded cases, their main legal issues and links to the full text of decisions if published.	http://www.unctad.org/iia-dbcases

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Source and Content	Web site Address
Public International Law	
<u>International Court of Justice:</u> – Judgments and orders of the ICJ since its creation, as well as all the parties' oral and written pleadings. – Judgments and orders of the Permanent Court of International Justice, the predecessor of the ICJ.	http://www.icj-cij.org
<u>Permanent Court of Arbitration:</u> – Awards and other information (pleadings…) in proceedings under PCA auspices where the parties have so agreed. These include investment arbitration awards as well as purely public international law cases. These awards date back to 1902.	http://www.pca-cpa.org/law/riaa
<u>U.N. Reports of International Arbitral Awards (UNRIAA):</u> – Electronic version of the 25 volumes of the UNRIAA. – Includes awards rendered between States and between States and international organizations. – These decisions were rendered by *ad hoc* tribunals or by mixed and international compensation commissions.	http://www.un.org/law/riaa

Journal Reviews of Investment Arbitration Case Law

The rapid growth of investment arbitration and its case law has led to a multiplicity of recurring journal reviews dealing with the subject matter. Each of these has different specificities which are listed below. All of these reviews are useful to any practitioner wishing to have a global overview of the case law for a given period of time.

References	Content
<u>Cahiers de l'Arbitrage–Gazette du Palais</u> I. Fadlallah, C. Leben & E. Teynier eds., "Investissements internationaux et arbitrage."	<u>Since 2003</u>, a selected review of the year's investment arbitral case law. It is organized by themes—notion of investment, of investor—in which each contributor analyzes the relevant decisions.
<u>German Yearbook of International Law</u> R. Happ & N. Rubins, "Awards and Decisions of ICSID Tribunals."	<u>Since 2003</u>, a descriptive review of ICSID case law with summaries of most of the cases rendered each year.[4]

4 This review was gathered in a monograph in 2009, which includes the reviews from 2003 to 2007, R. Happ & N. Rubins, Digest of ICSID Awards and Decisions, 2003–2007 (Oxford University Press 2009).

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References	Content
Journal du Droit International E. Gaillard, "Centre international pour le règlement des différends relatifs aux investissements (C.I.R.D.I.): chronique des sentences arbitrales."	Since 1986, this review includes a selected number of awards translated in French and then commented. It is always preceded by a general introduction on the year's developments in international investment law.[5]
Revue de Droit des Affaires Internationales–International Business Law Journal W. Ben Hamida & F. Horchani, "Droit et pratique des investissements internationaux."	Since 2007, this descriptive review aims at giving a rapid overview, every four months, of the recent developments in international investment law. It deals both with case law and with other recent news in international investment law.
Revue Québécoise de Droit International J. Fouret & D. Khayat, "Centre international pour le règlement des différends relatifs aux investissements (CIRDI)."	Since 2002, the sole exhaustive ICSID case law review. Every published decision during a given period of time is analyzed and commented as well as compared with previous case law and doctrinal statements. It is always preceded by a short introduction on the latest developments of ICSID.[6]
XXXIII. Yearbook of Commercial Arbitration (2008) D. Krishnan & A. Farren, "Digest of Investment Treaty Decisions and Awards."	In 2008, a digest of all publicly available investment treaty decisions up to July 30, 2008. It is indeed a list which enumerates the principal subject matters for each decision with the relevant paragraphs in parenthesis. (This is an update of the 2006 digest published in Volume XXXI.)

II. INTERNATIONAL TREATIES: IDENTIFICATION AND INTERPRETATION

When a practitioner is faced with a potential investment arbitration, it is likely that the basis of the tribunal's jurisdiction will be a BIT concluded between the investor's State and the host State of the investment. Some multilateral instruments also provide for

5 This review was gathered in a monograph in 2004, which includes the reviews from 1986 to 2003 as well as commentary of one award of 2004: E. Gaillard, La Jurisprudence du CIRDI (Pédone, Paris 2004).

6 This review was gathered in a monograph in 2009, which includes the reviews from 2002 to 2007, J. Fouret & D. Khayat, Recueil des Commentaires des Décisions du CIRDI (2002–2007) (Bruylant 2009). An electronic version of the reviews can be downloaded at http://www.rqdi.org.

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investment arbitration, and most of them are identified in the next section, a table listing the sources for indentifying and obtaining the text of the relevant treaties. One also needs to remember that many countries keep their own treaty databases, either general or solely devoted to investment treaties.[7] However, nothing replaces a thorough verification in the country involved as the official authorities might be the only ones to possess the information about the entering into force of an instrument. Past arbitral experience has shown that databases are the necessary first step but not the last one that should be undertaken if one wants to exhaustively verify the existence of the applicable treaty. Following this table is a section explaining and highlighting the relevant rules of treaty interpretation which need to be applied in investment arbitration proceedings.

Resources to Identify Investment Treaties

Source and Content	Address
ECT Secretariat: – Text of the Energy Charter Treaty. – Text of all the preceding agreements. – News about the disputes based on the ECT.	www.encharter.org
History of the ICSID Convention – All the negotiation and drafting history of the *Washington Convention* published by ICSID.	*History of the ICSID Convention* — Volumes I & II published by the ICSID Secretariat in English, French and Spanish. Published in 1970 and republished since.
ICSID: – Text of the *Washington Convention* and of all the arbitration, mediation and administrative regulations and rules. – Report of the World Bank Executive Directors. – Text of the *Additional Facility Rules*. – List of BITs.	http://icsid.worldbank.org
Investment Treaties: – This ICSID publication contains the texts of BITs concluded by more than 165 countries. It is continuously updated.	*Investment Promotion and Protection Treaties* (ten loose-leaf volumes) published at Oxford University Press.

7 For example, see the *French database* with all the bilateral and multilateral treaties that France has concluded: http://www.doc.diplomatie.fr/pacte/; the *U.S. database* on BITs and Free Trade Agreements concluded or being negotiated: http://www.ustr.gov/Trade_Agreements/BIT/Section_Index.html; the *UK database* of IPPAs: http://www.fco.gov.uk/en/about-the-fco/publications/treaties/treaty-texts/ippas-investment-promotion/; or even, from a developing country's perspective, the *Lebanese database* with all the BITs concluded by Lebanon: http://www.finance.gov.lb/International+Agreements/Protection+of+Investments/Agreement+List.htm.

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Resources to Identify Investment Treaties

Source and Content	Address
Investment Treaty Arbitration: – Model BITs of different countries. – List of Web sites to find BITs being either institutional or national.	http://ita.law.uvic.ca
NAFTA Claims: – Text of NAFTA. – Text of NAFTA negotiating texts and of the Commission Statements. – Text of Model Investment Treaties and Free Trade Agreements' investment chapters.	http://www.naftaclaims.com
NAFTA Secretariat: – All the legal texts pertaining to NAFTA in French, English, and Spanish.	http://www.nafta-sec-alena.org
UNCTAD–Investment Instruments Online: – Regularly updated list of the BITs concluded by countries. – Full text database of almost 2000 BITs. The most comprehensive database on the subject.	http://www.unctadxi.org/templates/DocSearch____779.aspx

Fundamental Rules of Treaty Interpretation in Public International Law

As opposed to international commercial arbitration, where the usual contractual means of interpretation—mainly derived from domestic legal orders—are applicable, investment arbitration is often based on treaties. The principles of interpretation of the applicable provisions of these instruments are public international law principles and are wholly disconnected from the national legal orders. The substance of these rules is also far from being the same as for contractual commercial arbitration. This subsection will thus provide the main elements for this interpretation and the necessary framework to understand the basis of most investment arbitration cases.

It should first be noted that treaties are the first source mentioned in Article 38 of the Statute of the ICJ,[8] and for a reason: "[t]reaties are […] the first place to look in order to determine a State's rights and duties."[9] The interpretation of these instruments is thus of paramount importance for investment arbitration where at least two-thirds of the cases are based on a BIT or an MIT. As the ICJ has constantly affirmed, when faced

8 Quoted in the introductory text of this chapter *supra*.

9 V. Lowe, International Law 64(Oxford University Press–Clarendon Law Series 2007).

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with a treaty: "[i]t is the duty of the Court to interpret the Treaties, not to revise them."[10] Hence the necessity to understand the applicable interpretation method.

The rules have been codified by the 1969 Vienna Convention on the Law of Treaties, particularly in Articles 31 and 32:[11]

ARTICLE 31

GENERAL RULE OF INTERPRETATION

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> *(a)* any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> *(b)* any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3 There shall be taken into account, together with the context:
>
> *(a)* any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> *(b)* any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> *(c)* any relevant rules of international law applicable in the relations between the parties.
>
> 4 A special meaning shall be given to a term if it is established that the parties so intended.

ARTICLE 32

SUPPLEMENTARY MEANS OF INTERPRETATION

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> *(a)* leaves the meaning ambiguous or obscure; or
>
> *(b)* leads to a result which is manifestly absurd or unreasonable.

These two articles constitute a benchmark from which international judicial bodies cannot easily depart since they have been repeatedly recognized as reflecting

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10 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase)*, Advisory Opinion of July 18, 1950, [1950] ICJ Rep. 221 at 229 and *Case Concerning the Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, Judgment of August 27, 1952, [1952] ICJ Rep. 176, at 196.

11 *Vienna Convention on the Law of Treaties*, May 22, 1969, 1155 U.N.T.S. 33 (Entry into force: January 27, 1980).

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customary international law and have been regularly applied by investment treaty tribunals.[12]

The treaty's object and purpose, stated at Article 31(1), is central in this interpretation process. Preambles, in this sense, are usually the most useful tools to achieve such a teleological interpretation.[13]

While Article 32 refers to them as supplementary means, the drafts, or the *travaux préparatoires* of BITs, MITs and the ICSID Convention, are constantly used by tribunals. These have therefore been diverted from their supplementary role and are being used as regular and normal elements on which every tribunal seems to rely. In fact, arbitrators will automatically resort to these elements if they are readily available.[14] Consequently, these elements will be casuistically used, depending on the accessibility to the documents, but the distinction between the general rule and the supplementary means of interpretation is almost nonexistent in practice as "most courts [. . .] do not draw fine distinctions as to the sequence and purpose for which interpretative aids are applied. Lawyers are even less restrained."[15]

Other elements ought also to be taken into account in carrying a correct interpretation, such as the different internal mechanisms contained in treaties. For example, NAFTA has its own interpretative body when a provision of the treaty needs to be clarified. This body is the FTC or, Free Trade Commission composed, of representatives of the State parties. Its most famous interpretation was given on July 31, 2001 concerning Article 1105 on the minimum standard of treatment. This Article had been at the center of multiple problems of interpretation before arbitral tribunals, and the State parties decided to clarify the meaning of "fair and equitable treatment" and "full protection and security."[16] Nevertheless, one major risk for such a procedure is that "States may strive to issue official interpretations to influence proceedings to which they are parties."[17]

The other endogenous procedure in conventional agreements is usually included in BITs: an inter-state arbitration clause specially designed to interpret a disputed provision in the particular treaty. This can provide guidance for investment tribunals if the State parties to a BIT have clarified a provision through this mechanism. Rarely used, to the best of our knowledge, this procedure has not even prevented an investment treaty tribunal from rendering an award interpreting the provision on the *ratione temporis* application of the BIT, even though that particular provision was being

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12 *See, e.g.*, Aguas del Tunari S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Jurisdiction, October 21, 2005, at paras. 88–93 and 226–39; Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award, October 12, 2005, at para. 50 *et seq.;* Saluka Investments BV v. The Czech Republic, *Ad hoc* BIT tribunal, Partial Award, March 17, 2006, at paras. 296–99.

13 *See, e.g.*, Continental Casualty Company v. Argentine Republic, ICSID Case No. ARB/03/9, Decision on Jurisdiction, February 22, 2006, at para. 80.

14 C. Schreuer & R. Dolzer, Principles of International Investment Law 33 *et seq* (Oxford University Press 2008).

15 V. Lowe, *supra* note 9, at 74.

16 The text of the Statement can be found at www.naftaclaims.com/commission.htm.

17 C. Schreuer & R. Dolzer, *supra* note 14, at 35.

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reviewed by an inter-state arbitral tribunal.[18] Consequently, the binding force of such an interpretative procedure has yet to be proven.

The final point one has to retain relates to the authority of precedents, which is dealt with in Chapter 26. For the purposes of this chapter, suffice it to note that while, in interpreting treaties, most tribunals have heavily relied on precedents and acknowledged the value of such precedents, they have, at the same time, repeatedly affirmed that they were not bound by such precedents. The best example concerns the multiple awards involving Argentina where the umbrella clause,[19] included in the U.S.-Argentina BIT, has been interpreted in a diametrically opposite manner by different tribunals. Nonetheless, precedents are a useful tool for counsel as they are still, most of the time, the most reliable source to exemplify how a particular provision should be interpreted. However, it should not be forgotten that these will only be elements, sometimes powerful, on which an arbitral tribunal might base its argumentation. No more, no less. The discrepancies observed in the Argentinean cases can be considered as an epiphenomenon as most tribunals pay some deference and attention to previous decisions. In fact, the mindset of investment treaty tribunals might be summed up as follows:

> The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.[20]

All these elements are necessarily combined, but the reliance first on the methodology set out by the Vienna Convention is almost automatic. Then all the necessary

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18 See the 18 paragraphs of the dissenting opinion of Franklin Berman, mainly focusing on this pending decision, where he argues that the refusal of the tribunal to suspend its proceedings in order to wait for the decision of the inter-state arbitration should have led the Committee to annul the award: Indústria Nacional de Alimentos S.A. and Indalsa Perú, S.A. v. The Republic of Peru, ICSID Case No. ARB/03/4, Decision of the *Ad hoc* Committee of September 5, 2007.

19 For the important differences in the analysis of the umbrella clause contained in the U.S.-Argentina BIT, *see, e.g.*, Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16, Decision on jurisdiction of May 11, 2005; CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award of May 12, 2005; El Paso Energy International Company v. Argentine Republic, ICSID Case No. ARB/03/15, Decision on jurisdiction of April 27, 2006; Pan American Energy LLC & BP Argentina Exploration Company v. Argentine Republic, ICSID Case No. ARB/03/13, Decision on jurisdiction of July 27, 2006; LG&E v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on liability of October 4, 2006. For an attempt to give a definitive interpretation of this provision, see the recent CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, Decision of the *ad hoc* Committee of September 25, 2007.

20 Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, March 21, 2007 at ¶ 67. *See also* Pey Casado v. Chile, ICSID Case No. ARB/98/01, Award, May 8, 2008 at ¶ 119.

evidence can be used to interpret the applicable treaty "in good faith in accordance with the ordinary meaning to be given to the terms of th[at] treaty in their context and in the light of its object and purpose."

III. CUSTOMARY INTERNATIONAL LAW

Customary international law, as set out in the ICJ Statute, is a source placed on the same level as treaties. Hence, in principle, the obligations deriving from it weigh the same as sources of public international law. The difficulty of this source is to understand where to find it: what are the resources identifying the norms deriving from it? Once this is done, the issue is also the applicability and the relevance of such norms for international investment law. Nevertheless, and as a preliminary understanding, one needs to comprehend what custom is in international law, and what the mechanism to create a customary norm is.

What is International Custom and How Is a Customary Norm Created?

International custom is one of the threes sources of public international law, along with treaties and general principles of law. Nevertheless, it is the most difficult source of international law to identify as the terms of its definition always seem very broad and vague, and this uncertainty can lead to serious controversies.[21] Article 38 of the ICJ Statute states that it is "evidence of general practice accepted as law," and authors have generally stated that "what is sought for is a general recognition among States of a certain practice as obligatory."[22] One also needs to differentiate it from usages as these are not legal obligations but rather practices accepted on the basis of courtesy.[23] Custom is usually defined as being composed of two elements: practice and *opinio juris sive necessitatis*. The ICJ has repeatedly accepted that the customary process will only be perfected through the combined existence of these two elements:

> The Court will now turn to an examination of customary international law to determine whether a prohibition of the threat or use of nuclear weapons as such flows from that source of law. As the Court has stated, the substance of that law must be "looked for primarily in the actual practice and *opinio juris* of States.[24]

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21 « il s'agit d'une source d'une nature particulière et même controversée » *in* P. Daillier & A. Pellet, Droit International Public 322 (6th ed., L.G.D.J.). For an exhaustive and theoretical understanding of custom in international law, *see* pp. 322–45.

22 J.L. Brierly, The Law of Nations: An Introduction to the International Law of Peace 61 (6th ed., Oxford University Press 1978).

23 I. Brownlie, Principles of Public International Law 4–5 (5th ed., Oxford University Press).

24 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of July 8, 1996, [1996] ICJ Rep. 226.

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The first element is the material element or *consuetudo* which is a uniform and consistent practice—in other words, precedents. It can, at the beginning of the creation of the norm, be a simple usage between States. That practice needs to be uniform and constant as well as accepted by the other State as binding.[25]

That practice need not be legal acts in essence, but all acts and omissions as long as they are taken by subjects of international law or attributable to them. These comprise, among others, positions taken by diplomatic agents[26] but also domestic legislations[27] or decisions taken at an inter-state level[28] or by an international organization.[29]

The second element, the psychological element, is the *opinio juris sive necessitatis*. This element is vague and difficult to prove, but it is the sense, the impression by the State that it is bound by a rule, as illustrated by the constant and recurrent practice of States generally in respecting, though not necessarily complying on all occasions with, that principle. As otherwise stated, "[t]he sense of legal obligation, as opposed to motives of courtesy, fairness, or morality is real enough, and the practice of states recognizes a distinction between obligation and usage."[30] The ICJ stated that element as early as in the *North Sea Continental Shelf Case*:

> The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitua1 character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.[31]

Even if, traditionally, *opinio juris* derives from constant practice, it is usually the repetitive nature and consistency of such elements that creates the impression of being legally bound by such a norm.[32]

Having addressed, in a concise manner, the process leading to the creation of a customary norm, it is important to understand the means to identify customary norms before understanding which one may have an impact in investment arbitration.

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25 Asylum Case (Columbia v. Peru), Judgment November 27, 1950, [1950] ICJ Rep. at 276–77.

26 Interhandel (Switzerland v. United States of America), Judgment March 21, 1959, [1959] ICJ Rep. 6.

27 PCIJ, *Lotus Case* (Serie A–N 10), Judgment September 7, 1927.

28 North Sea Continental Shelf (Federal Republic of Germany v. Netherlands), Judgment February 20, 1969 [1969] ICJ Rep. 3.

29 Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion October 23, 1956 [1956] ICJ Rep. 77.

30 I. Brownlie, *supra* note 23, at 7.

31 North Sea Continental Shelf (Federal Republic of Germany v. Netherlands), Judgment February 20, 1969 [1969] ICJ Rep. 3.

32 Some authors have argued that in a few cases, the process has been inverted: when a norm is necessary it is announced as a norm and then the practice follows. *See, e.g.*, P. Daillier & A. Pellet, *supra* note 21, at 332.

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Means to Identify Customary Norms in Public International Law

The identification of norms of customary international law is a difficult exercise: "the search of the rule of customary international law is not as simple as might at first appear."[33] As for any argument, factual or legal, the burden of proof will be on the party requesting the application of such a norm.[34] But how to prove such norms? And how to identify their precise contours?

There are three basic sources to identify whether a principle is a customary norm or a mere theoretical concept. The first is case law and is usually the most relevant and trustworthy. As in any legal system, "a court is presumed to know the law and may apply a custom even if it has not been expressly pleaded."[35] Thus, the party attempting to prove such a norm before a court will have to demonstrate the existence of the material and psychological elements. The ICJ has always affirmed that its role is to discern which rules were customary and which ones were not.[36] Hence, when trying to rely on a norm believed to be customary, any counsel would be wise to analyze the jurisprudence of the World Court in order to ascertain whether or not that rule had already been recognized. Investment treaty tribunals usually do not decide by themselves if a norm is customary. Rather, they rely on previous findings, either by the ICJ or PCIJ or deriving from a constant trend in past arbitral awards from the PCA, for example. The analysis of these cases is, therefore, one of the main means to identify such norms.

The second source is also the identification, or rather codification of these norms in multilateral treaties. As acknowledged, a "treaty does not 'make' customary law, but [. . . it may both codify existing law and contribute to the process by which new customary law is created and develops."[37] Where a treaty is considered to codify customary law, the arbitral tribunal does not take into account whether or not the host State in an investment arbitration is a party to that particular treaty. If France were to be a respondent in such an arbitration, it would not matter that it is not a party to the Vienna Convention on the Law of Treaties, as this instrument is now recognized by all international courts as an instrument which, for the most part, including in respect to interpretation, codifies the international customary law of treaties. Hence, some codification agreements could be invoked by counsel in an investment arbitration procedure to identify and frame customary obligations, even if the host country is not a party.

Finally, the last source to identify customary norms is the writings of qualified authors. Relying on public international law textbooks is probably the easiest secondary source to identify these norms. The references to case law and to codifying treaties might be easier to find in such textbooks.

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33 V. Lowe, *supra* note 9, at 48.

34 PCIJ, *Lotus Case* (Serie A–N 10), Judgment of September 7, 1927, at 18.

35 I. Brownlie, *supra* note 23, at 11.

36 "[T]he Court has next to consider what are the rules of customary international law applicable to the present dispute."; *in Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of June 27, 1986, at ¶ 183 *et seq.*

37 A. Boyle & C. Chinkin, The Making of International Law 234 (Oxford University Press 2007).

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As a word of conclusion, it is important to mention that customary norms are evolving. Not being written in instruments containing specific revision procedures, they evolve as the relations between States do and as the needs for change at the international level appear. As Vaughan Lowe affirms, "it is a mistake to think of international law as a monolithic body of law."[38] All these rules evolve through changes in the practice of States. Some norms might even disappear or be replaced by more protective norms. Investment arbitral tribunals have recognized the evolving nature of customs and have advised caution when resorting to customary norms identified in old awards as these norms might have evolved:

> Put in slightly different terms, what customary international law projects is not a static photograph of the minimum standard of treatment of aliens as it stood in 1927 when the Award in the *Neer* case was rendered. For both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development.[39]

Consequently, relying on the most recent international case law or writings might be the safest means to ensure the existence or nonevolution of these norms as they "come into existence, evolve and die through a dynamic and incremental process of claims and reactions by States."[40]

Applicability and Relevance of Customary Norms in International Investment Law

The customary norm exists, and actually coexists, with the norms included in the applicable BITs in a given dispute. Even though it is an accepted principle that the BIT is a *lex specialis* if applicable in a dispute and that the *lex specialis* derogates from the *legi generali*,[41] the bilateral treaties might not cover all the issues in a given dispute. Hence, customary international law will be a complementary source of obligations for the State even though these sources "are not hierarchically ordered"[42] as there is no formal hierarchy of the sources in public international law.

Concerning the importance of such a source in international investment law, its influence and weight are real. As mentioned, the customary rules of treaty interpretation are always used by investment arbitral tribunals to interpret BITs. It is mostly procedural principles, part of customary international law, that are used as such by investment tribunals, for example, *res judicata*, estoppel, *lis pendens*, or the issue of

38 V. Lowe, *supra* note 9, at 61.

39 ADF Group Inc. v. United States, ICSID Case No. ARB (AF)/00/1, Award, January 9, 2003, ¶ 179.

40 T. Gazzini, *The Role of Customary International Law in the Field of Foreign Investment*, 8.5 JWIT 691, 694 (2007).

41 Amoco Int'l Fin. Corp. v. Iran, 15 Iran-U.S. CTR 189 (1987). The Iran-U.S. Claims tribunal stated at ¶ 112 that "As a *lex specialis* in the relations between the two countries, the Treaty supersedes the *lex generalis*, namely customary international law."

42 T. Gazzini, *supra* note 40, at 697.

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denial of justice.[43] More substantial principles or norms are usually dealt with in a conventional instrument,[44] either solely in the BIT or in conjunction with the *Washington Convention* during an ICSID arbitration. Tribunals have repeatedly reaffirmed that they will not resort to customary norms for the substantial elements already covered in the applicable conventional instruments; this is generally the case regarding the nationality of the investor: "As the matter of nationality is settled unambiguously by the Convention and the BIT, there is no scope for consideration of customary law principles of nationality, as reflected in Barcelona Traction."[45]

Hence, customary international law will play a secondary, or procedural, role when the basis of a claim is a BIT but will be more important either when the BIT is incomplete or when the basis of the tribunal's jurisdiction is an investment contract or domestic legislation. In these latter cases, all the abovementioned means to identify such norms are fundamental in order for the investor to fully obtain the protection provided by international law and for the host State to ensure that all its sovereign customary prerogatives are respected.

CONCLUSION

These research tools do not aim to be exhaustive but rather to give a first brush, an introductory overview of the most important elements to take into account when faced with a dispute in investment arbitration.

"[F]or a lawyer without books would be like a workman without tools";[46] one can hope that this entire monograph, including the present chapter, will be a double tool: practical and theoretical. This twofold approach is the only acceptable one in order to grasp, as thoroughly as possible, the ever-evolving subject of international investment law.

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43 Even though this principle is sometimes subsumed under the fair and equitable treatment heading. *See, e.g.*, Consortium R.F.C.C. v. Kingdom of Morocco, ICSID Case No. ARB/00/6, Award, December 22, 2003.

44 For example, general principles of treatment or conditions for an expropriation are generally set out in these treaties. In the absence of such norms, then customary international law might come into play to fill the normative gaps.

45 ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary, ICSID Case No. ARB/03/16, Award, October 2, 2006 at ¶ 357.

46 Thomas Jefferson, *Letter to Thomas Turpin*, February 5, 1769.

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