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INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

INTRODUCTORY NOTE

*by August Reinisch**

From the Perennial Issue of the Notion of Investment Pursuant to Article 25 ICSID Convention and Narrow Dispute Settlement Provisions to Further Clarifications of Substantive Standards of Protection—ICSID Arbitration in 2009

I. Introduction

This introductory note follows the path of the last years[1] by presenting an overview of the most important ICSID cases of the reporting year 2009.[2] Some of these ICSID decisions are reproduced in parts in the Legal Maxims Section of this Yearbook.[3] Jurisdictional decisions, awards on the merits as well as annulment decisions have clarified the law in a number of respects.

II. Jurisdictional Issues

In 2009, ICSID tribunals had to cope with the usual jurisdictional challenges raised by respondent States both under applicable investment agreements and pursuant to Article 25 of the ICSID Convention.[4] Challenges relating to the Centre's jurisdiction *ratione materiae* and *ratione personae* have become almost a routine affair. Nevertheless, ICSID tribunals are still struggling with some fundamental issues of

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1 *See* August Reinisch, *From Contested Jurisdiction to Indirect Expropriation and Fair and Equitable Treatment—Developments in ICSID Arbitration in 2004*, 5 Global Community YILJ 1653 (2005); id., *From the Intricacies of* Ratione Personae *Jurisdiction to Failed Justifications on the Merits under the Necessity Defence—ICSID Arbitration in 2005*, 6 Global Community YILJ 1449 (2006); id., *New Jurisdictional Hurdles, More on Investment Protection Standards and Novel Procedural Issues—ICSID Arbitration in 2006*, 7 Global Community YILJ 1799 (2007); id., *Back to Basics: From the Notion of "Investment" to the Purpose of Annulment—ICSID Arbitration in 2007*, 8 Global Community YILJ 1591 (2008); id., *From Novel Personal Jurisdiction Issues to Considerable Substance on Fair and Equitable Treatment—ICSID Arbitration in 2008*, 9 Global Community YILJ 749 (2009).

2 In 2009, ICSID registered 25 new cases, bringing the total number of cases instituted before the Centre to 305. Fourteen Awards and 3 Decisions on Jurisdiction were rendered in 2009. *See* ICSID Caseload Statistics (Vol. 1, 2010), available online at <http://icsid.worldbank.org/ICSID/FrontServlet>.

3 *See* Jane Hofbauer & Christina Knahr, *Legal Maxims: Summaries and Extracts from Selected Case Law: ICSID*, in this Volume.

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

Article 25 of the ICSID Convention, in particular, the notion of "investment" under the ICSID Convention as a jurisdictional requirement.

A. The Notion of "Investment" Under the ICSID Convention

The precise content of the notion of "investment," pursuant to Article 25 of the ICSID Convention a jurisdictional requirement for ICSID tribunals, has been a matter of contention for years. The lack of definition of this term in the Convention has led to a gradual evolution of an acceptable meaning of this notion by scholars and tribunals. Over the last years the so-called *Salini* test[5] has become more and more acceptable to many ICSID tribunals. According to this view, an investment may be identified by the following typical features: a certain duration, a certain regularity of profit and return, the assumption of risk, a substantial commitment, and a significant contribution to the host State's development.[6] While many ICSID tribunals have followed this approach, uncertainty returned when in 2006 a tribunal and in 2007 an annulment committee elevated the "significant contribution" aspect to a jurisdictional requirement. In both cases the existence of an "investment" in the sense of Article 25 of the ICSID Convention was denied because the activities in question—the provision of legal services in *Mitchell v. Congo*[7] and the salvaging contract in *Malaysian Historical Salvors v. Malaysia*[8]—were held to be devoid of significant contribution to the respective host States' development.

The annulment decision in *Malaysian Historical Salvors v. Malaysia*[9] may bring ICSID jurisprudence back in line. The *ad hoc* committee found that the original tribunal, composed of a sole arbitrator, had manifestly exceeded its powers in the original decision

> 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 these reasons: (a) it [. . .] limited itself to its analysis of criteria which it found to bear upon the interpretation of Article 25(1) [. . .]; (b) its analysis of these criteria elevated them to jurisdictional conditions, and exigently interpreted the alleged condition of a contribution to the economic development of the host State so as to exclude small contributions, and contributions of a cultural and historical nature; (c) it failed to take account of the preparatory work of the ICSID Convention [. . .], notably the decisions of the drafters of the ICSID Convention to reject a monetary floor [. . .], to reject specification of its duration, to leave "investment" undefined, and to accord great weight to the definition of investment agreed by the Parties [. . .].[10]

The committee's emphasis that the *Salini* elements do not establish jurisdictional requirements which have to be fulfilled in a cumulative fashion but rather represent

5 Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, para. 52.

6 Christoph H. Schreuer, Loretta Malintoppi, August Reinisch, & Anthony Sinclair, The ICSID Convention: A Commentary 128, 129 (2009).

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

8 Malaysian Historical Salvors, SDN, BHD v. Malaysia, ICSID Case No. ARB/05/10, Award on Jurisdiction, 17 May 2007.

9 Malaysian Historical Salvors, SDN, BHD v. Malaysia, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009.

10 *Id.*, para. 80.

typical characteristics is largely in line with the view of commentators.[11] Less convincing is the committee's insistence that the sole arbitrator had already exceeded his powers by failing to even consider the investment definition of the applicable bilateral investment treaty (BIT) since fulfilment of the BIT requirement of investment and the ICSID notion of investment are usually seen as separate elements which both have to be fulfilled in ICSID arbitration.[12]

Also the sole arbitrator in the *Pantechniki* case[13] dealt with the question of what constitutes an investment for purposes of ICSID jurisdiction. The case arose from a contract whereby a Greek company agreed to perform road works in Albania which were massively affected by public riots involving the looting of construction sites. The arbitrator had no problem in qualifying the construction works as an investment both under the applicable Albania/Greece BIT's broad asset-based investment definition as well as under the ICSID Convention. However, he added some general reflections which cast doubt on the hitherto accepted assumption that Article 25 of the ICSID Convention contains objective criteria which have to be separately fulfilled in order to permit an ICSID tribunal to hear an investment claim. As to the *Salini* test he questioned whether "the word 'investment' in Article 25(1) [of the ICSID Convention] carries some inherent meaning which is so clear that it must be deemed to invalidate more extensive definitions of the word 'investment' in other treaties."[14] The *Pantechniki* arbitrator voiced particular unease about the subjective elements of the *Salini* test like the "sufficient" duration, magnitude and contribution to development. However, he stopped short of discarding the idea of separate investment requirements under the ICSID Convention by acknowledging that particular transactions may be so simple and instantaneous that they cannot possibly be called "investments" "without doing violence to the word."[15]

Another 2009 ICSID case broadly addressed the issue of "investment" as a *ratione materiae* requirement under the ICSID Convention. The tribunal in *Phoenix v. Czech Republic*[16] declined to exercise jurisdiction over a claim brought by an Israeli investor against the Czech Republic because it found that the acquisition of two Czech

11 Schreuer, Malintoppi, Reinisch, & Sinclair, *supra* note 6, at 128.

12 *Cf.* Ceskoslovenska Obchodni Banka v. Slovak Republic, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999, para. 68 ("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."), Mytilineos Holdings SA v. 1. The State Union of Serbia & Montenegro, 2. Republic of Serbia, UNCITRAL Partial Award on Jurisdiction, 8 September 2006, para. 112 ("It is the established practice of ICSID tribunals to assess whether a specific transaction qualifies as an 'investment' under the ICSID Convention, independently of the definition of investment in a BIT or other applicable investment instrument, in order to fulfill the *ratione materiae* prerequisite of Article 25 of the Convention.").

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

14 *Id.*, para. 43.

15 *Id.*, para. 48.

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

companies was not a "bona fide" investment because it was made solely for the purpose of arbitrating a dispute before ICSID.

The tribunal set out to affirm the "double-barrelled" test, according to which a finding that a contract satisfied the definition of "investment" under the BIT would not be sufficient for an ICSID tribunal to assume jurisdiction, if the contract failed to satisfy the criterion of an "investment" within the meaning of Article 25.[17] Regarding the latter aspect, the tribunal affirmed the *Salini* test "according to which the notion of investment implies the presence of the following elements: (i) a contribution of money or other assets of economic value, (ii) a certain duration, (iii) an element of risk, and (iv) a contribution to the host State's development."[18] As to the last criterion which had led to controversial findings in the *Mitchell* annulment case[19] as well as in *Malaysian Historical Salvors v. Malaysia*,[20] the tribunal proposed the following modification:

> It is the Tribunal's view that the contribution of an international investment to the *development* of the host State is impossible to ascertain—the more so as there are highly diverging views on what constitutes "development." A less ambitious approach should therefore be adopted, centered on the contribution of an international investment to the *economy* of the host State, which is indeed normally *inherent in the mere concept of investment as shaped by the elements of contribution/duration/risk*, and should therefore in principle be presumed.[21]

After a lengthy discussion, the *Phoenix* tribunal summarizes its view holding that the following six elements have to be taken into account:

1. a contribution in money or other assets;
2. a certain duration;
3. an element of risk;
4. an operation made in order to develop an economic activity in the host State;
5. assets invested in accordance with the laws of the host State;
6. assets invested *bona fide*.[22]

The fifth element is usually considered under specific BIT provisions, so-called "in accordance with domestic law" clauses,[23] but in the tribunal's view it should be regarded as an implicit, general requirement; whereas the sixth element is derived

17 *Id.*, para. 74; approvingly citing Malaysian Historical Salvors Sdn, Bhd v. Malaysia, ICSID Case No. ARB/05/10, Award, 28 May 2007, para. 55.

18 Phoenix v. Czech Republic, para. 83.

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

20 Malaysian Historical Salvors, SDN, BHD v. Malaysia, ICSID Case No. ARB/05/10, Award on Jurisdiction, 17 May 2007.

21 Phoenix v. Czech Republic, para. 85.

22 *Id.*, para. 114.

23 Rudolf Dolzer & Christoph H. Schreuer, Principles of International Investment Law 65 (2008); Christina Knahr, *Investments "in Accordance with Host State Law,"* Transnational Dispute Management 4, 5 (September 2007); Andrea Carlevaris, *The Conformity of Investments with the Law of the Host State and the Jurisdiction of International Tribunals*, 9 The Journal of World Investment and Trade 35 (2008); Andrew Newcombe & Lluís Paradell, Law and Practice of Investment Treaties: Standards of Treatment 134 *et seq.* (2009).

from the general principle of *bona fides*. Because the tribunal found the last element lacking it declined to exercise jurisdiction. According to the tribunal

> the Claimant made an "investment" not for the purpose of engaging in economic activity, but for the sole purpose of bringing international litigation against the Czech Republic. This alleged investment was not made in order to engage in national economic activity, it was made solely for the purpose of getting involved with international legal activity. The unique goal of the "investment" was to transform a pre-existing domestic dispute into an international dispute subject to ICSID arbitration under a bilateral investment treaty. This kind of transaction is not a *bona fide* transaction and cannot be a protected investment under the ICSID system.[24]

The *Phoenix* tribunal also provided a strong policy reason to disallow such treaty shopping. In its view, preexisting national disputes should not be brought to ICSID tribunals by a simple transfer of national economic interests to a foreign company in an attempt to seek protection under a BIT. It considered itself obliged not to protect "such an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs." According to the *Phoenix* tribunal it had

> to ensure that the ICSID mechanism does not protect investments that it was not designed for to protect, because they are in essence domestic investments disguised as international investments for the sole purpose of access to this mechanism.[25]

The above cases demonstrate that although the tribunals have become more hesitant to qualify the contribution to a host State's development as a jurisdictional requirement, there is still some uncertainty about the precise scope of the notion of investment under Article 25 of the ICSID Convention.

B. The Existence of a "Legal Dispute" as a Jurisdictional Requirement Under the ICSID Convention

Article 25 of the ICSID Convention endows tribunals with jurisdiction over "legal disputes" arising out of investments.[26] The absence of this jurisdictional requirement of a "legal dispute" was decisive in *Azpetrol v. Azerbaijan*.[27] The case arose from various investments linked to the former Azeri Minister Farhad Aliyev and involved a number of corruption charges on which the tribunal heard evidence but which it did not have to address since the parties had reached a settlement agreement in late 2008. When the respondent moved to dismiss the case, claimant objected questioning the validity of the 2008 settlement. The *Azpetrol* tribunal, however, considered the 2008 agreement valid and binding. This led to the final procedural question whether the respondent's request should lead to a discontinuance of proceedings according to Rule 43(1) ICSID Arbitration Rules[28] or to a

24 Phoenix v. Czech Republic, para. 142.

25 *Id.*, para. 144.

26 *See supra* note 4.

27 Azpetrol International Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V. v. The Republic of Azerbaijan, ICSID Case No. ARB/06/15, Award, 8 September 2009.

28 Rule 43 (1) ICSID Arbitration Rules provides: "If, before the award is rendered, the parties agree on a settlement of the dispute or otherwise to discontinue the proceeding, the Tribunal, or the Secretary-General if the Tribunal has not yet been constituted, shall, at their written request, in an order take note of the discontinuance of the proceeding."

finding of lack of jurisdiction pursuant to Article 25(1) of the ICSID Convention. The tribunal decided that since Rule 43(1) ICSID Arbitration Rules required a joint request for discontinuance by the parties it was inapplicable to the case at hand. It continued, however, to find that

> [a]lthough the Claimants objected to the existence of a binding settlement, they did not contest that the terms of the settlement would have finally disposed of all matters in dispute. In these circumstances, the Tribunal concludes that there is no "legal dispute" between the Claimants and the Respondent as required by Article 25(1) of the ICSID Convention [. . .] and consequently no jurisdiction to hear the claim.[29]

C. How Narrow Are Narrow Dispute Settlement Clauses?

The problem of narrow dispute settlement clauses has vexed investment tribunals for quite some time. A number of BITs and other investment treaties, primarily of former Communist States, contain provisions pursuant to which only disputes "involving" or "concerning" the amount of compensation in case of expropriation may be brought before an international arbitral tribunal.[30] Nevertheless, claimants have tried to invoke such clauses in order to litigate also the question whether an expropriation has occurred in the first place.

The 2009 case of *Tza Yap Shum v. Republic of Peru*[31] broadly addressed the proper scope of such narrow dispute settlement clauses. In the case at hand, the China/Peru BIT provided for ICSID arbitration of disputes "involving the amount of compensation for expropriation."[32] The claimant successfully argued that this gave the tribunal also competence to decide on the merits of his expropriation claim. In reaching this conclusion, the tribunal broadly reviewed the existing split opinions of investment tribunals on narrow dispute settlement clauses.

In *Berschader v. Russia*,[33] an investment tribunal set up according to the arbitration rules of the Stockholm Chamber of Commerce found that a dispute settlement clause referring to disputes "concerning the amount or mode of compensation" had to be interpreted according to its "ordinary meaning," which excluded arbitration of "disputes concerning whether or not an act of expropriation actually

29 Azpetrol v. Azerbaijan, para. 105.

30 *See* Norah Gallagher & Wenhua Shan, Chinese Investment Treaties: Policies and Practice 313 (2009); Stephan W. Schill, *Tearing Down the Great Wall: The New Generation Investment Treaties of the People's Republic of China*, 15 Cardozo J. Int'l & Comp. L. 73, 89 *et seq*. (2007); Luke Eric Peterson, *Interpreting Narrowly Worded Arbitration Clauses in Soviet-Era and Chinese BITs*, Investment Treaty News (January 17, 2008); Gordon Smith, *Chinese Bilateral Investment Treaties: Restrictions on International Arbitration*, 78 The International Journal of Arbitration, Mediation and Dispute Management 58 (2010).

31 Tza Yap Shum v. Republic of Peru, ICSID Case No. ARB/07/6 (China/Peru BIT), Decision on Jurisdiction and Competence, 19 June 2009. *See also* Luke Eric Petersen, *ICSID Panel Interprets Narrow-Looking Jurisdictional Clause so as to Permit Arbitration of Dispute over Alleged Expropriation of Chinese-Owned Assets in Peru*, 2 Investment Arbitration Reporter 11 (29 June 2009).

32 Article 8(3) China/Peru BIT.

33 Vladimir and Moise Berschader v. The Russian Federation, SCC Case No. 080/2004, Award, 21 April 2006.

occurred."[34] Similarly, the tribunal in the *RosInvest* case[35] concluded that an almost identical clause "does not include jurisdiction over the questions whether an expropriation occurred and was legal."[36] A similar finding was recently made by an UNCITRAL tribunal in *Austrian Airlines AG v. Slovakia*.[37]

The *Tza Yap Shum* tribunal, however, followed a broad interpretation which was already implicit in *Telenor* and *Saipem* and was fully addressed and endorsed in the challenge proceedings of the *EMV* case before English courts.

In *Telenor v. Hungary*,[38] the applicable dispute settlement clause referred to disputes "concerning the amount or payment of compensation" under the BIT articles dealing with expropriation. The ICSID tribunal rejected the claimant's attempt to invoke the applicable BIT's most favored nation (MFN) clause in order to widen a narrow dispute settlement clause so as to include fair and equitable treatment. However, it ultimately found that it did not have jurisdiction over the claimant's expropriation claims because Telenor had failed to make out a prima facie case[39] of expropriation.[40] Evidently this did not exclude its power to adjudicate the existence and lawfulness of expropriation.

In *Saipem v. Bangladesh*,[41] an ICSID tribunal asserted jurisdiction over the question whether an expropriation had occurred although a narrow dispute settlement clause referred to disputes "relating to compensation for expropriation." However, in *Saipem* the issue was not addressed by the respondent State.

The first broad discussion and wide interpretation of a narrow dispute settlement clause is contained in *European Media Ventures SA v. Czech Republic*,[42] confirming the unpublished decision on jurisdiction in *European Media Ventures SA v. Czech Republic*.[43] The wording of the applicable BIT referring to "disputes—concerning compensation" was considered to be broad. In the view of the English court, this covered "issues of entitlement as well as quantification."[44]

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34 *Id.*, para. 153.

35 RosInvestCo UK Ltd. v. The Russian Federation, Award on Jurisdiction 2007, SCC Case No. Arb. V079/2005.

36 *Id.*, para. 114.

37 Austrian Airlines AG v. The Slovak Republic, UNCITRAL Final Award, 9 October 2009.

38 Telenor Mobile Communications AS v. Republic of Hungary, ICSID Case No. ARB/04/15, Award, 13 September 2006.

39 *See, e.g.*, Impregilo S.p.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, para. 254, in which the Tribunal 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."

40 *Telenor v. Hungary*, paras. 80 and 102.

41 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, 21 March 2007.

42 European Media Ventures SA v. Czech Republic, Judgment of the High Court of England and Wales, 5 December 2007 (2007) EWHC 2851 (Comm).

43 European Media Ventures SA v. Czech Republic, UNCITRAL Award on Jurisdiction, 15 May 2007 (not public).

44 European Media Ventures SA v. Czech Republic, Judgment of the High Court of England and Wales, 5 December 2007 (2007) EWHC 2851 (Comm), paras. 43 and 44.

The ICSID tribunal in *Tza Yap Shum v. Peru* had to interpret a dispute settlement clause referring to disputes "involving the amount of compensation for expropriation." It considered

> that the phrase "involving the amount of compensation for expropriation" may have a great variety of possible meanings. In case, according to Respondent, emphasis were given to the words "amount of compensation," this would suggest a restrictive interpretation, one which would only include disputes related to the determination of the value of the investment. It may be assumed, in case this were the right interpretation, that such questions as whether expropriation has taken place or whether any compensation must be paid, among other potentially important matters, would be decided in a different manner. At the other end of the interpretative spectrum, this phrase may include, in addition to the amount of compensation, a determination of other important matters related to the alleged expropriation. This is the interpretation requested by Claimant. For a variety of reasons, the Tribunal has decided that the latter, i.e. the broadest interpretation, happens to be the most appropriate.[45]

After a detailed review of the existing case law and policy arguments pro and contra a wide reading of the narrow clause, the tribunal concluded

> that to give meaning to all the elements of the article, it must be interpreted that the words "involving the amount of compensation for expropriation" includes not only the mere determination of the amount but also any other issues normally inherent to an expropriation, including whether the property was actually expropriated in accordance with the BIT provisions and requirements, as well as the determination of the amount of compensation due, if any.[46]

It should be added that at about the same time a similar conclusion was reached by a Stockholm Chamber of Commerce (SCC) tribunal in the *Renta 4* case.[47] These cases demonstrate that there is still inconsistency in the approaches of arbitrators to interpret the scope of their jurisdiction under so-called narrow dispute settlement clauses.

D. Umbrella Clauses

The precise meaning of so-called umbrella clauses remains contentious not only in investment law scholarship,[48] but also in arbitration practice. After the well-known split of opinions in the two SGS cases against Pakistan and the Philippines, a gradual consolidation appears to take place.

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45 *Tza Yap Shum v. Republic of Peru*, para. 150.

46 *Id.*, para. 188.

47 Renta 4 S.V.S.A et al. v. Russian Federation, Award on Preliminary Objections, 20 March 2009, SCC No. 24/2007 (Spain/Russia BIT).

48 Christoph H. Schreuer, *Travelling the BIT Route: Of Waiting Periods, Umbrella: Clauses and Forks in the Road*, 5 The Journal of World Investment and Trade 231 (2004); Anthony Sinclair, *The Origins of the Umbrella Clause in the International Law of Investment Protection*, 20 Arbitration International 411 (2004); Thomas Wälde, *The "Umbrella" Clause on Investment Arbitration—A Comment on Original Intentions and Recent Cases*, 6 The Journal of World Investment and Trade 183 (2005); Stanimir A. 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 The Journal of World Investment and Trade 555 (2004).

In *SGS v. Pakistan*,[49] the arbitrators rejected the view that "breaches of a contract [. . .] concluded with a State (widely considered to be a matter of municipal rather than international law) are automatically 'elevated' to the level of breaches of international law. Having regard to the distinction in principle between breaches of contract and breaches of treaty, contractual claims could only be brought under Article 11 'under exceptional circumstances.'"[50] In *SGS v. Philippines*, the tribunal adhered to the traditional view that an umbrella clause "makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments. But it does not convert the issue of the extent or content of such obligations into an issue of international law."[51]

Some tribunals, such as *El Paso* and *Pan American*,[52] adhere to the restrictive approach taken by the *SGS v. Pakistan* tribunal. In a similar vein, others, like the one in *Salini v. Jordan*,[53] find that an umbrella clause only commits the host State to create and maintain in its territory a "legal framework" favorable to investments, and does not bind it "to 'observe' any 'obligation' it had previously assumed with regard to specific investments of investors of the other contracting Party."[54]

A majority, however, appears to side with the *SGS v. Philippines* approach. Most explicit in this regard was the final award in *Noble Ventures v. Romania*,[55] where an ICSID tribunal concluded that a clause providing that "[e]ach Party shall observe any obligation it may have entered into with regard to investments"[56] was "[a]n umbrella clause [which] is usually seen as transforming municipal law obligations into obligations directly cognizable in international law."[57]

In 2009, an ICSID tribunal in *Bureau Veritas v. Paraguay*[58] ruled on a BIT clause according to which the Contracting States had to "observe any obligation it may have entered into with regard to (foreign) investments." The tribunal interpreted this umbrella clause as a means to permit the investor, a Dutch customs inspection

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

50 *Id.*, para. 172.

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

52 *See* El Paso Energy International Company v. Argentine Republic, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006, para. 85; Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic, ICSID Case No. ARB/03/13, Decision on Jurisdiction, 27 July 2006, para. 113.

53 Salini Costruttori S.p.A and Italstrade S.p.A v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/02/13, Decision on Jurisdiction of 15 November 2004.

54 *Id.*, para. 126.

55 Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award, 12 October 2005.

56 Article II(2)(c) Romania-U.S. BIT.

57 *Noble Ventures*, *supra* note 55, para. 53.

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

firm, to sue Paraguay over unpaid contract claims. However, the tribunal also held that the claimant first had to submit its contract claims to local courts in Paraguay.

III. Substantive Issues

ICSID awards in 2009 addressed a number of important issues concerning the major substantive standards of investment protection.

A. Expropriation

The 2009 ICSID case law provides an example of the rather rare cases of direct expropriation. In *Siag v. Egypt*,[59] a case that had led to a split opinion on jurisdiction *ratione personae* two years earlier,[60] an ICSID tribunal found not only that Egypt had "formally transferred ownership [. . .] from Siag Touristic [. . .] to the Government,"[61] but also that such expropriation did not conform to the legality requirements of customary international law and the applicable BIT. The tribunal held that the expropriation was discriminatory, not for a public purpose, and in violation of due process. Regarding the BIT requirement that an expropriation triggered an obligation to make "adequate and fair compensation," the ICSID tribunal made the following interesting inference:

> Although the Italy-Egypt BIT does not expressly employ the word "prompt" (simply stating that compensation paid must be "adequate and fair"), the Tribunal considers that the absence [. . .] ought not to be seen to permit Egypt to refrain from paying compensation indefinitely.[62]

This suggests that the promptness of compensation (which is an important element of the *Hull* formula requiring "adequate, prompt and effective compensation"[63] and which is widely used in BITs) is seen as an inherent element of a fair compensation.

The legality of the land dispossession of farmers in Zimbabwe by the Mugabe regime, qualified as expropriatory measures, was challenged in the ICSID case of *Funnekotter v. Zimbabwe*.[64] The tribunal avoided, however, the sensitive issue of (racial) discrimination by relying solely on the lack of compensation making the expropriation unlawful.[65] It should be noted that in a non-ICSID case before the

59 Waguih Elie George Siag & Clorinda Vecchi v. The Arab Republic of Egypt, ICSID Case No. ARB/05/15, Award and Dissenting Opinion, 1 June 2009.

60 Waguih Elie George Siag & Clorinda Vecchi v. The Arab Republic of Egypt, ICSID Case No. ARB/05/15, Decision on Jurisdiction, 11 April 2007. *See also* August Reinisch, *Back to Basics: From the Notion of "Investment" to the Purpose of Annulment—ICSID Arbitration in 2007*, 8 Global Community YILJ 1579 (2008), at 1591, 1597.

61 Waguih Elie George Siag & Clorinda Vecchi v. The Arab Republic of Egypt, ICSID Case No. ARB/05/15, Award and Dissenting Opinion, 1 June 2009, para. 427.

62 *Id.*, para. 435.

63 Green H. Hackworth, Digest of International Law, Vol. III, 658 (1942); Andreas F. Lowenfeld, International Economic Law 475 *et seq.* (2d ed. 2008).

64 Bernardus Henricus Funnekotter and Others v. Republic of Zimbabwe, ICSID Case No. ARB/05/6, Award, 22 April 2009.

65 *Id.*, para. 98 ("The Tribunal will first examine whether or not the subparagraph (c) relating to the provisions of a just compensation has been breached. If it arrives to the conclusion that it has, it

Southern African Development Community Tribunal, in *Campbell and Others v. Zimbabwe*,[66] racial discrimination was ascertained by the Tribunal. The Tribunal found that while the controversial law did not explicitly refer to white farmers it, in effect, applied to white farmers only and thus constituted unlawful expropriation.

ICSID cases in 2009 also addressed the more frequently arising issue of identifying indirect expropriation. The award in *Bayindir v. Pakistan*[67] is a case in point. The dispute concerned an aborted highway construction project. While the Turkish investor claimed that the termination of the contract was expropriatory and in violation of fair and equitable treatment obligations under the applicable BIT, the respondent maintained that the termination of the contract resulted from the investor's failure to perform. The *Bayindir* tribunal confirmed the view that, in principle, also contractual rights might be expropriated and that in order to determine whether an indirect expropriation had occurred the level of deprivation of the owner had to be assessed.[68] A further aspect, important in the case where a potential deprivation of contractual rights is in issue, was the examination "whether the alleged interference with the property or the rights of the investor has been made in the State's exercise of its sovereign powers."[69] It is in this respect that the *Bayindir* tribunal refined the generally accepted distinction between ordinary breaches of contract and takings of contractual rights by stating that

> even where [. . .] the breach stems from a governmental directive, it would not necessarily follow that the contractual breach is the result of a sovereign act, as a directive of the State may be given in the framework of the contract.[70]

On this basis, the tribunal concluded that the termination of the contract was justified by the poor performance of the investor "with the consequence that the expulsion must be seen in the framework of the contractual relationship, not as an exercise of sovereign power."[71] The fact that the Pakistani authorities were closely involved in this decision did not alter that assessment. Pursuant to the tribunal "governmental involvement is not necessarily equivalent to the exercise of sovereign power when it is grounded on legitimate contractual considerations."[72]

A rather unusual expropriation case was decided by an ICSID tribunal in *Saipem v. Bangladesh*.[73] The case arose from a dispute over the construction of pipelines by an Italian company in Bangladesh. However, the ICSID case did not directly deal

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will not be necessary for it to consider whether, as alleged by the Claimants, the other conditions provided for in that Article or the provisions of Article 3 have also been breached.").

66 Mike Campbell (Pvt) Ltd and Others v. Zimbabwe, Southern African Development Community Tribunal (SADC Tribunal), 28 November 2008.

67 Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award, 27 August 2009.

68 *Id.*, paras. 441 and 443.

69 *Id.*, para. 444.

70 *Id.*, para. 445.

71 *Id.*, para. 461.

72 *Id.*

73 Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/7, Award, 30 June 2009.

with the underlying dispute, but rather with the question whether an International Chamber of Commerce (ICC) award which Saipem had already obtained against Bangladesh was expropriated by judicial measures of the local courts of the host State. The *Saipem* tribunal expressly determined that the potentially expropriated property was "Saipem's residual contractual rights under the investment as crystallised in the ICC Award."[74] The courts in Bangladesh had revoked the authority of the ICC tribunal to arbitrate the claims against Bangladesh and, when an award was rendered, they treated the award as a "nullity." The ICSID tribunal held that such action amounted to an indirect expropriation of Saipem's residual contractual rights. However, it stressed that "the substantial deprivation of Saipem's ability to enjoy the benefits of the ICC Award [was] not sufficient to conclude that the Bangladeshi courts' intervention is tantamount to an expropriation."[75] Rather, it found that due to the specific circumstances of the case the unlawfulness of the judicial action was a necessary condition for a finding of expropriation. The *Saipem* tribunal insisted that some supervisory jurisdiction of national courts over (international) arbitration was not unlawful in principle. However, it held that, in the specific case, the revocation of the ICC tribunal's authority constituted an abuse of right.[76] This finding of illegality led the tribunal to conclude that Bangladesh had indirectly expropriated Saipem's rights under the ICC award.

B. Fair and Equitable Treatment

The meaning of the fair and equitable treatment standard was addressed in a number of cases in 2009. An important clarification regarding the central aspect of predictability and stability was made by the ICSID tribunal in the *EDF (Services) Limited v. Romania* award.[77] The tribunal cautioned against an over-emphasis of stability which would unduly approximate fair and equitable treatment to a freezing of existing conditions achieved under the exceptional tool of stabilization clauses. The tribunal found that

> [t]he idea that legitimate expectations, and therefore FET, imply the stability of the legal and business framework, may not be correct if stated in an overly-broad and unqualified formulation. The FET might then mean the virtual freezing of the legal regulation of economic activities, in contrast with the State's normal regulatory power and the evolutionary character of economic life. Except where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectation would be neither legitimate nor reasonable.[78]

The *EDF* case arose from the termination of duty-free services provided by a UK investor through joint venture companies. The tribunal held, however, that Romanian legislation abolishing certain duty-free services was not contrary to fair and equitable treatment. It rejected the claimant's allegation that this legislation was specifically targeting its business. Rather, it found that the legislation was a

74 *Id.*, para. 128.

75 *Id.*, para. 133.

76 *Id.*, para. 161.

77 EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13, Award and Dissenting Opinion, 8 October 2009.

78 *Id.*, para. 217.

measure falling within the police powers of States taken in the public interest.[79] This assessment demonstrates an interesting further overlap with the law of expropriation where the police powers doctrine is often used to deny expropriation claims for legitimate governmental regulation distinguished from regulatory expropriation.[80]

The *EDF* tribunal equally rejected claimant's allegation that it fell victim to a concerted attack of the Romanian fiscal authorities. In the tribunal's view, the "conduct did not lack proportionality, transparency and good faith, was not improper and discreditable and was far from constituting 'an act that shocks or at least surprises a sense of judicial propriety,' as asserted by Claimant."[81]

The most extensive elaboration on fair and equitable treatment was made by the tribunal in *Bayindir v. Pakistan*.[82] In its 2009 award, the tribunal denied that the termination of a highway construction contract was politically motivated and contrary to fair and equitable treatment. Rather, it was justified by the constructor's poor performance. In the course of its reasoning the tribunal made a number of interesting findings.

First, the use of the fair and equitable treatment standard is remarkable since the applicable BIT did not contain such an express treaty clause—except for a reference in the treaty's preamble describing "fair and equitable treatment" as "desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources."[83] However, the *Bayindir* tribunal thought that this did not rule out the possibility of importing a fair and equitable treatment obligation through the MFN clause expressly included in the Treaty.[84] To the contrary, the tribunal held that Bayindir was entitled to rely on the fair and equitable treatment provisions contained in Pakistani BITs signed after the Pakistan-Turkey BIT.

Second, the *Bayindir* tribunal broadly addressed the content of the fair and equitable treatment standard. On the basis of previous cases, the tribunal found that the factors relevant for this treatment standard

> comprise the obligation to act transparently and grant due process, to refrain from taking arbitrary or discriminatory measures, from exercising coercion or from frustrating the

79 *Id.*, para. 292.

80 Ursula Kriebaum, *Regulatory Takings: Balancing the Interests of the Investor and the State*, 8 The Journal of World Investment and Trade 717 (2007); Andrew Newcombe, *The Boundaries of Regulatory Expropriation in International Law*, 20 ICSID Review—Foreign Investment Law Journal (2005), at 1, 18 *et seq*.

81 EDF (Services) Limited v. Romania, *supra* note 77, para. 279.

82 Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award, 27 August 2009.

83 Agreement between the Islamic Republic of Pakistan and the Republic of Turkey concerning the Reciprocal Promotion and Protection of Investments, 16 March 1995, Preamble ("Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources.").

84 Bayindir v. Pakistan, *supra* note 82, para. 155.

> investor's reasonable expectations with respect to the legal framework affecting the investment.[85]

In the case at hand the tribunal held that the investor could not reasonably expect that Pakistan would not avail itself of its contractual rights and also that the way how the termination of the contract was brought about did not violate due process. It thus rejected Bayindir's fair and equitable treatment claim.

C. Full Protection and Security

The standard BIT obligation to provide full protection and security to foreign investors is usually understood as a duty to prevent actual physical harm to foreign investments by (private) third parties.[86] It is widely accepted that full protection and security does not imply strict liability,[87] rather demands from host States to exercise due diligence in attempting to prevent harm.[88]

The 2009 *Pantechniki* case[89] further addressed the issue whether the level of due diligence depended upon the state of development of the host State. The case arose from a classical full protection and security setting in which a Greek investor's construction sites had been looted by civil disturbances which the Albanian police failed to prevent. The sole arbitrator in the *Pantechniki* case denied the claim because he found that the police did not refuse to intervene but was unable to do so "in the face of social unrest of this magnitude."[90] He also endorsed the view that investment tribunals should consider a State's level of development and stability as relevant circumstances in determining whether it had acted according to due diligence.

85 *Id.*, para. 178.

86 Saluka Investments BV (The Netherlands) v. The Czech Republic, Partial Award, 17 March 2006, para. 484 ("The practice of arbitral tribunals seems to indicate, however, that the 'full security and protection' clause is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force."); *see also* American Manufacturing & Trading, Inc. (AMT) (US) v. Republic of Zaire, ICSID Case No. ARB/93/1, Award, 21 February 1997, para. 6.05; Technicas Medioambientales Tecmed S.A. v. Mexico, ICSID Case No. ARB/AF/00/2, Award, 29 May 2003, paras. 175–77.

87 Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy), Judgment, 20 July 1989, ICJ Reports 15 (1989), para. 108 ("[T]he provision of 'constant protection and security' cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed."); Technicas Medioambientales Tecmed S.A. v. Mexico, ICSID Case No. ARB/AF/00/2, Award, 29 May 2003, para. 177 ("[. . .] [T]he guarantee of full protection and security is not absolute and does not impose strict liability upon the State that grants it.").

88 Final Award in the Matter of an UNCITRAL Arbitration: Ronald S. Lauder v. The Czech Republic, Award, 3 September 2001, para. 308 ("The Arbitral Tribunal is of the opinion that [full protection and security] obliges the parties to exercise such due diligence in the protection of foreign investment as reasonable under the circumstances.").

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

90 *Id.*, para. 82.

D. Attribution

After the lengthy discussion of attribution in the 2008 award in *Jan de Nul v. Egypt*[91] this issue was again addressed in the 2009 award of *EDF (Services) Limited v. Romania*.[92] Like most investment tribunals, it regarded the 2001 International Law Commission (ILC) Articles on State Responsibility[93] "as a codification of customary international law"[94] and used their "structural, functional and control tests for determining whether an act or conduct by an entity should be attributed to the State."[95]

The *EDF* case arose from a joint venture entered into by a UK firm with two Romanian State-owned companies to provide airport and in-flight duty-free services. When these services came to an end as a result of new regulation and of measures adopted by the Romanian joint-venture partners the issue arose whether the latter could be attributed to the host State. The tribunal found that the entities in question "both possessing legal personality under Romanian law separate and distinct from that of the State, may [not] be considered as a State organ" pursuant to the structural text under Article 4 of the ILC Articles.[96] It also rejected attribution under the functional test of Article 5 of the ILC Articles because it found that the acts in question were not adopted in the exercise of governmental authority.[97] After a detailed discussion of Article 8 of the ILC Articles dealing with attribution as a result of direction or control, the tribunal concluded that with regard to some of the challenged acts Romania had used its ownership interest in or control of corporations specifically in order to achieve a particular result which permitted attribution of these acts.[98]

The tribunal concluded, however, that the decision of the State-owned companies not to renew the contracts with EDF was neither in breach of contractual obligations, nor in violation of Romania's fair and equitable treatment obligations.

IV. Compensation or Damages

Investment tribunals repeatedly have to address the issue whether in case of expropriation it is always the compensation standard of the applicable investment treaty (often based on the *Hull* formula demanding "adequate, prompt and effective compensation") or whether, in the special case of unlawful expropriation,

91 Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Award, 6 November 2008.

92 EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13, Award and Dissenting Opinion, 8 October 2009.

93 Draft Articles on Responsibility of States for Internationally Wrongful Acts, in: Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, 43, UN Doc. A/56/10 (2001).

94 Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award, 12 October 2005, para. 69; Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 156.

95 *EDF (Services) Limited v. Romania*, para. 187.

96 *Id.*, para. 190.

97 *Id.*, paras. 191–98.

98 *Id.*, paras. 199–213.

damages are due. Despite some uncertainties, the majority of tribunals appear to have adopted the opinion that the treaty standards of compensation merely lay down a legality requirement for expropriations, while in case of unlawful expropriations damages become due.[99]

Although this issue was discussed in *Funnekotter v. Zimbabwe*,[100] the tribunal concluded that it did not have to decide it. The arbitrators proceeded to award compensation pursuant to the applicable treaty standard—although they had previously found that the expropriation had been unlawful. This indicates that *Funnekotter* stands for the minority approach to equalize compensation and damages.

The orthodox distinction was upheld by the tribunal in *Saipem v. Bangladesh*.[101] The tribunal expressly stated that the BIT standard was not applicable because it set out the "measure of compensation for lawful expropriation which this one is not."[102] Instead, the tribunal resorted to the relevant principles of customary international law and in particular to the principle set out in the *Chorzów Factory* case, from which it cited:

> The essential principle contained in the actual notion of an illegal act [. . .] is that reparation must [. . .] 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.[103]

V. Annulment of Awards

Many ICSID *ad hoc* committees have confirmed the view that the special control mechanism of Article 52(1) of the ICSID Convention, leading to a potential annulment of ICSID awards, is not only based on very limited grounds[104] but is also clearly distinguished from an appellate system. Pursuant to the *ad hoc* committee in *MTD v. Chile*,[105] an *ad hoc* committee is "not a court of appeal from the tribunal."[106]

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99 Irmgard Marboe, Calculation of Compensation and Damages in International Investment Law 3–75 (2009); Ian Brownlie, Principles of Public International Law 539 (2008).

100 Bernardus Henricus Funnekotter and Others v. Republic of Zimbabwe, ICSID Case No. ARB/05/6, Award, 22 April 2009, paras. 108–115.

101 Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/7, Award, 30 June 2009.

102 *Id*., para. 201.

103 *Id*.

104 Article 52(1) ICSID Convention provides:

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

105 MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile, ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007.

106 *Id*., para. 52.

This approach was confirmed in the 2009 *Azurix* annulment decision[107] in which the *ad hoc* committee held that in

> annulment proceedings under Article 52 of the ICSID Convention, an *ad hoc* committee is thus not a court of appeal, and cannot consider the substance of the dispute, but can only determine whether the award should be annulled on one of the grounds in Article 52(1).[108]

Based on this limited mandate, the *Azurix* committee addressed Argentina's arguments relating to the original tribunal's jurisdictional findings, to its findings relating to the applicable law, to its consideration of evidence, to the constitution of the tribunal, as well as to the tribunal's calculation of the damages and concluded that none of them merited annulment of the 2006 award[109] under the limited scope of review permitted under Article 52(1).

In a similar vein, the *ad hoc* committee in *M.C.I. v. Ecuador*[110] found that:

> the only permissible remedies against an award are those provided for in the Convention, which include a request for annulment but not an appeal. *Ad hoc* committees are therefore 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 insofar as the list of grounds contained in Article 52 of the Washington Convention requires. This was reaffirmed by many committees, whose decisions are relied upon by the parties. Consequently, the role of an *ad hoc* committee is a limited one, restricted to assessing the legitimacy of the award and not its correctness.[111]

The *ad hoc* committee in this case rejected the applicant's request for partial annulment of a 2007 award[112] in which an ICSID tribunal had held that it lacked jurisdiction over certain aspects of a dispute because they arose before the entry into force of the applicable BIT. In the eyes of the annulment committee, the ICSID tribunal had neither manifestly exceeded its powers nor failed to state reasons when coming to its conclusion. Nevertheless, the *MCI* committee[113] concurred in principle with the *ad hoc* committee in *Malaysian Historical Salvors v. Malaysia*[114] that an

107 Azurix v. Argentine Republic, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, 1 September 2009.

108 *Id.*, para. 41.

109 *Id.*, ICSID Case No. ARB/01/12, Award, 14 July 2006.

110 M.C.I. Power Group L.C. and New Turbine, Inc. v. Ecuador, ICSID Case No. ARB/03/6, Decision on Annulment, 19 October 2009.

111 *Id.*, para. 24.

112 M.C.I. Power Group L.C. and New Turbine, Inc. v. Ecuador, ICSID Case No. ARB/03/6, Award, 31 July 2007.

113 M.C.I. Power Group L.C. and New Turbine, Inc. v. Ecuador, ICSID Case No. ARB/03/6, Decision on Annulment, 19 October 2009, para. 56 ("A decision that there is no jurisdiction may result in a manifest excess of powers when the Tribunal has acted outside the proper bounds of its competence.").

114 Malaysian Historical Salvors, SDN, BHD v. Malaysia, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009, paras. 74 and 83.

ICSID tribunal may exceed its powers by failing to exercise jurisdiction—a finding first clearly established in the *Vivendi* annulment decision.[115]

VI. Conclusions

The ICSID year 2009 contributed to the clarification of certain investment arbitration trends, like the rather cautious approach of *ad hoc* tribunals towards annulment findings or the nuanced approach of tribunals towards the requirements under fair and equitable treatment. The important issue of the interpretation of the notion of investment under Article 25 of the ICSID Convention has been addressed in a number of 2009 decisions, suggesting that the overemphasis of the "development contribution" by some earlier tribunals and *ad hoc* committees is not generally accepted, while at the same time cautioning against too broad approaches which might open the jurisdictional floodgates. Finally, 2009 decisions have demonstrated that the proper interpretation of so-called narrow dispute settlement clauses is still a matter of contention.

115 Compañiá de Aguas del Aconquija S.A. and Universal v. Argentine Republic, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002.

LEGAL MAXIMS: SUMMARIES AND EXTRACTS FROM SELECTED CASE LAW*

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Bernardus Henricus Funnekotter and Others v. Republic of Zimbabwe, ARB/05/6, Award, 22 April 2009

Waguih Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt, ARB/05/15, Award, 1 June 2009

Tza Yap Shum v. Republic of Peru, ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009

Saipem S.p.A. v. People's Republic of Bangladesh, ARB/05/7, Award, 30 June 2009

Bayindir Insaat Turizm Ticaret Ve Sanayi A.Şv. Islamic Republic of Pakistan, ARB/03/29, Award, 27 August 2009

EDF (Services) Limited v. Romania, ARB/05/13, Award, 8 October 2009

M.C.I. Power Group L.C. and New Turbine Inc. v. Republic of Ecuador, ARB/03/6, Decision on Annulment, 19 October 2009

* The working method chosen for the formulation of legal maxims is explained *supra*, Outline of the Sections, at page xiii.

Malaysian Historical Salvors SDN BHD v. The Government of Malaysia, ARB/05/10, Decision on the Application for Annulment, 16 April 2009*

Contents**

I.

II.7.983 ANNULMENT OF ICSID AWARD

[This annulment decision concerned the question whether the Award on Jurisdiction of 17 May 2007 in Malaysian Historical Salvors v. Malaysia should be annulled on the sole ground that the Tribunal manifestly exceeded its powers by failing to exercise jurisdiction over the dispute with which it was endowed under the ICSID Convention and the UK-Malaysia BIT. In particular it was controversial whether the resources spent by a company that contracted with the Government of Malaysia to salvage a shipwreck constitute an investment in that State within the meaning of Article 25(1) of the ICSID Convention.]

II.

I.1.16 TREATY INTERPRETATION
See also: I.1.20; I.1.3; I.17.01

A.

"[**56**] [. . .] The Vienna Convention on the Law of Treaties, a product of the extended codification processes of the International Law Commission [. . .], has been widely accepted, 108 States being party. [. . .] [T]he Vienna Convention as such is not applicable to the 1965 Washington Convention nor to the 1981 [. . .] BIT [. . .]. The non-retroactivity of the Vienna Convention is, however, '[w]ithout prejudice to the application of any rules set [in it] to which treaties would be subject under international law independently of the Convention.'[1] The Convention's provisions on the interpretation of treaties, embodied in Articles 31 [. . .] and 32, [. . .] have

* Summaries prepared by Jane Hofbauer, LL.M., Pre-Doctoral Researcher, and Christina Knahr, MPA, Post-Doctoral Researcher, Department of European, International and Comparative Law, University of Vienna, Austria. The full text of the decision is available online at <http://ita.law.uvic.ca/documents/MalaysianHistoricalAnnulment.pdf>. Original: English. Original footnote numbers are indicated in brackets: [].

** This is not the reproduction of the Table of Contents of the Decision.

1 [101] Vienna Convention [on the Law of Treaties, 23 May 1969, 1155 UNTS 331], Article 4.

been accepted by the International Court of Justice[2] and the international community as expressive [. . .] of customary international law [. . .]. [**57**] 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. The purpose of the ICSID Convention was described in a draft [. . .] conveyed by the Bank's General Counsel to the Executive Directors [. . .]: '[t]he purpose of this Convention is to promote the resolution of disputes arising [. . .] by encouraging and facilitating recourse to international conciliation and arbitration.'[3] The meaning of the term 'investment' may however be regarded as 'ambiguous or obscure' under Article 32 of the Vienna Convention [. . .][,] justifying resort to the preparatory work of the Convention 'to determine the meaning.' [. . .] In any event, courts and tribunals interpreting treaties regularly review the travaux préparatoires whenever they are brought to their attention [. . .]."

[Paras. 56, 57]

B.

II.7.9211 QUALIFICATION AS INVESTMENT
See also: I.1.16; I.1.162; I.17.012; II.7.933

"[**58**] At issue [. . .] is the meaning of the treaty term 'investment' as [. . .] used in Article 25(1) [. . .]–but also in Article 1 of the Agreement [. . .] because that instrument is the medium through which the Contracting States involved have given their consent to the exercise of jurisdiction of ICSID. [**61**] [B]y the terms of the Agreement, and for its purposes, the Contract is an investment. [. . .] The Sole Arbitrator did not reach another [. . .] conclusion [. . .]. He rather chose to examine, virtually exclusively, the question of whether there was an investment within the meaning of Article 25(1) [. . .][.] [T]he Sole Arbitrator observed that, 'while the Contract did provide some benefit to Malaysia,' there was not 'a sufficient contribution to Malaysia's economic development to qualify as an 'investment' for the purposes of Article 25(1) or Article 1(a) of the BIT.' [. . .] He provided an extensive analysis in support of his conclusion in respect of the ICSID Convention, but none in respect of his conclusion in respect of the BIT [. . .]. [**62**] Under Article 7 of the Agreement, the sole recourse in the event that a legal dispute [. . .] should arise which is not settled [. . .] is reference to [. . .] [ICSID]. [. . .] [I]f jurisdiction is found to be absent under the ICSID Convention, the investor is left without international recourse altogether. That result is difficult to reconcile with the intentions [. . .] in concluding [the] [. . .] Agreement, as those intentions are reflected by the terms of

2 [104] See *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, *I.C.J. Reports 1994*, pp. 21–22, para. 41; *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, *I.C.J. Reports 1999*, p. 1059, para. 18.

3 [105] ICSID, History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("History of the ICSID Convention"), Volume I, p. 16 (1968).

Article 7 as well as the Agreement's inclusive definition of what is an investment [. . .]."

[Paras. 58, 61, 62]

C.

I.1.16 REATY INTERPRETATION
See also: I.1.163; I.17.011; II.7.9211; II.7.9213; II.7.9223; II.7.933

"[**63**] [. . .] [L]ight is shed on the intentions of the Parties [. . .] by the [. . .] travaux préparatoires as well as the Convention's interpretation by the Executive Directors of the International Bank for Reconstruction and Development [. . .]. [**71**] The preparatory work of the Convention as well as the Report of the Executive Directors [. . .] shows that: (a) deliberately no definition of 'investment' as that term is found in Article 25(1) was adopted; (b) a floor limit to the value of an investment was rejected; (c) a requirement of indefinite duration of an investment or of a duration of no less than five years was rejected; (d) the critical criterion adopted was the consent of the parties [. . .]. [**72**] Does the passage [. . .] 'consent alone will not suffice [. . .], the jurisdiction of the Centre is further limited by reference to the nature of the dispute and the parties thereto' indicate that 'investment' as used in Article 25(1) has an objective content that cannot be varied by the consent of the parties? Only to the following limited extent. '[T]he nature of the dispute' appears to refer to the dispute being a legal dispute. The reference to 'the parties thereto' merely means that [. . .] the parties must be a Contracting State and a national of another Contracting State. These fundaments, and the equally fundamental assumption that the term 'investment' does not mean 'sale,' appear to comprise 'the outer limits,' the inner content of which is defined by the terms of the consent of the parties to ICSID jurisdiction. [**73**] While it may not have been foreseen at the time of the adoption [. . .], when the number of bilateral investment treaties in force were few, since that date some 2800 bilateral, and three important multilateral, treaties have been concluded, which characteristically define investment in broad, inclusive terms [. . .]. Some 1700 of those treaties are in force, and the multilateral treaties, particularly the Energy Charter Treaty, [. . .] endow ICSID with an important jurisdictional reach. [. . .] 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."

[Paras. 63, 71, 72, 73]

D.

II.7.983 ANNULMENT OF ICSID AWARD
See also: II.7.9211

"[**74**] [. . .] [T]he Committee finds that the failure of the Sole Arbitrator even to consider [. . .] 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. [**75**] Nevertheless, the Committee recognizes that the Sole Arbitrator acted in the train of several prior ICSID arbitral awards [. . .]. The seminal award is [. . .] Salini v.

Morocco [. . .][.][4] **[76]** Salini v. Morocco is largely consistent with the leading commentary [. . .]:

> it seems possible to identify certain features that are typical to most of the operations in question: […] that the projects have a certain *duration* […][,] a certain *regularity of profit and return* […][,] the assumption of *risk* usually by both sides […][,] that the commitment is *substantial* […][,] the operation's significance for the host State's *development*. This is not necessarily characteristic of investments in general. But the wording of the Preamble and the Executive Director's Report suggest that development is part of the Convention's object and purpose. These features should […] be understood […] as typical characteristics of investments […].[5]

[77] [. . .] Professor Schreuer [. . .] does not treat these characteristics [. . .] 'as jurisdictional requirements.' **[78]** While this Committee's majority has every respect for the authors of the Salini v. Morocco Award and those that have followed it [. . .], and for commentators who have adopted a like stance [. . .] it gives precedence to awards and analyses[6] that are consistent with its approach [. . .]. **[79]** The most recent Award that addresses the issue [. . .] is [. . .] the most persuasive, Biwater v. Tanzania.[7] [. . .] **[80]** The Committee fully appreciates that the ground for annulment set forth in Article 52(1)(b) of the ICSID Convention specifies that 'the Tribunal has manifestly exceeded its powers.' It is its considered conclusion 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 these reasons: (a) it [. . .] limited itself to its analysis of criteria which it found to bear upon the interpretation of Article 25(1) [. . .]; (b) its analysis of these criteria elevated them to jurisdictional conditions, and exigently interpreted the alleged condition of a contribution to the economic development of the host State so as to exclude small contributions, and contributions of a cultural and historical nature; (c) it failed to take account of the preparatory work of the ICSID Convention [. . .], notably the decisions of the drafters of the ICSID Convention to reject a monetary floor [. . .], to reject specification of its duration, to leave 'investment' undefined, and to accord great weight to the definition of investment agreed by the Parties [. . .]. **[81]** The Committee thus is constrained to annul the Award of the Sole Arbitrator [. . .]."

[Paras. 74, 75, 76, 77, 78, 79, 80, 81]

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4 [119] [. . .] [*Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, 6 ICSID Reports 400 (2004), ("*Salini v. Morocco*"), paras. 44, 52.]

5 [121] [. . .] [Christoph Schreuer, *The ICSID Convention: A Commentary*, p. 140 (2001)].

6 [122] See Yulia Andreeva, *Salvaging or Sinking the Investment? MHS v. Malaysia Revisited*, The Law and Practice of International Courts and Tribunals, Volume 7, No. 2, 2008, p. 161, and Devavish Krishan, *A Notion of ICSID Investment*, in T. Weiler (ed.), Investment Treaty Arbitration: A Debate and Discussion (2008).

7 [123] *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 [. . .] [paras. 310, 312–318].

III.

II.7.983 ANNULMENT OF ICSID AWARD

"**[83]** For the foregoing reasons, the Committee DECIDES, (1) that the Award on Jurisdiction of 17 May 2007 of the Sole Arbitrator in Malaysian Historical Salvors v. The Government of Malaysia is annulled; (2) that the Government of Malaysia shall bear the full costs and expenses incurred by ICSID in connection with this annulment proceeding. Accordingly the Government of Malaysia shall reimburse the Applicant the advances paid by the latter to ICSID; (3) that each party shall bear its own costs of representation in connection with this annulment proceeding. **[84]** Judge Shahabuddeen, while he has signed the Decision in authentication of its text, dissents from it. His Dissenting Opinion is appended to the Decision."

[Paras. 83, 84]

Bernardus Henricus Funnekotter and Others v. Republic of Zimbabwe, ARB/05/6, Award, 22 April 2009*

Contents**

I.

II.7.911 REQUEST FOR ICSID ARBITRATION
See also: I.17.011

[In this case a dispute arose between Funnekotter and others (Dutch nationals) and Zimbabwe. Each of the Claimants had direct or indirect investments in large commercial farms in Zimbabwe. They contend that they have been deprived of their property in violation of the BIT between the Netherlands and Zimbabwe.]

II.

I.17.1 EXPROPRIATION
See also: I.1.4; I.11.02; I.17.011

A.

"**[102]** Zimbabwe [. . .] invokes the defense that a state of necessity or emergency existed, which [. . .] relieved Respondent of responsibility for complying with otherwise applicable provisions of the BIT [. . .]. **[103]** [. . .] Zimbabwe domestic law may in this respect provide the Tribunal useful information on the situation which prevailed in Zimbabwe [. . .]. However, [. . .] during that period there had been no state of emergency declared in that country. In any event, it is on the basis of the applicable rules of International Law that, in conformity with [. . .] the BIT, the Tribunal must decide whether or not there was at the time a state of necessity which could have made lawful deprivation of property without compensation [. . .]. **[104]** [. . .] Article 7 does not exonerate Contracting Parties from their obligation under Article 6 in case of national emergency or riot. It only provides in such a case for a further guarantee of equal treatment with nationals of the Contracting Party or nationals of Third Parties. **[105]** [A]ccording to the International Court of Justice, 'the state of necessity is a ground recognized by customary international

* Summaries prepared by Jane Hofbauer, LL.M., Pre-Doctoral Researcher, and Christina Knahr, MPA, Post-Doctoral Researcher, Department of European, International and Comparative Law, University of Vienna, Austria. The full text of the award is available online at <http://ita.law.uvic.ca/documents/ZimbabweAward.pdf>. Original: English. Original footnote numbers are indicated in brackets: [].

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law for precluding the wrongfulness of an act not in conformity with an international obligation.' However 'the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met.'[1] **[106]** In the present case, Zimbabwe is invoking state of necessity, first, to explain its difficulties to face the situation resulting from the invasion of commercial farms by settlers and war veterans; second, to justify the measures of expropriation it took in the public interest. However, it never explains why such a state of necessity prevented it from calculating and paying the compensation due to the farmers in conformity with the BIT. The argument [. . .] cannot be upheld. **[107]** As a consequence, the Tribunal concludes that Zimbabwe breached its obligation under Article 6(c) of the BIT to pay just compensation to the Claimants [. . .]."

[Paras. 102, 103, 104, 105, 106, 107]

B.

I.17.1331 STANDARD COMPENSATION
See also: I.17.02; I.17.1332

"**[108]** [. . .] Claimants contend that the standard of compensation [. . .] for [. . .] unlawful expropriation must be calculated according to customary international law as decided by the Permanent Court of International Justice in the *Chorzow Factory* case.[2] **[109]** In that case, the Permanent Court made a distinction between lawful and unlawful expropriation. It held that, in case of lawful expropriation, the damages suffered must be repaired through the 'payment of fair compensation' or 'the just price of what was expropriated' at the time of the expropriation.[3] By contrast, it decided that, in case of unlawful expropriation, international law provides for *restitutio in integrum* or, if impossible, its monetary equivalent at the time of the judgment. **[110]** In recent years, there has been some debate on that distinction. The Iran-United States Claims Tribunal in the *Amoco* case observed in 1987 that, in spite of the fact that the *Chorzow Factory* case 'is nearly sixty years old, this judgment is widely regarded as the most authoritative exposé of the principles applicable in this field and is still valid to day.'[4] More recently an ICSID Tribunal similarly held that the BIT's standards of compensation apply only to lawful expropriations and that those standards 'cannot be used to determine the issue of damages payable in the case of an unlawful expropriation.'[5] However, the

1 [128] [. . .] [*Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), Judgement of 25 Sept. 1997, I.C.J. Reports 1997, para. 51, p. 37].

2 [129] Case Concerning the Factory at Chorzów (Claim for Indemnity) (Germany v. Poland), 1928 P.C.I.J. (ser. A) No. 17 (13 Sept.) [hereinafter Chorzów Factory].

3 [130] [. . .] [*Chorzów Factory*], para. 47.

4 [131] Amoco Inter'l Fin. Corp. v. Iran, Partial Award, Iran-U.S. Cl. Trib., No. 310–56-3 (14 July 1987).

5 [132] ADC Affiliate Ltd and ADC & ADMC Mgmt Ltd v. Hungary (ICSID Case No. ARB/03/16), Award of 2 Oct. 2006, para. 481.

contrary opinion has also been advanced[6] and case law is not perfectly clear in this respect,[7] in particular in case of lack of compensation."

[Paras. 108, 109, 110]

I.17.13 LAWFULNESS OF EXPROPRIATION
See also: I.17.133

"**[111]** As the Iran-United States Claims Tribunal rightly observed [. . .] 'Obviously, the value of an expropriated enterprise does not vary according to the lawfulness or the unlawfulness of the taking . . .The difference is that, if the taking is lawful the value of the undertaking at the time of the dispossession is the measure and the limit of the compensation, while if it is unlawful, this value is or may be, only a part of the reparation to be paid.'[8] In general, as [. . .] stated in the *Phillips Petroleum* case, 'the lawful/unlawful taking distinction . . . is relevant only to two possible issues: whether restitution of the property can be awarded and whether compensation can be awarded for increase of the value of the property between the date of the taking and the date of the judicial or arbitral decision awarding compensation.' [. . .] **[112]** [. . .] [T]he major points of difference that distinguish computation of damages for lawful expropriation from [. . .] unlawful expropriation are not here at issue. **[115]** The Tribunal is of the opinion that the damages suffered by the Claimants must be evaluated at the date of dispossession. This is the rule both under general international law and under Article 6(c) of the BIT and the Respondent has not established that there was at the time any state of necessity precluding the application of such a rule [. . .]. The identity of calculation under the BIT and general international law reinforces the Tribunal's conclusion that arguments respecting the treatment of a violation of Article 6(c) as a lawful or unlawful expropriation need not be reached [. . .]."

[Paras. 111, 112, 115]

I.17.133 COMPENSATION
See also: I.17.1332

"**[122]** The Tribunal [. . .] notes that compensation under Article 6(c) must represent the 'genuine value of the investment [. . .].' In certain cases, the net asset value, i.e., the value as recorded in the accounts, will not correspond to the genuine value. If the net asset value is lower than the genuine value, compensation will be higher than the net asset value. **[123]** [. . .] Whatever may be the basis of evaluation–general international law or Article 6–the damages must correspond to the genuine value of the properties at the time of expropriation. The Tribunal, therefore does

6 [133] *See e.g.,* Michael W. Reisman and Robert D. Sloone, *Indirect expropriation and its valuation in the BIT Convention*, 2004 British Y.B. Int'l L., p. 133; Audley Sheppard, The distinction between Lawful and Unlawful Expropriation, in the Investment Arbitratory and the Energy Charter Treaty, 2006, p. 172.

7 [134] *See, e.g.*, CME Czech Republic B.V. (Nethl.) v. The Czech Republic, UNCITRAL, 14 March 2003; Wena Hotels Ltd. v. Arab Republic of Egypt (ICSID Case No. ARB/98/4), Award of 8 Dec. 2000; Metalclad Corp. v. United Mexican States (ICSID Case No. ARB(AF)/97/1) Award of 30 Aug. 2000; Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt (ICSID Case No.ARB/99/6), Award of 12 Apr. 2002.

8 [135] *Amoco Inter'l Fin. Corp.* [*v. Iran*, *supra* n. 131], para. 197.

not have to consider whether [. . .] the corresponding provisions of Article 6(c) could be put aside under the most favoured nation clause incorporated in the BIT. **[124]** [. . .] The Tribunal observes that, under general international law as well as under the BIT, investors have a right to indemnities corresponding to the value of their investment, independently of the origin and past success of their investment,[9] as well as of the number and aim of the expropriations done.[10] [. . .]"

[Paras. 122, 123, 124]

I.17.1332 CALCULATION
See also: I.17.1

"**[145]** The Claimants are requesting compound interest [. . .]. The Respondent contends that 'the principle of compound interest has a punitive element' which is not justified in the present case. **[146]** The Tribunal does not share that appreciation. As stated rightly [. . .] '[i]t is not the purpose of compound interest to attribute blame to, or to punish, anybody for the delay in the payment made to the expropriated owner; it is a mechanism to ensure that compensation awarded to the Claimant is appropriate in the circumstances.'[11] This explains why, in many ICSID cases, such compound interests have been granted [. . .]."

[Paras. 145, 146]

III.

II.7.98 ICSID AWARD

"**[148]** For the reasons set out earlier in this award, the Tribunal decides that: 1. The Respondent has breached its obligations under Article 6(c) of the BIT; 2. The Respondent shall pay the Claimants within three months of the date of dispatch of this Award the following amounts, in Euros: [. . .] [Total €8,220,000.] 3. The Respondent shall pay 10% interest compounded every six month on such amounts from the following dates, until full payment of those amounts. [. . .] 4. The parties shall bear all their respective expenses and fees related to this proceeding. 5. The Respondent shall bear the fees and expenses of the Tribunal and the charges of ICSID. It will therefore reimburse the Claimants the sum of USD 225,000 advanced by them, in this respect."

[Para. 148]

9 [145] *See* Tokios Tokelės v. Ukraine (ICSID Case No. ARB/02/18), Award of 26 July 2007.

10 [146] Fedax N.V. v. Republic of Venezuela (ICSID Case No. ARB/96/3), Award of 9 March 1998.

11 [166] Compañia del Desarrollo de Santa Elena S.A. v. Costa Rica (ICSID Case No. ARB/96/1), Award of 17 February 2000, para. 104.

Waguih Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt, ARB/05/15, Award, 1 June 2009*

Contents**

I.

II.7.911 REQUEST FOR ICSID ARBITRATION
See also: I.17.011

[In this case a dispute arose between Mr Waguih Elie George Siag and Mrs Clorinda Vecchi (Italian citizens) and Egypt. The Claimants are the principal investors in Touristic Investments and Hotels Management Company (SIAG) S.A.E. and Siag Taba Company (together 'Siag'), which in 1989 bought a large parcel of ocean-front land on the Gulf of Aqaba on the Red Sea from the Government of Egypt for the purpose of developing a tourist resort. The Claimants allege that through a series of acts and omissions commencing in 1995, Egypt expropriated their investment.]

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II.

II.7.92 ICSID JURISDICTION
See also: II.2.023; II.2.111; II.2.21; II.3.31

A.

"**[117]** [. . .] [A]lmost five months after the Tribunal's Decision on Jurisdiction, Egypt filed a 'Notification and Application Concerning Objection to the Centre Subject Matter Jurisdiction over this Proceeding.' Egypt [. . .] claimed that it had recently discovered that Waguih Siag had been declared bankrupt [. . .], with retroactive effect from [. . .] 1994 [. . .][.] **[118]** Egypt contended that, under Egyptian bankruptcy law Mr Siag [. . .] could no longer validly agree to arbitrate any dispute relating to any asset forming part of the bankruptcy estate. [. . .] **[175]** The proper starting point in assessing Egypt's [. . .] application is [. . .] [the] submission that Egypt brought its application too late and that it should accordingly be disregarded by the Tribunal pursuant to ICSID Rule 26 and/or held waived pursuant to ICSID Rule 27. **[176]** [. . .] ICSID Rule 41(1) reads as follows:

> 'Any objection that the dispute […] is not within the jurisdiction […] shall be made as early as possible. A party shall file the objection […] no later than the expiration of the time limit fixed for the filing of the counter-memorial […] – unless the facts on which the objection is based are unknown to the party at that time.' […]

[184] [. . .] [P]revious ICSID Tribunals, [. . .] have dismissed objections brought outside applicable deadlines. **[187]** Moreover, Professor Schreuer [. . .] expresses the view that Rule 41(1) contains a time limit. He further states that if facts which could give rise to a jurisdictional objection are discovered after the expiration of the time limit [. . .], any such objection must be 'raised immediately when the relevant facts come to light.'[1] It follows [. . .] that submissions filed after expiration of either the time limit contained in Rule 41(1) or time limits set by the Tribunal pursuant to Rule 26(1) and which are not raised immediately upon discovery of the relevant facts, would not be considered as having been filed 'as early as possible' and may thus be both disregarded, under Rule 26(3), and considered to be waived, under Rule 27. **[188]** [. . .] [T]he Tribunal rejects Egypt's submission that it was not able to waive its objections to jurisdiction because such could only be done by Mr Siag's alleged bankruptcy creditors. ICSID Rule 41(1) confers upon 'a party' the right to object to jurisdiction. Egypt has utilised that right. There was no suggestion by Egypt that the right to object to jurisdiction could, let alone, could only, be utilised by Mr Siag's purported bankruptcy creditors. The Tribunal considers that it would be unusual if a party were permitted to utilise a right but prevented from waiving that right. If that were the case the right in question would become an immutable obligation. Egypt has not claimed that it was obliged to bring its bankruptcy objections [. . .]. A natural extension to this proposition is that a party may be held to have waived a right granted to it, if it fails to properly address that right."

[Paras. 117, 118, 175, 176, 184, 187, 188]

1 [162] Christoph H. Schreuer, The ICSID Convention: A Commentary (2001), at p. 553.

I.11.0131 IMPUTABILITY TO THE STATE OF THE CONDUCT OF ITS ORGANS
See also: II.3.31

"**[189]** [. . .] The next question for the Tribunal is [. . .] whether Egypt did in fact waive its objections. **[190]** [. . .] The last date allowed [. . .] for submissions on jurisdiction by Egypt was 24 July 2006. Egypt's application was made more than 13 months after that date, and was made more than 5 months after the Tribunal had issued its Decision on Jurisdiction [. . .]. **[191]** [. . .] Egypt asserts [. . .] that the basis of its objection [. . .] was not known to Egypt at that time, and further, was not reasonably knowable. **[195]** [. . .] [T]he Tribunal notes the provisions of Article 7 of the ILC Articles, which states that: 'The conduct of an organ of a State. . .shall be considered an act of the State under international law. . .*even if it exceeds its authority*.' [. . .] [U]nder Article 4 of the ILC Articles, '[a]cts of a state's organs will be attributed to that state *even if they are contrary to law* . . .'[2] [. . .]. The clear corollary of that statement is that acts of a State's organs that are not contrary to law or in excess of authority will be applied *a fortiori* to the State. [. . .] Egypt cannot deny knowledge of its own acts. **[203]** [. . .] Egypt was bound by ICSID Rule 41(1) to raise its objection [. . .] as early as possible but did not do so [. . .]."

[Paras. 189, 190, 191, 195, 203]

II.2.111 OBJECTIONS TO JURISDICTION
See also: II.2.023; II.2.21; II.7.91

"**[204]** [. . .] In terms of Rule 26, Egypt [. . .] [filed] its objection to jurisdiction [. . .] after the expiration of the time limits [. . .]. Egypt did not expressly state that its lack of knowledge constituted a 'special circumstance' [. . .] to offset Rule 26. However, even on the assumption that that submission was intended, it is rejected [. . .]. In terms of Rule 27, Egypt knew or should have known that, in its submission, Article 25 of the ICSID Convention had not been complied with. [. . .] The Tribunal does not uphold the submission that Rule 27 does not apply to an objection flowing from a breach of Article 25. [. . .] [T]he ICSID Convention clearly constitutes a set of 'other rules. . .applicable to the proceeding' for the purposes of Rule 27. The Tribunal accepts the submissions [. . .] that the ICSID Convention and ICSID Rules are to be read together as part of an ensemble [. . .] governing the conduct of ICSID arbitrations. [. . .] Egypt failed to 'state promptly' its objections to jurisdiction, as it is required by Rule 27. **[206]** The Tribunal [. . .] considers that both ICSID Rules 26 and 27 apply [. . .]."

[Paras. 204, 206]

II.7.922 ICSID JURISDICTION *RATIONE PERSONAE*
See also: I.3.0; II.2.023; II.2.21; II.3.31

"**[288]** [. . .] Article 25 does not confer jurisdiction over dual nationals. However, [. . .] [t]he Tribunal does not consider that it is Article 25 that is properly under discussion as having been waived; it is ICSID Rule 41. It is that Rule which grants the right to a party to object to the jurisdiction [. . .], and it is the right granted by Rule 41 which the Claimants assert has been waived as a result of a failure to

2 [166] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2008), p. 196 [. . .].

invoke that right 'as early as possible.' The alternative [. . .] is that a party could never waive an objection to jurisdiction no matter how dilatory had been that party's conduct, because the right to object to jurisdiction at any time was protected by Article 25 of the ICSID Convention. The Tribunal does not accept that proposition. **[289]** [. . .] [T]he Tribunal upholds [. . .] that the issue of Mr. Siag's nationality is a matter of personal, not subject-matter, jurisdiction [. . .]. **[311]** [. . .] Egypt could and should have made its objection during the jurisdiction phase and that its failure to do so was in contravention of [. . .] ICSID Rule 41(1) [. . .][.] **[312]** The appropriate sanction must now be determined. [. . .] As the Tribunal has ruled, it is not Article 25 that has potentially been waived, it is the right conveyed by ICSID Rule 41 to object to the Centre's jurisdiction [. . .]. Non-compliance with Article 25 can be objected to pursuant to ICSID Rule 41. Failure to state said objection [. . .] will render the objection waived, if the party raising the objection knew or should have known of the alleged breach of Article 25 [. . .] earlier [. . .][.] [T]he Tribunal considers that ICSID Rule 27 is applicable in this case [. . .]. **[313]** [. . .] Egypt's objection to jurisdiction [. . .] shall be disregarded, pursuant to ICSID Rule 26, and has been waived pursuant to ICSID Rule 27."

[Paras. 288, 289, 311, 312, 313]

B.

II.1.0 BURDEN OF PROOF

"**[315]** [. . .] [T]he general rule, well established in international arbitrations, is that the Claimant bears the burden of proof with respect to the facts it alleges and the Respondent carries the burden of proof with respect to its defences.[3] **[316]** Thus, while it is clear that the burden of proof in respect of all jurisdictional objections lies with Egypt, at the merits phase Mr Siag must first prove on the balance of probabilities that he acquired Lebanese nationality [. . .]. **[317]** [. . .] Claimants stated that Mr Siag had provided extensive *prima facie* evidence of his Lebanese nationality, and that accordingly 'the burden of proof is now on Egypt.' [. . .] The Tribunal agrees with this contention. [. . .] Egypt asserted that it had proved Mr Siag's non-Lebanese nationality and that accordingly 'the burden has shifted.' [. . .] The Tribunal does not accept this [. . .]. Because negative evidence is very often more difficult to assert than positive evidence, the reversal of the burden of proof may make it almost impossible for the allegedly fraudulent party to defend itself, thus violating due process standards. It is for this reason that Tribunals have rarely shifted the burden of proof.[4] [. . .] **[326]** [. . .] It is common [. . .] for serious allegations such as fraud to be held to a high standard of proof. The same is the case in international proceedings, [. . .] among them the Award of the ICSID Tribunal in *Wena Hotels*. [. . .] The Tribunal accepts that the applicable standard of proof is greater than the balance of probabilities but less than beyond reasonable doubt.

3 [364] See Rosell and Prager, *Illicit Commission and Question of Proof*, 15 Arbitration International 329, 335 (1999) (citing ICC Award 6653 (1993), *reprinted in* 1993 JDI 1053; and also Art. 24 UNCITRAL Arbitration Rules).

4 [370] See Matthieu de Boisséson, *Due process and the specific example of allegations of fraud or corruption notably in the context of investment treaty arbitration*, Paper given at IBA Arbitration Day, Dubai, 16 February 2009.

The term favoured by Claimants is 'clear and convincing evidence.' [. . .] The Tribunal agrees with that test."

[Paras. 315, 316, 317, 326]

C.

II.2.4 SUSPENSION AND TERMINATION OF PROCEEDINGS
See also: II.2.21

"**[363]** The difficulty with Article 41 as previously worded [January 2003 version– 'the proceedings *shall* be suspended], which was the article applicable in this case, was that on its face it appeared to be mandatory provision requiring suspension on the mere raising of a jurisdictional objection. However, that provision is obviously intended to deal with the usual situation where there has been no decision on jurisdiction at the time the objection [. . .] was raised. [. . .] [T]here has been only one other instance in the lengthy history of ICSID arbitration where there has been a suspension after a decision on jurisdiction.[5] **[364]** However, it is not the case that the apparently mandatory wording of Article 41(3) must trump all other provisions of the ICSID Rules. If applied automatically to every jurisdictional objection which is raised after a decision on jurisdiction had been rendered, it would be possible [. . .] for a party, by seeking to raise insubstantial variations or supplementations to its earlier arguments, to prevent the Tribunal from ever reaching the merits. [. . .] [It] could eventually destroy the right of an individual Claimant to its 'day in Court' because such conduct could easily exhaust the limited resources [. . .] and render him or her unable to continue. **[365]** [. . .] The Tribunal has an overriding duty to preserve the integrity of the proceedings and ensure fairness [. . .]. It would be most unfair if a Respondent could impede the fair resolution of the proceedings [. . .], especially [. . .] of [. . .] points which through greater diligence could have been discovered earlier. **[366]** A Tribunal has inherent power to take measures to preserve the integrity of the proceedings.[6] In part that inherent power finds as a textual foot-hold Article 44 of the Convention, which authorises the Tribunal to decide 'any question of procedure, not expressly dealt with in the Convention, the ICSID arbitration rules, or any rule agreed by the parties.'[7] ICSID Rule 41 does not specifically provide for a situation where there are new challenges to jurisdiction after the issuing of an award on jurisdiction. More

5 [450] *Ceskoslovenska Obchodni Banka, a.s. v. The Slovak Republic*, ICSID Case ARB/97/4.

6 [451] [. . .] [Christoph H. Schreuer, *The ICSID Convention: A Commentary* (2001), at p. 683.] The doctrine of inherent, i.e., non-statutory, powers has been applied by the International Court of Justice and other international tribunals in a number of different contexts. Notably, inherent powers have been invoked in order summarily to dismiss proceedings lacking even a prima facie jurisdictional foundation, suspend proceedings in certain cases of parallel related litigation, and refuse to hear vexatious claims; See C. Brown, *The Inherent Powers of International Courts and Tribunals*, 76 B.Y.I.L 195 (2005) [. . .], pp. 231–232 and the references [. . .].

7 [452] Examples of the use of Article 44 include *Aguas Provinciales de Santa Fe S.A v The Argentine Republic* ICSID Case No. ARB/03/17 (order accepting *amicus* submissions of March 17, 2006); *Aguas Argentina S.A Suez and Vivendi Universal S.A v The Argentine Republic*, ICSID Case No ARB/03/19 (order allowing withdrawal of one party from an arbitration that is to continue thereafter of April 14 2006); *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No ARB/02/06, Decision on Objections to Jurisdiction, January 29, 2004, paras. 173 *et seq*. (and Order to Stay Proceedings).

broadly, there is an inherent power of an international tribunal to deal with any issues necessary for the conduct of matters falling within its jurisdiction. That power exists independently of any statutory reference.[8] In the specific circumstances of the present case it was [. . .] both necessary and appropriate to take action under its inherent power to ensure the continuity and fairness of the proceedings. It was for these reasons that it was felt that the best way forward was to allow Egypt's additional jurisdictional objections to be considered and determined [. . .], without automatically suspending the proceedings."

[Paras. 363, 364, 365, 366]

III.

I.17.11 DIRECT EXPROPRIATION
See also: I.17.02

A.

"**[427]** [. . .] Direct expropriation occurs when the title of the owner is affected by the measure in question.[9] In the present case Egypt [. . .] formally transferred ownership [. . .] from Siag Touristic [. . .] to the Government [. . .]. **[428]** However, [. . .] [i]t is well-accepted that a State has the right to expropriate foreign-owned property.[10] [. . .] [H]owever, [. . .] an expropriation is only lawful if certain conditions are met. Several of these requirements have become part of customary international law.[11] They are also included to varying degrees in most treaties, including the BIT governing this arbitration [. . .]."

[Paras. 427, 428]

I.17.131 PUBLIC PURPOSE

"**[430]** [. . .] [T]hat the pipeline could have been built elsewhere does not of itself demonstrate that Claimants' land was not expropriated for a public use. [. . .] The Tribunal accepts the assurance [. . .] that Al Sharq [which now has ownership of the land] is a publicly owned company. [. . .] **[431]** That assurance is not sufficient to satisfy the requirement of Article 5 of the BIT that the expropriation is 'for a public purpose.' The wording of Article 5 requires that the public purpose was the reason the investment was expropriated. The Tribunal does not consider such to be the case. The Claimants' investment was expropriated [. . .] by Ministerial Resolution No. 83. The reason for the expropriation was stated therein to be 'the

8 [453] *Prosecutor v. Beqa Beqaj*, Case No. IT-03–66-T-R77, Judgment on Contempt Allegations (27 May 2005), paras. 10 and 9. *Beqaj* was one of the recent cases on charges of contempt in the [. . .] [ICTY]. [. . .] [T]he power to punish contempt is part of "an inherent jurisdiction, deriving from [ICTY's] judicial function, to ensure that its exercise of the jurisdiction which is expressly given to it by [its] Statute is not frustrated and that its basic judicial functions are safeguarded": *Prosecutor v. Duško Tadic*, Case No. IT-94-I-A-R77, Judgment on Allegations of Contempt against Prior Counsel (31 January 2000), para. 13 [. . .]. The specific power to deal with contempt has since been codified in Rule 77(A)(iv) of ICTY's Rules of Procedure and Evidence.

9 [609] [. . .] [Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2008),] p. 92.

10 [611] Ibid., p. 89; *see also* Shaw, *International Law* (5th ed., 2003), p. 738.

11 [612] [. . .] [Ibid.,] p. 91.

failure of [. . .] 'Siag' to honor its commitments stipulated in the mentioned contract on time.' [. . .] No mention was made of the land being needed for, or the intention to use it for, a public purpose. [. . .] It was not until Presidential Decree No. 205 was passed down in 2002 that Egypt stated that the land would be allocated for the public benefit. [. . .] **[432]** The Tribunal does not accept that because an investment was eventually put to public use, the expropriation of that investment must [. . .] have been 'for' a public purpose. [. . .] [T]he expropriation took place in 1996 and Al Sharq was not constituted until 2000. [. . .] That does not [. . .] mean that the land could not [. . .] have been taken for another [. . .] public purpose. [. . .] There were six years between expropriation and the first indication that a public use was intended. [. . .] **[433]** [. . .] As the conditions of expropriation set out in Article 5 are cumulative, failure on one is failure overall [. . .]."

[Paras. 430, 431, 432, 433]

I.17.133 COMPENSATION

"**[434]** [. . .] Claimants' investment was expropriated in 1996, some 12 years ago. Dolzer and Schreuer state that under customary international law and 'most treaties,' compensation must not only be adequate, it must also be promptly paid.[12] [. . .] **[435]** Even the most charitable of impartial observers would not [. . .] contend that a 12-year delay [. . .] was 'prompt.' [. . .] [Although the Italy–Egypt BIT does not expressly employ the word 'prompt' (simply stating that compensation paid must be 'adequate and fair'), the Tribunal considers that the absence ought not to be seen to permit Egypt to refrain from paying compensation indefinitely.]"

[Paras. 434, 435]

1.17.13 LAWFULNESS OF EXPROPRIATION

"**[437]** One could possibly argue that Prime Ministerial Resolution No. 799, not having been cancelled, was a legitimate legal procedure, but [. . .] that argument fails to appeal since the many resolutions and decrees overturned prior to Resolution No. 799 [. . .] provides convincing evidence that Egypt has not followed proper legal procedures [. . .]."

[Para. 437]

I.17.132 NON DISCRIMINATORY

"**[439]** [. . .] [T]he expropriation of two foreign-owned investments may constitute discrimination as much as the expropriation of a single investment. It depends on the specific circumstances [. . .]. As to discriminatory intent, [. . .] there is some difference of opinion as to whether such intent is necessary to show discrimination, or whether a discriminatory effect will suffice.[13] In any event it is clear that a discriminatory effect must be shown [. . .]."

[Para. 439]

12 [624] [. . .] [Ibid,] p. 91.

13 [630] [. . .] [Ibid,] p. 177.

II.0.6 DUE PROCESS

"**[440]** [. . .] [C]iting *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, [. . .] due process may be denied both substantively and procedurally [. . .]. **[441]** In terms of substantive abuse, [. . .] [t]he Tribunal accepts that there were delays to the Project, but [. . .] not [. . .] that those [. . .] provided a valid reason to cancel the contract and expropriate the [. . .] investment. It is not in dispute that Siag Touristic had until the end of 2006 to complete 'Phase One' [. . .]. Resolution No. 83 was passed on 23 May 2006 [. . .][.] Claimants were [not] afforded due process by Egypt's early cancellation [. . .]. **[442]** [. . .] The Tribunal [. . .] finds that [. . .] they ought to have received a notice that the TDA was considering expropriating the investment. [. . .] The Tribunal finds that the failure by Egypt to provide such notice constitutes a denial of due process [. . .]."

[Paras. 440, 441, 442]

B.

I.17.25 FULL AND CONSTANT PROTECTION AND SECURITY

"**[447]** The standard of protection expected [. . .] is not absolute. [. . .] [A] host state must exercise 'due diligence' in preventing harm to an investment.[14] [. . .] Claimants investment was expropriated by force and in opposition to explicit pleas for protection. The Egyptian courts on several subsequent occasions cancelled the Resolutions or decrees that purported to give legitimacy to the expropriation, yet Claimants' investment has not been returned to them [. . .]. The Tribunal notes in this respect the decision in the *Wena Hotels* [. . .] case, wherein the seized investments were returned to Claimants after a year, yet the Tribunal in that case ruled that the full protection clause of the relevant BIT had been breached."

[Para. 447]

C.

I.17.24 FAIR AND EQUITABLE TREATMENT
See also: I.1.022

"**[450]** The fair and equitable treatment [. . .] standard is broad requirement, the application of which depends on the particular facts of each case. It is however widely recognised that the principle of good faith underlies fair and equitable treatment.[15] Numerous arbitral tribunals have held that, in international investment arbitration, the host State's duty to respect the investor's legitimate expectations arises from its more general duty to act in good faith towards foreigners.[16] The general, if not cardinal, principle of customary international law that States must act in good faith is thus a useful yardstick by which to measure the Fair and

14 [640] [. . .] [Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2008),] pp. 149–150.

15 [642] *Siemens A.G. v. the Argentine Republic*, ICSID Case No. ARB/02/8, Award of 6 February 2007; *Tecnicas Medioambientales Tecmed S.A. v. the United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003; *Azurix Corp v. the Argentine Republic*, ICSID Case No. ARB/01/12, Award of 14 July 2006.

16 [643] Ibid.; *Metalclad Corporation v. the United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award of 30 August 2000.

Equitable standard. While its precise ambit is not easily articulated, a number of categories [. . .] may be observed from past cases. These include such notions as transparency, protection of legitimate expectations, due process, freedom from discrimination and freedom from coercion and harassment.[17] [. . .]"

[Para. 450]

D.

I.17.26 UNREASONABLE AND DISCRIMINATORY MEASURES

"**[459]** [. . .] [M]any of the measures taken by Egypt in the course of this dispute were unreasonable in the ordinary meaning of that term. By way of non-exhaustive example, Egypt expropriated Claimants' investment in May 1996 on the purported grounds that Siag Touristic had not met its construction deadlines when those deadlines had in fact not arrived; [. . .] it re-took Claimants' investment in August 1996 despite the fact that Resolution No. 83 had been enjoined by the Cairo Administrative Court; and it failed to comply with the several judicial rulings invalidating Resolution No. 83 and its successor. Any one of those actions would constitute unreasonable behaviour; viewed *in toto* the matter is beyond question."

[Para. 459]

E.

I.17.22 MFN-TREATMENT
See also: I.17.4

"**[461]** [. . .] Claimants invoke the provisions of Article 3 in order to import from the BIT concluded between Egypt and Greece a so-called 'umbrella clause,' i.e., an obligation on Egypt to 'observe any other obligation it may have entered into, with regard to investments of the other Contracting Party.' [. . .] **[463]** The Tribunal considers that the obligations referred to by Claimants are adequately protected by the BIT [. . .]. **[464]** Given the Tribunal's rulings in Claimants' favour on both expropriation and fair and equitable treatment, the Tribunal considers that nothing would be added to Claimants' claim by the invocation of the most favoured nation doctrine and the 'umbrella clause' of the Egypt–Greece BIT."

[Paras. 461, 463, 464]

F.

I.3.0 NATIONALITY
See also: I.1.0; I.1.02; I.1.021; I.1.022; I.1.23

"**[477]** The thrust of Professor Shearer's argument was that *Nottebohm* did not so much state that Mr Nottebohm's Liechtenstein nationality was ineffective, but that Mr Nottebohm could not 'oppose' his Liechtenstein nationality to Guatemala, with which he had particularly strong ties. [. . .] Guatemala, but only Guatemala, was entitled not to recognise Mr Nottebohm's Liechtenstein nationality. Professor

17 [644] [. . .] [Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2008),] pp. 133–147.

Shearer submitted [. . .] the same [. . .] in this case: [. . .] Claimants' strong ties to Egypt should entitle Egypt [. . .] not to recognise Claimants' Italian nationalities, valid though they may be. **[478]** [. . .] [D]espite the re-characterisation of the *Nottebohm* doctrine as one of opposability, 'the substance of the genuine link doctrine remains the same.' [. . .] Claimants' ties to Egypt [. . .][,] must be compared to something, which in this case would be Claimants' ties to Italy. [. . .] [T]hat was the case in *Nottebohm*; it was not simply Mr Nottebohm's strong ties to Guatemala that 'cost him,' it was the 'extremely tenuous'[18] ties he had with Liechtenstein. [. . .] [T]he Tribunal has determined [. . .] that Claimants also have legitimate ties to Italy [. . .]. **[479]** In contrast, Mr Nottebohm had no ties to Liechtenstein save a resident brother whom he occasionally visited. Mr Nottebohm acquired the nationality of Liechtenstein purely to avoid the repercussions of being German in an Allied nation during the Second World War and 'with the sole aim of thus coming within the protection of Liechtenstein.'[19] [. . .] Claimants in this case [. . .] [b]oth have familial ties to Italy, not only of domicile but of blood, and both acquired Italian nationality well before these proceedings were initiated. [. . .]"

[Paras. 477, 478, 479]

I.1.41 CONFLICT BETWEEN INTERNATIONAL LAW AND NATIONAL LAW
See also: II.7.943

"**[484]** [. . .] [It is] an undisputed principle of international law that a state may not invoke its municipal law to avoid its international obligations. [. . .] **[485]** [. . .] '[T]he law in this respect is well settled. A state cannot plead provisions of its own law...in answer to a claim against it for an alleged breach of its obligations under international law.'[20] Egypt's obligations [. . .] under international law and [. . .] the BIT cannot be avoided by recourse to Egypt's domestic law. **[486]** [. . .] [T]hat the laws in question were in place before the expropriation has no effect on the fact that there was an illegal expropriation [. . .]."

[Paras. 484, 485, 486]

G.

I.3.0 NATIONALITY
See also: I.1.01; I.17.02

"**[497]** [. . .] [T]he Tribunal does not accept that the doctrine of continuous nationality is applicable or appropriate to this case. [. . .] [T]he doctrine as espoused in *Loewen* has been highly controversial. *Loewen* [. . .] asserted that 'in international law parlance, there must be continuous national identity from the date of the events giving rise to the claim, which date is known as the *dies a quo*, through the date of the resolution of the claim, which date is known as the *dies ad quem*.'[21] The Tribunal [. . .] considered that continuous nationality was a rule of customary

18 [677] [. . .] [*Liechtenstein v. Guatemala*, [1955] ICJ 4,] p. 25.

19 [678] Ibid., p. 26.

20 [691] Brownlie, [. . .] [*Principles of Public International Law* (6th ed., 2003),] p. 34.

21 [700] ICSID Case No. ARB(AF)/98/3, para. 225.

international law [. . .]. **[498]** The *Loewen* decision has been the subject of intense scrutiny and criticism by [. . .] scholars and investment arbitration practitioners. In particular, criticism has been levelled at the *Loewen* Tribunal's cursory treatment of customary international law on a subject where prior influential decisions have held that 'it may well be doubted that the alleged rule [of continuous nationality] has received such universal recognition as to justify the broad suggestion that it is an established rule of international law.'[22] Commentators have also stigmatised the Tribunal's application of a rule developed in one particular context (diplomatic protection) to another area (investment treaty claims). [. . .] [T]he *Loewen* Tribunal did not cite a single authority in support of any of its propositions with regard to continuous nationality. Finally, academics and practitioners have questioned the relevance of the *Loewen* Tribunal's conclusions in light of the [. . .] [ILC's] subsequent explicit admission that it 'was not prepared to follow the *Loewen* Tribunal in adopting a blanket rule that nationality must be maintained to the date of resolution of the claim' and its preference for the 'the date of official presentation of the claim as the *dies ad quem*.'[23] **[499]** The Tribunal [. . .] will add its view that the ICSID Convention does not require a party to hold constant nationality until the date an award is rendered. The only dates of relevance to Article 25 of the ICSID Convention are those of consent and registration. In addition [. . .] in its 2006 Draft Articles on Diplomatic Protection, the [. . .] [ILC] considered that the doctrine of continuous nationality was inappropriate in the case of an individual claim.[24] [. . .]"

[Paras. 497, 498, 499]

H.

I.17.133 COMPENSATION

"**[539]** [. . .] Reading Article 5 of the BIT as a whole, [. . .] subclause (iii) is concerned with lawful expropriation [. . .]. Pursuant to Article 5(ii), investments may not be nationalised or expropriated except on the specific terms stated [. . .][, including] that the expropriation must be '. . . for a public purpose in the national interest of [the] State, for adequate and fair compensation ... and in accordance with due process of law.' [. . .] [T]he Tribunal is strongly of the view that the expropriation [. . .] was not a lawful expropriation to which Article 5 of the BIT applied. **[542]** The basis on which the Tribunal intends to compensate the Claimants is by ascertaining [. . .] the value of the expropriated asset in the Claimants' hands immediately prior to the expropriation [. . .]. **[545]** The question whether punitive damages are available is logically distinct from the question whether recovery for an unlawful expropriation should proceed on a different [. . .] basis from recovery for a lawful expropriation. The latter issue almost always concerns an argument over whether certain measures of compensation provided for in the applicable BIT should or should not act as a ceiling to recovery. Punitive damages, by their very nature, are not compensatory. It is worth observing that in the oft-cited *Chorzów Factory* case,

22 [701] *United States v Germany*, 31 October 1924, VII Reports of International Arbitral Awards 119, at 140 (Edwin B. Parker, Umpire).

23 [702] ILC Draft Articles on Diplomatic Protection with Commentaries (2006), pp. 37–38.

24 [703] [. . .] [Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2008),] p. 47.

the principle derived from that case is that even in the case of an unlawful taking, the relief to be given to the claimant is still purely compensatory. The potential availability of punitive damages, or a punitive 'enhancement' of compensatory damages, is a matter of some controversy in international law [. . .][.] [T]he prevailing view of the Iran-United States Claims Tribunal appears to have been that punitive damages are not available[25] and it appears that the recovery of punitive or moral damages is reserved for extreme cases of egregious behaviour.[26] **[546]** Further, in attempting to identify precedents for the award of punitive damages, it is necessary to distinguish cases in which the harm suffered by the claimant was not essentially financial in nature, or cases in which what was really being addressed was the level at which compensatory damages should be measured. [. . .]"

[Paras. 539, 542, 545, 546]

IV.

II.7.98 ICSID AWARD

"**[631]** For all the foregoing reasons and rejecting all submissions to the contrary the Tribunal hereby FINDS, DECLARES, AWARDS and ORDERS as follows:

(I) JURISDICTION

For the reasons set forth in the Tribunal's Decision on Jurisdiction dated 11 April 2008 (which it incorporates by reference) and in the present Award, the Tribunal finds that the present dispute is within the jurisdiction of the Centre and the competence of the Tribunal. In particular it; a) Finds and declares that at all relevant times Mr Siag was not an Egyptian national; (b) Finds and declares that Egypt's objection to jurisdiction based on Mr Siag's alleged Egyptian nationality and all of its related contentions about his alleged disqualifying dual nationality fail and are hereby dismissed; [. . .] (c) Finds and declares that Egypt's objection to jurisdiction concerning Mr Siag's alleged fraud or other misconduct in relation to his acquisition of Lebanese nationality fails and is hereby dismissed. [. . .] (d) Finds and declares that Egypt's objection to jurisdiction based on Mr Siag's alleged bankruptcy fails and is hereby dismissed; [. . .]

(II) LIABILITY

The Tribunal finds and declares that: (a) The Claimants have established all the necessary elements of their claims; (b) Egypt is liable to Claimants for unlawfully expropriating Claimants' investment, consisting of the Property and the Project, in breach of Article 5(1)(ii) of the BIT; [. . .] (c) Egypt is liable to Claimants for failing to provide full protection to Claimants' investment, consisting of the Property and the Project, in breach of Article 4(1) of the BIT; [. . .] (d) Egypt is liable to Claimants for failing to ensure the fair and equitable treatment of Claimants' investment, consisting of the Property and the Project, in breach of Article 2(2) of the BIT; [. . .] (e) Egypt is liable to Claimants for allowing Claimants' investment, consisting of

25 [737] Charles N. Brower & Jason D. Brueschke, *The Iran-United States Claims Tribunal* 477 (1998).

26 [738] [. . .] *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award of 6 February 2008.

the Property and the Project, to be subjected to unreasonable measures, in breach of Article 2(2) of the BIT. [. . .]

(III) EGYPT'S DEFENCES

The Tribunal finds and declares that: (a) Egypt's defence that the Claimants may not oppose their Italian nationalities to Egypt fails and is dismissed; (b) Egypt's defence based on Mr Siag's alleged bankruptcy fails and is hereby dismissed; (c) Egypt's defence that the Claimants are estopped from denying their Egyptian nationality fails and is dismissed; (d) Egypt's defence challenging the standing of Mrs Vecchi's estate fails and is dismissed.

(IV) DAMAGES

The Tribunal finds, declares and orders that: (a) The Claimants are entitled to recover from Egypt the total sum of USD 74,550,794.75 in compensation for its actions in breach of the BIT as set out in paragraph 631 (II) (b)-(e) above, comprising the following: (i) the sum of USD 69,108,858 for the loss of the Claimants' investment, comprising the Property and the Project; (ii) the sum of USD 4,441,936.75 as part of the value of construction work carried out by the Claimants; (iii) the sum of USD 1,000,000 toward the Claimants' legal expenses incurred in litigation before Egypt's domestic courts. (b) The Respondent shall pay the total sum of USD 74,550,794.75 awarded in paragraph 631 (IV) (a) above within 30 days of the date of this Award together with interest thereon calculated pursuant to paragraph 631 (VI) (a) below.

(V) COSTS AND EXPENSES

The Tribunal finds, declares and orders that: (a) The Claimants are entitled to recover from Egypt the sum of USD 6,000,000 in respect of their legal costs, expert witness expenses and other expenses together with interest thereon calculated pursuant to paragraph 631 (VI) (b) below; (b) The Respondent shall pay the total sum of USD 6,000,000 awarded in paragraph 631 (V) (a) above within 30 days of the date of this Award; (c) The Parties should each bear fifty per cent of the Tribunal's fees and expenses and ICSID's charges, as separately notified by ICSID.

(VI) INTEREST

The Tribunal finds, declares and orders that: (a) The Claimants are entitled to recover interest from Egypt and Egypt is ordered to pay interest on all sums of damages awarded under paragraph 631 (IV) above, at the six month LIBOR rates applicable from time to time since 23 May 1996 through until the date of payment, with such interest being compounded six-monthly; (b) The Claimants are entitled to recover interest from Egypt and Egypt is ordered to pay interest on all sums of costs and expenses awarded under paragraph 631 (V) above, from the 30th day following the date of this Award, at the applicable six month LIBOR rate through until the date of payment, with such interest being compounded six-monthly.

(VII) GENERAL

The Tribunal finds and declares that: (a) All other claims and requests by the parties are dismissed."

[Para. 631]

Tza Yap Shum v. Republic of Peru, ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009*

Contents**

I.

II.7.911 REQUEST FOR ICSID ARBITRATION

[This decision on jurisdiction concerned a dispute between Mr. Tza Yap Shum, a national of the People's Republic of China and TSG Perú S. A. C., a company incorporated under Peruvian law, and Peru. The dispute arose from alleged violations of the Peru-China BIT which affected the investment made by Mr. Tza Yap Shum in TSG Peru S.A.C. (or 'TSG'), a Peruvian Company in the business of producing fish-based food products and export thereof to Asian markets. In 2004, the Peruvian Tax Administration (or 'SUNAT') started a number of actions which, according to Claimant, ended up destroying TSG business operations and economic viability.]

II.

I.14.23 ARBITRATION AGREEMENT
See also: I.1.16; II.1.0; II.7.93

"**[37]** The broad acceptance of arbitration as a way to settle disputes among investor States does not [. . .] eliminate the basic requirement prior to arbitration: an agreement of the parties to arbitrate.[1] As maintained [. . .] in the *Factory at Chorzów* case, consent should be proven by a preponderance of the evidence.[2] While Respondent and certain case law relevant to the matter have suggested that the

* Summaries prepared by Jane Hofbauer, LL.M., Pre-Doctoral Researcher, and Christina Knahr, MPA, Post-Doctoral Researcher, Department of European, International and Comparative Law, University of Vienna, Austria. The full text of the decision is available online at <http://ita.law.uvic.ca/> (unofficial English translation). Original: Spanish. Original footnote numbers are indicated in brackets: [].

** This is not the reproduction of the Table of Contents of the Decision.

1 [2] *Plama Consortium Ltd. v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), Decision on Jurisdiction, 8 February 2005, para. 198 [hereinafter *Plama Consortium v. Bulgaria*].

2 [3] See *Chorzów Factory Case (Germany v. Poland)*, PCIJ, Series A, No. 9, 1927, Claim for Indemnity (Jurisdiction), p. 32; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Decision dated 12 Dec. 1996, Sep. Op. by Judge Higgins, ICJ, 1996 Reports, p. 857, para. 35.

burden of proof regarding the existence of an agreement on particular jurisdiction should be 'clear and unambiguous,'[3] the Tribunal considers that the best option consists in considering that the provisions of treaties dealing with jurisdiction matters constitute elements of total agreement between the parties. Any provision in a treaty [. . .] constitutes a legal and solemn pledge of a sovereign government. [. . .] [T]he only appropriate way to observe adequately such expressions is by analysing objectively and comprehensively the wording of such agreement.[4] In this proceeding, the position adopted by case law lead us to conclude that the appropriate standard to interpret the rules on settlement of disputes and other provisions in a treaty on jurisdiction matters is identical to that applicable to other provisions in the Peru-China BIT–neither more nor less restrictive.[5]"

[Para. 37]

III.

II.7.9223 NATIONAL OF ANOTHER CONTRACTING STATE
See also: I.3.0; I.17.011; II.2.111

A.

"**[52]** The Tribunal first has to verify compliance with the nationality requirements of Article 25 of the ICSID Convention. [. . .] [Said] Article requires that the Claimant have [. . .] the nationality of a Contracting State other than the State party to the dispute pursuant [*sic*]. **[53]** Accordingly, the Tribunal needs to consider the text of the Treaty under which Claimant filed the request for arbitration. Provision 1(2) of the Peru-China BIT establishes that 'The term 'investors' means: in respect of the People's Republic of China: (a) natural persons who have nationality of the People's Republic of China in accordance with its laws...' **[54]** There is no question that according to international law it is for each State to determine who their nationals are under its laws. [. . .]"

[Paras. 52, 53, 54]

II.1 EVIDENCE
See also: I.3.0; I.17.011; II.1.0; II.2.111

"**[58]** [. . .] The Tribunal concludes making use of the powers vested to it under Rule 34 of the Arbitration Rules which provides that the Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value. **[63]** In [the] opinion of the Tribunal, the nationality conferred by a State to a person under its laws has a strong presumption of validity. [. . .] Respondent [. . .] has the burden of proof to invalidate such presumption. This has been recently confirmed by [. . .] *Ioan Micula* [. . .] *v. Romania*, ICSID Case No. ARB/05/20 [. . .]: The burden of

3 [4] *Plama Consortium v. Bulgaria*, supra n. 2; cf. *Wintershall v. Argentine Republic*, (Caso CIADI No. ARB/04/14) Award, 8 December 2008, paragraphs 105 and 167.

4 [5] See *Amco Asia Corporation and Others v. The Republic of Indonesia*, (ICSID Case No. ARB/81/1), Decision on Jurisdiction, 25 September 1983, paragraph 14(i), 23 I.L.M. 351, 359 (1984).

5 [6] *Siemens A.G. v. Argentina* (ICSID Case No. ARB/02/8), Decision on Jurisdiction, 3 August 2004; *Suez*, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. *v. Argentina*, ICSID Case No. ARB/03/17), Decision on Jurisdiction, 6 May 2006; *National Grid P.L.C. v. Argentine Republic*, (UNCITRAL Case No. 1:09-cv-00248-RBW, Award, 3 November 2008).

proving that nationality was acquired in a manner inconsistent with international law lies with the party challenging the nationality. In that respect, there exists a presumption in favour of the validity of a State's conferment of nationality. *The threshold to overcome such presumption is high*.[6] [. . .] **[66]** Accordingly, the Tribunal finds that Claimant has proven that he had the Chinese nationality on the date on which the parties consented to submit the dispute to arbitration as well as on the date on which the request for arbitration was registered. **[67]** Secondly, [. . .] [i] n Respondent's opinion, the set of laws governing the relationship of the People's Republic of China with Hong Kong confer the region a high degree of autonomy as a result of which Hong Kong residents would be excluded from the Peru-China BIT scope of application. **[68]** First of all, it is convenient to restate that what the Tribunal has to determine [. . .] is whether Claimant [. . .] is eligible to submit his dispute related to his investment *in the Republic of Peru* to international arbitration under ICSID Convention and the Peru-China BIT. [. . .] **[69]** [. . .] [N]either the ICSID Convention nor the Peru-China BIT provide that Chinese nationals with residence in Hong Kong are excluded from the scope of application thereof."

[Paras. 58, 63, 66, 67, 68, 69]

II.7.92 ICSID JURISDICTION
See also: I.1.16; I.1.20; I.3.0; II.2.111; II.7.9212; II.7.9223

"**[70]** [. . .] Article 25 [. . .] ICSID [. . .] establishes only that the jurisdiction of the Centre shall extend to disputes arising directly out of an investment, between a Contracting State and a national of another Contracting State [. . .]. Consequently, the Tribunal [. . .] will restrict itself to verify [. . .] whether the Claimant has the nationality of a Contracting State. [. . .] **[71]** [. . .] According to Article 31 of the Vienna Convention, the Tribunal must interpret the relevant provisions of the Peru-China BIT in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in its context and in the light of its object and purpose. **[72]** [. . .] Provision 1(2) of the Peru-China BIT merely establishes that 'The term 'investors' means: in respect of the People's Republic of China: (a) Natural persons who have nationality of the People's Republic of China in accordance with its laws....' The Tribunal believes that the intention of the both parties to the Peru-China BIT must be considered, as expressly provided in the terms of the Treaty.[7] **[73]** It is clear for the Tribunal, [. . .] that the preceding Article restricts [. . .] such laws to those who govern the acquisition and loss of Chinese nationality. [. . .] [F] or the sake of discussion, had [. . .] the Peru-China BIT not been applicable to investments of Peruvian nationals in Hong Kong, this would not necessarily prevent [that] the investments of Chinese nationals with residence in Hong Kong or in any other jurisdiction are protected by the Peru-China BIT."

[Paras. 70, 71, 72, 73]

6 [28] Decision on Jurisdiction and Admissibility in Ioan Micula et al. v. Romania (ICSID Case No. ARB/05/20), 24 Sept. 2008, para. 87, quoting comments to article 4 of draft articles on diplomatic protection (2006), p. 34.

7 [31] [. . .] See also *Sociedad General de Aguas de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. The Argentine Republic* (ICSID Case No. ARB/03/17), Decision on Jurisdiction, 16 May 2006, para. 54; *Nacional Grid PLC v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 20 June 2006, para. 80.

B.

II.7.9211 QUALIFICATION AS INVESTMENT
See also: I.3.0; I.17.011; II.2.111; II.7.92; II.7.9214

"**[91]** Respondent [. . .] maintains that the BIT does not protect indirect investments. [. . .] [I]t is important to make some preliminary clarification. **[92]** [. . .] Respondent's objection in this regard does not revolve around the investor's capacity [. . .] to claim in his condition of TSG's indirect shareholder.[8] Rather, Respondent's objection focuses on questioning whether the investor's decision of channelling his investment through Linkvest, a company incorporated in the British Virgin Islands, excludes Claimant from both ICSID Convention and the BIT [. . .]. **[93]** Secondly, [. . .] having established that Claimant has the Chinese nationality and is the ultimate owner and controller of the investment (TSG), this is not a case where Claimant is assuming a nationality by sheer convenience to make use of the protection [. . .] under the ICSID Convention and the BIT. [. . .] **[94]** Finally, Respondent [. . .] [has] not proved that indirect investments are excluded or forbidden under international law related to investments. On the contrary, there exist sources that indicate the contrary [. . .]. **[95]** Article 25(1) of the ICSID Convention simply 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 [. . .].' **[96]** Accordingly, the Convention does not establish any difference between direct and indirect investments. [. . .] [I]t is not for the Tribunal to make such a difference, not to say give any legal effects thereto. The Tribunal's conclusion in this regard is supported by *Société Ouest Africaine des Bétons Industriels v. Senegal* in which the Arbitral Tribunal did not see any obstacle to maintain its jurisdiction in spite of the fact that Belgian investors had channelled their investment in Senegal through a company incorporated in a third-party country which was not a Contracting Party of the ICSID Convention.[9] **[97]** With regard to international law of investment-related international arbitration, there are also precedents. [. . .] **[98]** For example, [. . .] *Waste Management* [. . .], based on a broad definition of the term 'investment' in the North American Free Trade Agreement concluded that 'Where a treaty spells out in detail and with precision the requirements for maintaining a claim, there is no room for implying into the treaty additional requirements, whether based on alleged requirements of general international law in the field of diplomatic protection or otherwise. *If the NAFTA Parties had wished to limit their obligations of conduct to enterprises or investments having the nationality of one of the other Parties they could have done so. [. . .] The nationality of any intermediate holding companies is irrelevant to the present claim.* [. . .][10] **[99]** [. . .] *Société Générale v. The Dominican Republic* [. . .] maintained that: 'The Tribunal also notes that the Treaty, in defining investment in the broad manner explained, including minority or indirect forms of equity interest, necessarily

8 [47] Which objection, certainly, has been the matter of a number of recent Awards on claims disputes against the Argentine Republic which have recognised the right of indirect and minority shareholders. [. . .]

9 [49] *Société Ouest Africaine des Bétons Industriels v. Senegal* (ICSID Case No. ARB/82/1), Award dated 25 February 1988, paras. 35–38 [. . .].

10 [51] *Waste Management Inc. v. Estados Unidos Mexicanos*, (ICSID Case No. ARB(AF)/98/2), Award dated 30 April 2004, paragraph 85.

implies that there may be one or several layers of intermediate companies or interests intervening between the claimant and the investment.'[11] **[100]** The above examples may be different from this case as a result of the particular wording employed in each of the BITs based on which the disputes were filed, which did make a distinction between direct and indirect investments. However, a careful reading [. . .] reveals that the main concern of the tribunal was to determine the investors' nationalities, rather than the nationalities of corporate schemes through which the investment had been channelled. In other words, in order to assert their jurisdiction [. . .], these tribunals have understood as their primary work identifying the investment, not in terms of the manner it was channelled, but rather of the effective link with the investors who meet the nationality requirements under the ICSID Convention and the relevant BITs.[12] **[101]** This has been clearly explained by the Tribunal in [. . .] *Siemens A.G. v. República Argentina*:

> […] The Tribunal observes that there is no explicit reference to direct or indirect investment as such in the Treaty. The definition of 'investment' is very broad. An investment is any kind of asset considered to be such under the law of the Contracting Party where the investment has been made. […] The drafters were careful to use the words 'not exclusively' before listing the categories of 'particularly' included investments. One of the categories consists of 'shares, rights of participation in companies and other types of participation in companies.' […] The Treaty does not require that there be no interposed companies between the investment and the ultimate owner of the company […].[13]"

[Paras. 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101]

I.1.16 TREATY INTERPRETATION
See also: I.1.20; I.17.011; II.7.9211

"**[102]** [. . .] [T]he Tribunal interprets the BIT in accordance with the rules established by the Vienna Convention. According to Article 31 [. . .], the Tribunal will rely mainly on the text of the BIT as a source of the common purpose of the Contracting Parties.[14] **[103]** The Tribunal believes that the overall text of the BIT, including the Preamble and Protocol thereof, reveals the Contracting Parties' intention, [. . .] to promote and protect the investments of Chinese nationals in Peruvian territory. **[106]** [. . .] [T]he Contracting Parties in its intention to promote and protect investments, decided to define them through an ample formulation which, by general rule, will protect all kind of investments. Additionally, [. . .] no evidence has been produced that indirect investments are not 'in accordance with the laws and regulations' of the Republic of Peru. [. . .] **[107]** The Tribunal would expect such a limitation would have been included explicitly in the BIT. [. . .] **[109]** The analysis of the Tribunal is not changed by remarks about other investment

11 [52] *Sociéte Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic*, Preliminary Objections, 19 Sept. 2008, para. 52 and Annex 1. [. . .].

12 [53] See in general Christoph Schreuer, "Shareholder Protection in international Investment Law."

13 [54] *Siemens A.G. v. República Argentina*, Decision on Jurisdiction, 3 August 2004, para. 137 [. . .].

14 [55] [. . .] See also *Sociedad General de Aguas de Aguas de Barcelona S. A. and Vivendi Universal S.A. v. The Argentine Republic* (ICSID Case No. ARB/03/17), Decision on Jurisdiction, 16 May 2006, para. 54; *Nacional Grid PLC v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 20 June 2006, para. 80 [. . .].

treaties signed by the parties [. . .] with third-party countries wherein, unlike the BIT, indirect investments are explicitly protected. [. . .]"

[Paras. 102, 103, 106, 107, 109]

C.

II.2.11 PRELIMINARY OBJECTIONS
See also: I.17.1; II.2.111

"**[116]** The Tribunal will consider first Respondent's position. In their opinion, for the Tribunal to exercise jurisdiction, the expropriation claim must–at least *prima facie*–qualify under the requirements established in Article 4 of the BIT. **[118]** Respondent emphasises that [this] Article is objective legislation and an assessment thereof may require a definitive interpretation thereof. The Tribunal realises that, in this preliminary stage, neither the BIT nor the ICSID Convention and Arbitration Rules require the Tribunal to provide a definitive interpretation of the scope of Article 4. On the contrary, Article 41 of the Convention [. . .] [and] **[119]** [s]imilarly, Arbitration Rule 41(4) [. . .] [provide] that the Tribunal 'may deal with the objection as a preliminary question or join it to the merits of the dispute.' **[120]** [. . .] [W]ith regard to Respondent's objection under Article 4, the Tribunal understands that it is their duty to abide by the requirements of Article 25 of the ICSID Convention, as it verifies that the claim is a dispute of legal nature that arises directly out of the investment. **[121]** [. . .] The Tribunal is not alien to the approach adopted by numerous tribunals following the opinion maintained by Judge Rosalyn Higgins in her particular vote [. . .] in the *Case Oil Platforms* dated 12 December 1996. **[122]** According to such an opinion, the Tribunal may provisionally accept as true the facts as described by Claimant and assess whether the same would reasonably violate Article 4. [. . .] [F]or the purposes of this preliminary stage, the Tribunal believes that *prima facie* the facts [. . .] may [. . .] violate [. . .] the BIT. It remains to be seen if in the stage of the merits, Claimant will produce sufficient evidence thereof and proves how they effectively violate such provision. [. . .]"

[Paras. 116, 118, 119, 120, 121, 122]

D.

I.1.16 TREATY INTERPRETATION
See also: I.1.20; I.14.11; II.2.111; II.7.96

"**[144]** The BIT clause addressing specifically the settlement of disputes is Article 8. [. . .] **[145]** The different positions of the Parties with regard to the scope of Article 8 have focused mainly on the phrase 'involving the amount of compensation for expropriation' in Article 8(3). Variations of this phrase are included in [. . .] many treaties since the 1980s. In general, the doctrine has understood that such phrase reflects certain degree of distrust or ideological unconformity on the part of communist regimes regarding investment of private capital, and maybe also certain concern about the decisions of international tribunals on matters such regimes are not familiar with and over which they had no control. Such wording seemed to seek certain limitations. However, the exact scope [. . .] must be determined."

[Paras. 144, 145]

I.17.1 EXPROPRIATION

See also: I.1.16; I.1.20; I.17.011; I.17.133; II.7.96

Interpretation of Article 8 in accordance with the Vienna Convention

"**[148]** Article 8(3) provides [. . .]: *If a dispute involving the amount of compensation for expropriation* cannot be settled [. . .] it may be submitted [. . .] to the International Centre for Settlement of Investment Disputes [. . .]. *Any disputes concerning other matters* [. . .] may be submitted to the Centre if the parties to the dispute so agree. [. . .] **[149]** The scope of the underlined phrases [. . .] constitutes the Tribunal's core interpretation issue. *Prima facie*, Article 8(3) seems to establish an exception to the procedure established in Article 8(2), namely, the determination of a dispute of expropriation by the courts of the State accepting the investment. [. . .] **[150]** The Tribunal considers that the phrase 'involving the amount of compensation for expropriation' may have a great variety of possible meanings. In case [. . .] emphasis were given to the words 'amount of compensation,' this would suggest a restrictive interpretation, one which would only include disputes related to the determination of the value of the investment. [. . .] At the other end of the interpretative spectrum, this phrase may include, in addition to the amount of compensation, a determination of other important matters related to the alleged expropriation. [. . .] For a variety of reasons, the Tribunal has decided that the latter, i.e., the broadest interpretation, happens to be the most appropriate. **[151]** The Tribunal first refers to the specific wording used by Article 8(3). The BIT uses the word 'involving' which, according to the Oxford Dictionary means 'to enfold, envelope, entangle, include.' [. . .] A *bona fide* interpretation of these words indicate that the only requirement established in the BIT is that the dispute must 'include' the determination of the amount of a compensation, and not that the dispute must be restricted thereto. [. . .] **[153]** [. . .] In accordance with Article 31 [. . .] [i]t may be assumed, in accordance with the wording of the Preamble [. . .], that the purpose of including the entitlement to submit certain disputes to ICSID arbitration is that of conferring certain benefits to promote investments. [. . .] **[155]** [. . .] [T]he final sentence in Article 8(3) [. . .] reads as follows:

> The provisions of this Paragraph shall not apply if the investor concerned has resorted to the procedure specified in Paragraph 2 of this Article.

[156] Article 8(2) of the Treaty [. . .] establishes that:

> […] either party to the dispute shall be entitled to submit this dispute to the competent court of the Contracting Party accepting the investment.

[157] These provisions [. . .] seem to indicate that if an investor submits a dispute to a competent tribunal of the Contracting State [. . .], the investor may not have access to ICSID arbitration at all. **[159]** [. . .] [T]he last sentence dispels any doubt about whether an investor [. . .] finds himself with an irrevocable either-or choice, also known as '*fork in the road*.' **[162]** [. . .] [T]he Tribunal has also sought guidance in supplementary interpretation means as authorised by Article 32, including preparatory works of the BIT and the circumstances surrounding its conclusion. [. . .] **[163]** As a preliminary matter, the Tribunal [. . .] recognises [. . .] that as China deposited the ratification instruments of the ICSID Convention [. . .], it notified to the Centre the class or classes of disputes that would accept to submit under the jurisdiction of the Centre. Such notice reads [. . .]: In accordance with Article 25(4)

[. . .] only disputes involving compensation for expropriation and nationalisation. [. . .] **[165]** The [. . .] same Article 25(4) [. . .] clarifies that such notices shall not constitute the consent of the parties to the ICSID Convention. [. . .] [I]t would be questionable to interpret the consent of the parties to the BIT under Article 8 thereof based on the notification which addresses a completely different treaty [. . .].[15] [. . .]"

[Paras. 148, 149, 150, 151, 153, 155, 156, 157, 159, 162, 163, 165]

I.17.13 LAWFULNESS OF EXPROPRIATION
See also: I.17.011; 1.17.133

Interpretation of Article 8 based on other arbitration decisions and awards

"**[173]** While the Tribunal is not formally bound to take into account the decisions of other tribunals, they do consider the decisions of prior tribunals must be referred to and explain to what extent our analysis follows their rational or [. . .] point out where we respectfully disagree. [. . .] [D]espite the existence of hundreds of treaties containing similar clauses on the settlement of disputes, the number of arbitral decisions that have tried to interpret them has been scanty. Likewise, the tribunals that have examined such similar provisions have reached different results. For example, in *Saipem S.p.A v. Bangladesh* [. . .] and *Telenor Mobile Communications A.S. v. Hungary* [. . .] the tribunals decided that they had jurisdiction to try the disputes regarding the existence and/or lawfulness of an expropriation, as well as matters related to an adequate amount of compensation. [. . .] We reached a conclusion similar to that in the case *Franz Sedelmayer v. The Russian Federation* [. . .]. But the tribunals in *Berschader v. The Russian Federation* [. . .] as well as [. . .] in *RosInvest UK Ltd. v. The Russian Federation* [. . .] reached the opposite conclusion [. . .]. Finally, in the case *Czech Republic v. European Media Ventures S.A.* [. . .] performed a new revision of the award issued by a Tribunal that operated under the UNCITRAL Arbitration Rules. The Tribunal concluded, after a thorough analysis, that the clause of settlement of disputes 'involving the compensation for expropriation' of the treaty between the Belgo-Luxembourg Economic Union and the Socialist Republic of Czechoslovakia appropriately conferred jurisdiction to the arbitration tribunal based on the merits of the case for the arbitral tribunal to determine not only the amount of compensation but also many other preliminary issues related to the expropriation in question.[16] **[174]** This Tribunal [. . .] recognises that while the clauses of settlement of disputes and the treaties in question are similar, they may vary to some extent from the perspective of the operating situation of our case. Even so, the Tribunal believes that the decisions of such distinguished tribunals share two important elements that deserve separate comments. First of all, [. . .] it is usually said that clauses of settlement of disputes that include such expressions as 'involving the compensation for expropriation' or 'involving the amount of compensation for expropriation' reflect a clearly established 'national policy,' especially by the communist governments of the 1980s and 1990s.

15 [90] C. Schreuer, *The ICSID Convention: A Commentary*, Cambridge Univ. Press, 2001, pages 340–343.

16 [104] *Czech Republic v. European Media Ventures S.A.* See also, Martina Polasek, *Saipem S.p.A. v. The People's Republic of Bangladesh* (ICSID Case No. ARB/05/07). Introductory Note, *ICSID Review. Foreign Investment Law Journal, Vol. 22, No. 1* (Spring 2007), p. 95.

However, this Tribunal has found nothing in prior awards supporting firmly such position. For example, the tribunal in *Berschader* maintained that 'the restrictive wording [. . .] arose from the deliberate intention of the Contracting Parties to limit the scope of the arbitration under the Treaty' [. . .].[17] The Tribunal seems to reach such conclusion by comparing the wording of the BIT in question with that of posterior treaties and by so doing infers the purpose of the wording in the Belgium/Luxembourg–USSR BIT. We find in the award no other indication that the parties had such an intention. [. . .] **[176]** The Tribunal finds more relevant the awards in *Saipem v. Bangladesh* [. . .], *Telenor Mobile Communications v. Republic of Hungary* [. . .] and *Sedelmayer v. The Russian Federation* where the tribunals interpreted variations of the same type of the 'restrictive' clause of settlement of disputes. In all of these cases, the Tribunals did not find it difficult to decide that the Contracting Party had agreed on submitting to international arbitration, not only to determine the 'compensation' but also for any other issues related, including the existence and lawfulness of the expropriation. Surprisingly, none of these awards analyse the alleged national policy arguments. On the contrary, [. . .] it seems that none of the governments (two of which, Hungary and Russia, were communist states) had even tried to argue that the expressions 'involving compensation' or 'involving the amount of compensation' established public policies and the parties' intention to exclude all legal issues related to expropriation from the consent to international arbitration. Had the restrictive interpretation been the result of a policy deeply enrooted [. . .], it would have been unlikely that the involved governments had decided not to discuss it. [. . .] **[177]** If we move away from arguments based on public policies and focus on the interpretation of similar clauses of settlement of disputes by other tribunals, this Tribunal is not convinced that a more restrictive interpretation of the wording of the treaty [. . .]. In *Berschader*, for example, the Tribunal [. . .] concludes that 'the wording expressly limits the type of dispute, which may be subjected to arbitration under the Treaty, to a dispute concerning the amount or mode of compensation to be paid in the event of an expropriatory act [. . .].'[18] **[179]** The Tribunal [. . .] focuses on BITs negotiated later by the Russian federation that contain much ampler arbitration clauses. [. . .] **[180]** While the wording in this ulterior treaty clearly includes 'all disputes' (which presumably includes a variety of issues not limited to expropriation matters), this Tribunal does not believe that such reference (and its retroactive comparison) are a legitimate proof of the Parties' intention with regard to the meaning of the words 'relative to the amount or manner of compensation' in the treaty relevant to *Berschader*.[19] **[181]** This Tribunal considers that, [. . .] Arbitrator Weiler's remarks in his opinion attached are more persuasive [. . .]:

> While my colleagues concentrate much of their analysis on identifying the intent of the drafters of the Treaty as of the date of its execution, I focus on the treaty terms themselves as the best evidence ascertaining such intent.[20]

17 [105] *Berschader v. Russia*, paragraph 155.

18 [110] *Berschader v. Russia*, paragraphs 152–153.

19 [113] *Berschader v. Russia*, paragraph 155.

20 [114] *Berschader v. Russia*, Separate Opinion by Arbitrator Weiler, paragraph 4.

[182] [. . .] [W]ith regard to the arguments related to the intention, he maintains that:

> I am reluctant to adopt this approach because it seems to me that when counsel argue to a Tribunal such as this about 'what the drafters intended' it is normally little more than the deft use of a euphemism to justify counsel's arguments as to how the terms of a treaty should be construed, in absence of any actual evidence on the subject.

[184] Similarly, [. . .] in *RosInvest* [. . .] **[185]** [. . .] the tribunal referred to other Russian BITs and in particular the wording of the Denmark-Russian BIT. This BIT again contains a clause of settlement of disputes that is completely open to 'any dispute.' According to the tribunal, these examples show 'how easily it can be indicated in clear and unambiguous terms that every aspect of expropriation shall be under the jurisdiction of an arbitral tribunal.'[21] Again, however, the wording of these ulterior treaties refer to possible disputes which include not only 'expropriations' but also all other kinds of potential disputes under a BIT. [. . .] **[186]** From the previous decisions on this matter, the Tribunal considers that the most thorough and detailed was that [. . .] in *Czech Republic v. European Media Ventures S.A.*[22] The Tribunal believes that this decision, among other things, correctly questions whether it is appropriate to use ulterior treaties (or assumptions guesses of how more accuracy could have been reached) as a method to determine the meaning of the wording of a previous treaty."

[Paras. 173, 174, 176, 177, 179, 180, 181, 182, 184, 185, 186]

I.17.011 BILATERAL INVESTMENT TREATIES
See also: I.17.1; I.17.133

Decision of the Tribunal on the Interpretations of Article 8

"**[187]** In short, having examined the argument and evidence, the decision of this Tribunal needs [to] establish the objective meaning of Article 8 in the overall context of the BIT. As indicated in the Preamble [. . .] the objective of the BIT consisted in increasing the flow of private investment between both Contracting Parties. In this context, the wording of Article 8(2), which indicates that either party shall be entitled to submit any dispute 'to the competent court of the Contracting Party' may be considered unnecessary as it seems that the right of an investor of either country to turn to the courts of the host State had already existed both in China and Peru. If the affected party would be interested only in establishing its rights under the laws of the host State, the wording of the treaty would seem to have been unnecessary. Notwithstanding, the use of bilateral investment treaties has thrived as [. . .] they extend the rights and protections of investors, both in content and form, by the incorporation of protections of international law. **[188]** The Tribunal concludes that to give meaning to all the elements of the article, it must be interpreted that the words 'involving the amount of compensation for expropriation' includes not only the mere determination of the amount but also any other issues normally inherent to an expropriation, including whether the property was actually expropriated in accordance with the BIT [. . .], as well as the determination of the amount of compensation due, if any. [. . .] [A] contrary

21 [116] *RosInvest v. Russia*, paragraph 113.

22 [118] *Czech Republic v. European Media Ventures S. A.*, supra n. 104.

conclusion would invalidate the provision related to ICSID arbitration since according to the final sentence of Article 8(3), turning to the courts of the State accepting the investment would preclude definitely the possibility choosing arbitration under the ICSID Convention. Consequently, [. . .] the Tribunal [. . .] considers that it is competent to decide on the merits of the expropriation claim [. . .]."

[Paras. 187, 188]

E.

I.17.22 MFN-TREATMENT

"**[193]** The effect and scope of MFN clauses in the BITs have become one of the *quaestiones vexatae* [. . .] of investment arbitration. [. . .] **[195]** [. . .] As described by the International Court of Justice, the purpose of an MFN clause is 'to establish and to maintain at all times fundamental equality without discrimination among all of the countries concerned.'[23] In the context of international investment law, the purpose has also been defined as 'providing investors a guarantee against certain forms of discrimination on the part of host States and [establishing] a quality standard of competitive standards among investors in different countries.'[24] **[196]** [. . .] Due to its long history and widespread use, there cannot be doubts in terms of the legitimacy of the MFN mechanism. It is supposed that when a nation includes one or more MFN provisions in a treaty, it does it purposefully in order to recognise that it is according investors of the other signatory State of the treaty in question [. . .] more favourable treatment and protection accorded under future treaties. [. . .]"

[Paras. 193, 195, 196]

I.17.011 BILATERAL INVESTMENT TREATIES
See also: I.17.012

"**[197]** [. . .] The pace of BITs, which had a modest beginning with efforts to provide certain essential protections against expropriations, discrimination and transfer rights of capital and earnings, speeded up dramatically after the ICSID Convention became effective in 1966. [. . .] Currently, the total number of BITs in force is about 3,000. At the beginning, the BITs were instruments designed mainly to promote the flow of capitals from traditionally capital-exporting countries to capital-importing countries. [. . .] [I]n the last two years, about 650 BITs have been signed between developing countries, some of which have now become important capital exporters.[25] The Peru-China BIT is a treaty with such characteristics. [. . .]"

[Para. 197]

I.1.16 TREATY INTERPRETATION
See also: I.1.161; I.1.162; I.1.20; I.17.011; I.17.22; I.17.24

"**[198]** [. . .] [I]t is not possible to decide in general that the MFN clauses are efficacious in some sorts of situations while they are not in others. Each MFN clause is a world in itself, which demands an individualised interpretation to determine its

23 [132] *Rights of Nationals of the U.S.A. in Morocco* (*Fr. v. U. S.*), 1952 ICJ 176, 192 (27 Aug.).

24 [133] See supra n. 127 [. . .].

25 [136] *UNCTAD Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking* (introduction).

scope of application.[26] **[199]** [. . .] We have already determined that the scope of the consent between the Contracting Parties established in Article 8 is sufficient to support the jurisdiction of the Centre [. . .]. However, [. . .] since the issues in question are indeed important, we will also proceed to analyse the scope of Article 3 of the Peru-China BIT. [. . .] **[203]** Article 3(1) of the Peru-China BIT specifically accords investors of both Contracting Parties the benefits of 'fair and equitable treatment' and 'protection' in the territory of the other Contracting Party. Article 3(2) in turn provides that 'the treatment and protection referred to in Paragraph 1 [. . .] shall not be less favourable than that accorded to investments [. . .] of investors of a third State.' **[204]** [. . .] [T]he following issues [arise]: the interpretation rules of the MFN clauses, the interpretation of the clause to determine the intention of the Contracting Parties as reflected by the wording [. . .], if the 'treatment' accorded to foreign investors [. . .] regarding the alleged violation of the fair and equitable treatment principle may be interpreted so as to include the broader provisions on ICSID arbitration established by ulterior BITs. [. . .] **[205]** [. . .] [T]he Tribunal again relies on Article 31 of the Vienna Convention. [. . .] **[206]** [. . .] [B]oth the Vienna Convention and the [. . .] International Court of Justice emphasise that 'what matters is the intention of the parties expressed in the text, which is the best indicator of the most recent common intention of the parties.'[27] In addition, [. . .] the Vienna Convention does not establish a different interpretation rule for the different clauses of the treaties. [. . .] **[207]** Article 3 of the BIT does not expressly include or exclude the settlement of disputes [. . .], however, lists a number of specific exceptions [. . .]. [M]entioning explicitly the specific exceptions, implies that there are other matters that have not been excluded specifically *'expression unius est exclusion alterius*.'[28] [. . .] **[208]** As we examine the terms of this BIT 'in its context' and 'in the light of its object and purpose,' the Tribunal has referred to the Preamble thereof, which makes it clear that the agreed purpose [. . .] was to stimulate investment and increase prosperity. [. . .] **[210]** [. . .] [T]he Tribunal, in accordance with the instructions in Article 32 of the Vienna Convention, has examined the evidence produced by Respondent whereby he intends to prove that the preparatory work and the circumstances surrounding the conclusion of the Peru-China BIT confirm that the purpose of the Contracting Parties was to restrict the scope of the MFN clause rather than extending the scope of the dispute settlement clause. [. . .] **[213]** [. . .] The wording of the MFN clause itself seems to be open to a broader interpretation, which may include access to procedure protections more favourable [. . .] for alleged violations of the fair and equitable treatment principle. **[214]** However, [. . .] Article 8(3) [. . .] directly addresses the scope of disputes that a [. . .] investor may submit to ICSID arbitration. [. . .] **[215]** As it can be noticed by a simple reading, Article 8(3) [. . .] is a rather restrictive provision, which only allows submitting to international arbitration disputes which [. . .] will be referred to as 'expropriation disputes' [. . .] or [. . .] that are expressly accepted by the parties. [. . .] **[216]** The Tribunal considers that the literal wording of Article 8 reflects that the Contracting

26 [139] M. Valenti: "*The Most Favoured Nation Clause in BIT's as a Basis for Jurisdiction in Foreign Investor–Host state Arbitration*" in *Arbitration International*, 24, (2008), p. 448.

27 [144] I. Brownlie, "*Principles of Public International Law*" (6th Edition. 2003), page 602.

28 [146] *National Grid v. Argentina*, UNCITRAL Decision on Competence, 20 June 2006, para. 82 (ref. to EPIL).

Parties reached an agreement on two fundamental issues. First, as indicated above, they agreed to submit expropriation disputes to ICSID arbitration. Secondly, they specifically considered the possibility of submitting other types of disputes to ICSID arbitration and specifically reserved the right to do it only 'if the parties to the dispute so agree.' [. . .]"

[Paras. 198, 199, 203, 204, 205, 206, 207, 208, 210, 213, 214, 215, 216]

II.7.93 CONSENT TO ICSID ARBITRATION
See also: I.17.22

"**[217]** [. . .] In our analysis of *Maffezini* and more recent awards which in general follow its rationale, we [. . .] underscore that applicable dispute settlement clauses therein refer to 'any dispute,' in a broad sense. [. . .] It is logical to infer that, due to the wide range of disputes included in those clauses, it would seem unnecessary for the parties to add any specific wording on the possibility to consent to submit in the future 'other disputes' to ICSID arbitration. [. . .] [A]ll those cases can be distinguished easily from the present case. [. . .] **[218]** [. . .] [T]he Tribunal considers that *Salini* is only indirectly relevant [. . .]: [. . .] as in the above-mentioned cases, Article 9 [. . .] refers to 'any disputes.' [. . .] **[219]** The Tribunal's decision in *Salini* on this key decision had two effects. First, it was determined that the dispute in question constituted, in fact, a contractual dispute between the parties [. . .]. Secondly, the tribunal concluded that as the treaty had established specifically the applicability of another procedure for the settlement of disputes under Article 9(2), that was the procedure to apply. [. . .] These circumstances constitute critical differences from the present case. **[220]** [. . .] [T]he present case is closer to that in *Plama v. Bulgaria*, wherein Claimant had argued that the MFN clause [. . .] of the relevant BIT had to be interpreted so as to allow Claimant first to skip the two preliminary stages agreed for the settlement of disputes, to then replace the arbitral proceeding agreed upon [. . .] with an ICSID arbitration. The Tribunal refused to allow the use of the MFN clause to introduce a completely new dispute settlement procedure instead of 'an international ad hoc arbitration court.' [. . .] Anyhow, following a similar reasoning, this Tribunal concludes that it may not allow interpreting the MFN clause of the BIT so as to override the more specific wording of Article 8(3). [. . .]"

[Paras. 217, 218, 219, 220]

IV.

II.7.97 ICSID DECISION ON JURISDICTION

"**[221]** Based on all the above reasons, the Tribunal hereby unanimously decides as follows: A. That Centre does have jurisdiction and the Tribunal competence to try the expropriation dispute filed by Claimant under the BIT; B. In accordance with Arbitration Rule 41(4), to schedule the subsequent proceedings after hearing both Parties; C. To postpone a decision on costs and expenses to a later time of the proceedings."

[Para. 221]

Saipem S.p.A. v. People's Republic of Bangladesh,
ARB/05/7, Award, 30 June 2009*

Contents**

I.

II.7.911 REQUEST FOR ICSID ARBITRATION

[In this case a dispute arose between Saipem S.p.A., a company incorporated and existing under the laws of Italy, and Bangladesh. Saipem and the Bangladesh Oil Gas and Mineral Corporation (Petrobangla), a State entity, entered into an agreement to build a pipeline. After the project was completed, Petrobangla did not repay the second half of the Retention Money. Thus, Saipem referred the dispute to an ICC Arbitral Tribunal, which in the following denied several procedural requests submitted by Petrobangla. Petrobangla therefore sought the support of the local courts. Despite the Supreme Court of Bangladesh having issued an injunction restraining Saipem from proceeding with the ICC Arbitration, the ICC Arbitral Tribunal decided to resume the proceedings. It rendered an award holding that Petrobangla had breached its contractual obligations to compensate Saipem. In the following, Petrobangla applied to set aside the ICC Award before the High Court Division of the Supreme Court of Bangladesh, which denied this application as it was 'misconceived and incompetent inasmuch as there is no Award in the eye of the law, which can be set aside.']

II.

II.2.51 EFFECTS OF A JUDGMENT/DECISION

A.

"**[90]** The Tribunal considers that it is not bound by previous decisions.[1] At the same time, [. . .] it must pay due consideration to earlier decisions of international tribunals. It believes that [. . .] it has a duty to adopt solutions established in a series of consistent cases. [. . .] [S]ubject to the specifics of a given treaty and of the

* Summaries prepared by Jane Hofbauer, LL.M., Pre-Doctoral Researcher, and Christina Knahr, MPA, Post-Doctoral Researcher, Department of European, International and Comparative Law, University of Vienna, Austria. The full text of the award is available online at <http://ita.law.uvic.ca/documents/SaipemBangladeshAwardJune3009.pdf>. Original: English. Original footnote numbers are indicated in brackets: [].

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1 [10] *See e.g., AES Corporation v. the Argentine Republic*, ICSID Case No. ARB/02/17, Decision on jurisdiction of 13 July 2005, [. . .] [paras.] 30–32 [. . .].

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 [. . .] towards certainty of the rule of law.[2]"

[Para. 90]

B.

I.17.1 EXPROPRIATION
See also: I.17.12

"**[126]** In the present case, the debate has hinged upon the existence of an expropriation in the meaning of the BIT [. . .] whether the disputed actions constitute an expropriation within the meaning of Article 5 of the BIT. This presupposes that 'property' has been 'taken' by the State. **[128]** Turning first to the identification of the property at stake, the Tribunal considers that the allegedly expropriated property is Saipem's residual contractual rights under the investment as crystallised in the ICC Award [. . .]. **[129]** [. . .] [T]he actions of the Bangladeshi courts do not constitute an instance of direct expropriation, but rather of 'measures having similar effects' within the meaning of Article 5(2) of the BIT. Such actions resulted in substantially depriving Saipem of the benefit of the ICC Award. [. . .] Such a ruling is tantamount to a taking of the residual contractual rights arising from the investments as crystallised in the ICC Award [. . .]. **[130]** [. . .] [T]he intervention of the [. . .] courts [. . .] substantially deprived Saipem of its rights and thus qualifies as a taking. **[131]** [. . .] [I]t is generally accepted that an act must be governmental [. . .] to constitute an expropriation [. . .]."

[Paras. 126, 128, 129, 130, 131]

I.17.12 INDIRECT EXPROPRIATION
See also: I.17.1

Sole effects doctrine

"**[133]** [. . .] [A]ccording to the so-called 'sole effects doctrine,' the most significant criterion to determine whether the disputed actions amount to indirect expropriation or are tantamount to expropriation is the impact of the measure. [. . .] [C]ase law considers that there is expropriation if the deprivation is substantial[3] [. . .]. That said, [. . .] the Tribunal agrees with the parties that the substantial deprivation of Saipem's ability to enjoy the benefits of the ICC Award is not sufficient to conclude that the Bangladeshi courts' intervention is tantamount to an expropriation. If this were true, any setting aside of an award could then found a claim for expropriation, even if the setting aside was ordered by the competent state court upon legitimate grounds. **[134]** [. . .] [T]he Tribunal emphasizes that the following analysis should not be understood as a departure from the 'sole effects doctrine.' It is

2 [11] On the precedential value of ICSID decisions see Gabrielle Kaufmann-Kohler, Arbitral Precedent: Dream, Necessity or Excuse?, Freshfields lecture 2006, Arbitration International 2007, pp. 368 *et seq*.

3 [15] See for instance *Compañía del Desarrollo de Santa Elena, S.A.* v. *Republic of Costa Rica,* ICSID Case No. ARB/96/1, Award of 17 February 2000, 5 ICSID Reports 153, at 77–78.

due to the particular circumstances of this dispute [. . .] that the unlawful character [. . .] was a necessary condition."

[Paras. 133, 134]

I.1.4 RELATIONSHIP BETWEEN INTERNATIONAL LAW AND DOMESTIC LAW

The Court's jurisdiction to revoke the authority of the ICC Arbitral Tribunal

"**[138]** [. . .] [I]t is undisputable that Article 2.8 of the ICC Rules required the parties to the arbitration to resort to the ICC for matters of revocation. That said, while binding on the parties, the ICC Rules are not binding upon national courts. Hence, the Tribunal fails to see how the assertion of jurisdiction by the courts of Bangladesh can be deemed illegal on this ground. Indeed, it is generally accepted that national arbitration law can provide for a solution which is different from the ICC Rules. For instance, [. . .] Dutch arbitration law provides that the local courts have mandatory jurisdiction over a challenge and revocation of the authority of arbitrators and no one would think of claiming that the courts of the Netherlands breach international law by asserting jurisdiction over a request to challenge or revoke an ICC arbitrator. **[139]** Another question is whether the intervention of the courts of Bangladesh may be regarded as illegal because the courts did not have jurisdiction under the Bangladeshi Arbitration Act of 1940 (BAA). Article 5 BAA [. . .] reads as follows:

> The authority […] shall not be revocable except by leave of the court, unless a contrary intention is expressed in the arbitration agreement.

[140] [. . .]. Saipem views the authority of the ICC Court as exclusive, while Bangladesh considers it to be concurrent with the jurisdiction of the courts at the seat of the arbitration. **[141]** [. . .] Saipem argued that even if the jurisdiction of the local courts is concurrent with the one of the ICC Court [. . .] 'the[ir] supervisory role is subsidiary [. . .][']. **[142]** The Tribunal is sympathetic towards Saipem's position, in particular in light of the emphasis that the courts of Bangladesh usually put on party autonomy when dealing with arbitration in general and with challenges of arbitrators in particular [. . .]. **[143]** That said, Bangladesh is right that the interpretation of Article 5 BAA is a matter of Bangladeshi law and that Saipem has produced no expert opinion to rebut [. . .] expert evidence [. . .]. **[144]** For these reasons, the Tribunal considers that it is not established that the ICC Court's authority as regards revocation is exclusive under the applicable Bangladeshi law."

[Paras. 138, 139, 140, 141, 142, 143, 144]

I.1.25 ABUSE OF RIGHTS

"**[152]** The analysis of the Revocation Decision shows [. . .] that the judge explicitly held that the ICC Tribunal had 'manifestly committed in disregard to [*sic*] the law and as such the tribunal committed misconduct' [. . .]. **[155]** Having carefully reviewed the procedural orders referred to in the Revocation Decision as the cause of the ICC Tribunal's misconduct, the Tribunal did not find the slightest trace of error or wrongdoing. Under these circumstances, the finding of the Court that the arbitrators 'committed misconduct' lacks any justification. [. . .] Equally unfounded is the [. . .] declaring the revocation of the authority of the ICC Tribunal.

This declaration can only be viewed as a grossly unfair ruling. **[158]** Finally, the Tribunal notes that there is no indication in the record that the ICC Arbitrators were at any time consulted [. . .]. **[159]** [. . .] It is true that the revocation of an arbitrator's authority can legitimately be ordered in case of misconduct. It is further true that in making such order national courts do have substantial discretion. However, they cannot use their jurisdiction to revoke arbitrators for reasons wholly unrelated [. . .][.] [T]he standard for revocation used by the Bangladesh courts and the manner in which the judge applied that standard to the facts indeed constituted an abuse of right. **[160]** It is generally acknowledged in international law that a State exercising a right for a purpose that is different from that for which that right was created commits an abuse of rights.[4] [. . .] **[161]** [. . .] [T]he Tribunal is of the opinion that the Bangladeshi courts exercised their supervisory jurisdiction for an end which was different from that for which it was instituted and thus violated the [. . .] prohibition of abuse of rights."

[Paras. 152, 155, 158, 159, 160, 161]

I.1.4 RELATIONSHIP BETWEEN INTERNATIONAL LAW AND DOMESTIC LAW
See also: I.1.01; I.1.20; I.11.0; 1.14.23

"**[165]** [. . .] [T]he Tribunal understands that Bangladesh does not dispute being bound by the New York Convention. [. . .] [A] breach of the Convention would [. . .] engage Bangladesh's international responsibility. This is clear from Article 27 of the Vienna Convention on the Law of Treaties [. . .]. It also follows from Article 3 of the International Law Commission's Articles on State Responsibility [. . .], pursuant to which '[t]he 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.' Both provisions are declaratory of customary international law. **[166]** Bangladesh is right that Article II(3) of the New York Convention requires courts of member states to refer the parties to arbitration 'when seized of an action in a matter in respect of which the parties have made an [arbitration] agreement.' However, Article II(1) of the New York Convention imposes [. . .] a wider obligation to 'recognize' arbitration agreements. **[167]** Based on that obligation, it is [. . .] generally acknowledged that the issuance of an anti-arbitration injunction can amount to a violation of the principle embedded in Article II [. . .]. One could think that the present case is different, however, from an anti-arbitration injunction [. . .]. Technically, the courts [. . .] did not target the arbitration or the arbitration agreement in itself, but revoked the authority of the arbitrators. However, [. . .] a decision to revoke the arbitrators' authority can amount to a violation of Article II [. . .] whenever it *de facto* 'prevents or immobilizes the arbitration that seeks to implement that [arbitration] agreement' thus completely frustrating if not the wording at least the spirit of the Convention[5] [. . .]."

[Paras. 165, 166, 167]

4 [22] [. . .] Alexandre Kiss, "Abuse of Rights," in Bernhardt (Ed), *Encyclopedia of Public International Law*, Vol 1, at 5.

5 [26] S. M. Schwebel, Anti-Suit Injunctions in International Arbitration: An Overview, [in Anti-Suit Injunctions in International Arbitration (E. Gaillard, ed.), IAI Series on International Arbitration, no. 2, 2004] [. . .], pp. 3–4.

I.8.21 EXHAUSTION OF DOMESTIC REMEDIES
See also: II.7.93

"**[175]** [. . .] Article 26 of the ICSID Convention reverses the position existing under traditional international law in that it presumes that States parties to the Convention waive the requirement of exhaustion of local remedies as a condition of consent to international adjudication. Yet, States are entitled to reintroduce such requirement when ratifying the ICSID Convention [. . .]. **[176]** [. . .] [T]he question that arises is whether the requirement of exhaustion of local remedies which applies as a matter of substance and not procedure in the context of claims for denial of justice, may be applicable here by analogy. In other words, is exhaustion of remedies a substantive requirement of a valid claim for expropriation by actions of the judiciary? If the answer is affirmative, then the further question arises whether the conditions for exhaustion of local remedies are fulfilled [. . .]. Because they deal with a substantive component of a treaty breach, these questions must be addressed as part of the merits of the dispute. **[179]** [. . .] [I]t is Saipem's primary [. . .] argument that exhaustion of local remedies does not apply at all in investor-State arbitration. Referring to leading commentators, Saipem argues that this requirement is 'inconsistent with the creation of a right to arbitration by investors directly,' even in cases of denial of justice [. . .][6]. **[180]** [. . .] Saipem contends that 'as a matter of principle, exhaustion of local remedies does not apply in expropriation law' [. . .]. **[181]** The Tribunal agrees in substance with Saipem's analysis. Saipem's case is one of expropriation [. . .]. While the Tribunal concurs [. . .] that expropriation by the courts presupposes that the courts' intervention was illegal, this does not mean that expropriation by a court necessarily presupposes a denial of justice. Accordingly, it tends to consider that exhaustion of local remedies does not constitute a substantive requirement of a finding of expropriation by a court. **[182]** [. . .] The requirement of exhaustion of local remedies imposes on a party to resort only to such remedies as are effective. Parties are not held to 'improbable remedies'[7]. **[183]** [. . .] Saipem [. . .] can [. . .] be held to have exerted reasonable local remedies, having spent considerable time and money seeking to obtain redress without success although the allegation of misconduct was clearly ill-founded [. . .]."

[Paras. 175, 176, 179, 180, 181, 182, 183]

C.

I.17.133 COMPENSATION
See also: I.17.02

"**[201]** Article 5(1)(3) of the BIT [. . .] is not applicable [. . .] in the present instance because it sets out the measure of compensation for lawful expropriation which this one is not. Hence, the Tribunal will resort to the relevant principles of customary international law and in particular to the principle set out [. . .] in the *Chorzów Factory* case:

6 [28] [. . .] McLachlan/Shore/Weiniger, *International Investment Arbitration*, Oxford University Press, 2007, pp. 232–233 [. . .].

7 [29] *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award of 18 August 2008, paras. 399–400 quoting Jan Paulsson, Denial of Justice in International Law, Cambridge, 2006, pp.153–154.

> The essential principle contained in the actual notion of an illegal act […] is that reparation must […] 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[8].

[202] [. . .] [T]he Tribunal considers that [. . .] the amount awarded by the ICC Award constitutes the best evaluation of the compensation due under the *Chorzów Factory* principle. **[204]** [. . .] [T]he Tribunal considers that the expropriation of the right to arbitrate [. . .] under the ICC Arbitration Rules corresponds to the value of the award rendered without the undue intervention of the court of Bangladesh. **[205]** On the other hand, the Tribunal considers that the amounts claimed [. . .] by Saipem in relation to the intervention of the Bangladeshi courts and other related costs [. . .] are not part of Saipem's initial investment [. . .]."

[Paras. 201, 202, 204, 205]

III.

II.7.98 ICSID AWARD

"**[216]** On the basis of the foregoing reasons, the Tribunal renders the following award: 1. The Respondent shall pay to the Claimant the sums of USD 5,883,770.80, and USD 265,000.00 and €110,995.92 plus interest at a rate of 3,375% per annum from 7 June 1993; 2. The recommendation issued by the Tribunal on 21 March 2007 in connection with the Warranty Bond No. 86/USD/12/92 shall cease to be in effect as of the notification of this Award. 3. The costs of the proceedings, including the fees and expenses of the Tribunal and the fees of ICSID shall be borne by the parties in equal shares; 4. Each party shall bear the expenses it incurred in connection with the arbitration; 5. All other requests for relief are dismissed."

[Para. 216]

8 [34] *Chórzow Factory case (Merits), Germany v. Poland*, Judgment of the PCIJ of 13 September 1928, PCIJ Series A. Vol. 17 at 47 [. . .].

Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş v. Islamic Republic of Pakistan*, ARB/03/29, Award, 27 August 2009

Contents**

I.

II.7.911 REQUEST FOR ICSID ARBITRATION
See also: I.17.011

[In this case a dispute arose between Bayindir, a company incorporated under the laws of the Republic of Turkey, and Pakistan. Bayindir had entered into an agreement with the National Highway Authority ('NHA'), a public corporation, which planned the construction of a six-lane motorway and ancillary works known as the 'Pakistan Islamabad-Peshawar Motorway' (the 'M-1 Project'), for the execution of the project. After NHA informed Bayindir that liquidated damages would be imposed on Bayindir for late completion of the two Priority Sections with effect from 20 April 2001, Bayindir notified NHA that it had been unable to complete the Priority Sections 'due to reasons beyond [its] control.' Subsequently, Bayindir submitted a Request for Arbitration to ICSID.]

II.

I.17.24 FAIR AND EQUITABLE TREATMENT
See also: I.1.161; I.17.011; I.17.22; II.0.6

A.

Importation of FET Obligation by Operation of MFN Clause

"**[154]** The [. . .] preamble reads as follows: 'Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources.'[. . .]

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* Summaries prepared by Jane Hofbauer, LL.M., Pre-Doctoral Researcher, and Christina Knahr, MPA, Post-Doctoral Researcher, Department of European, International and Comparative Law, University of Vienna, Austria. The full text of the award is available online at <http://ita.law.uvic.ca/documents/Bayandiraward.pdf>. Original: English. Original footnote numbers are indicated in brackets: [].

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[155] In the Tribunal's view, such language [. . .] does not establish any operative obligation. [. . .] [T]he reference to FET in the preamble together with the absence of a FET clause in the Treaty might suggest that Turkey and Pakistan intended not to include an FET obligation in the Treaty. The Tribunal is, however, not persuaded that this suggestion rules out the possibility of importing an FET obligation through the MFN clause expressly included in the Treaty. The fact that the States parties to the Treaty clearly contemplated the importance of the FET rather suggests the contrary. Indeed, even though it does not establish an operative obligation, the preamble is relevant for the interpretation of the MFN clause in its context and in the light of the Treaty's object and purpose pursuant to Article 31(1) of the VCLT. **[157]** The ordinary meaning of the words used in Article II(2) [of the Treaty] together with the limitations provided in Article II(4) show that the parties to the Treaty did not intend to exclude the importation of a more favourable substantive standard of treatment accorded to investors of third countries. This reading is supported by the preamble's insistence on FET. **[160]** [. . .] The issue is therefore not whether the Claimant can invoke an FET obligation, but rather which one."

[Paras. 154, 155, 157, 160]

I.17.22 MFN-TREATMENT
See also: I.1.01; I.17.011

Identification of the FET Obligation

"**[164]** [. . .] [T]he Tribunal notes that the basis for importing an FET obligation into the Treaty is provided by its MFN clause, from which it follows that the applicable FET standard is a self-standing treaty obligation as opposed to the customary international minimum standard [. . .][.] [W]hether international customary law and the observations of other tribunals in applying the minimum standard may be relevant here will depend upon the terms of the applicable FET standard. **[166]** A comparison between Article II(2) of the Pakistan-UK BIT and Article 4 of the Pakistan-Switzerland BIT suggests that the FET protection offered by these two provisions is very similar [. . .]. **[167]** [. . .] [B]y virtue both of the time of its conclusion and its close similarity to Article II(2) of the Pakistan-UK BIT, Article 4 of the Pakistan-Switzerland BIT can be used as the applicable FET standard in the present case [. . .]."

[Paras. 164, 166, 167]

II.0.6 DUE PROCESS

Content of the FET Standard

"**[178]** The Tribunal [. . .] identifies the different factors which emerge from decisions of investment tribunals as forming part of the FET standard. These comprise the obligation to act transparently and grant due process,[1] to refrain from taking

1 [64] *See Metalclad Corporation v. United Mexican States* (ICSID Case No. ARB(AF)/97/1) [. . .], Award of 30 August 2000, [. . .] [para.] 76.

arbitrary or discriminatory measures,[2] from exercising coercion[3] or from frustrating the investor's reasonable expectations with respect to the legal framework affecting the investment.[4] **[179]** The Tribunal also agrees [. . .] that the *Tecmed* case lays out a broad conception of the FET standard. Yet, [. . .] the decision of the tribunal in *Thunderbird* [. . .] speaks of the *Tecmed* decision as an 'authoritative precedent' [. . .][.] [R]elying in part upon *Tecmed*, the tribunal in *Duke Energy v. Ecuador* stressed that the investor's expectations are an important element of FET, while at the same time emphasizing their limitations: '[. . .] To be protected, the investor's expectations must be legitimate and reasonable at the time when the investor makes the investment. The 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.'[5]"

[Paras. 178, 179]

I.17.3 CONTRACT VIOLATION

Were Bayindir's reasonable expectations frustrated?

"**[190]** [. . .] Several awards have stressed that the expectations to be taken into account are those existing at the time when the investor made the decision to invest.[6] **[191]** [. . .] [T]he expectations to be taken into account are those of the Claimant at the time of the revival of the Contract in July 1997. [. . .] **[192]** A second question concerns the circumstances that the Tribunal must take into account in analyzing the reasonableness or legitimacy of Bayindir's expectations at the time of the revival of the Contract. In doing so, it finds guidance in prior decisions including *Saluka*, [. . .] *Generation Ukraine* [. . .] and *Duke Energy v. Ecuador* [. . .] which relied on 'all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State.'[7] **[193]** [. . .] [T]he Tribunal is of the view that the Claimant could not reasonably have ignored the volatility of the political conditions prevailing in Pakistan at the time it agreed to the revival of the Contract [. . .]. **[197]** [. . .] Moreover, in the present context of a contractual relationship between Bayindir and the NHA [. . .] the expectations of the Claimant are largely shaped by

2 [65] Several tribunals have linked lack of arbitrariness and non-discrimination to the FET standard. See *inter alia Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3) [. . .], Award of 30 April 2004, [. . .] [para.] 98 [. . .].

3 [66] [. . .] [*Saluka Investments BV (The Netherlands) v. The Czech Republic* (hereafter *Saluka v. Czech Republic*), Ad Hoc Arbitration (UNCITRAL Rules), Partial Award of March 17, 2006, para.] 308.

4 [67] [. . .] [*Duke Energy Electroquil Partners and Electroquil SA v. Republic of Ecuador*, (ICSID Case No. ARB/04/19) (hereafter *Duke Energy v. Ecuador*), Award of 18 August 2008, para.] 340.

5 [70] *Duke Energy v. Ecuador*, [. . .] [paras.] 339–340.

6 [80] See *Duke Energy v. Ecuador*, [. . .] [para.] 340, referring to *Occidental Exploration and Production Company v. The Republic of Ecuador* (hereafter *Occidental v. Ecuador*), LCIA Case No. UN3467, Award of 1 July 2004, [. . .] [para.] 185 [. . .] and [. . .] [*Técnicas Medioambientales Tecmed, SA v. United Mexican States* (ICSID Case No. ARB(AF)/00/2) (hereafter *Tecmed v. Mexico*), Award of 29 May 2003, para.] 154.

7 [83] *Duke Energy v. Ecuador*, [. . .] [para.] 340.

the contractual relationship [. . .]. In this connection, there was no basis for the Claimant to expect that NHA would not avail itself of its contractual rights. Although the Tribunal has no jurisdiction to assess whether there has been a breach of the Contract under the Contract's proper law, the Tribunal must nevertheless take into account the terms of the Contract as a factual element reflecting the expectations of the Claimant. [. . .] **[199]** Therefore, the Tribunal is of the opinion that Bayindir's claim relating to the frustration of its legitimate expectations cannot be sustained."

[Paras. 190, 191, 192, 193, 197, 199]

II.0.6 DUE PROCESS
See also: I.17.24

Was Bayindir deprived of due process and/or procedural fairness?

"**[344]** [. . .] [A] denial of due process or procedural fairness may amount to a breach of the FET standard.[8] This does not mean, however, that such guarantees are available in any given situation. As noted in *Waste Management*, [. . .] whilst the fair and equitable treatment standard may be infringed by conduct amounting to 'a complete lack of transparency and candour in an administrative process,' such standard largely depends upon and must be adapted to the circumstances of each specific case. The decisions which address this issue, generally do so in the context of judicial or administrative proceedings. [. . .] As for *Middle East Cement*, the procedural fairness requirement was applied to seizure and auction procedures, which can also be deemed administrative in nature. **[345]** The nature of the present issue is different. It deals with the internal decisions of NHA and the government regarding the management of the Contract. Public administrations are regularly involved in managing different types of contracts and act [. . .] in a manner which is not fundamentally different from that in which a private corporation handles its contractual relationships. Such internal processes may include decisions required to perform contractual obligations, such as planning and releasing budgetary allocations or carrying out performance reviews. The Tribunal is aware that, in certain respects, public and private contracting are not subject to the same requirements. A typical example is the tendering processes related to public procurement contracts. **[346]** This said, the Tribunal considers that [. . .] the decision of NHA, in consultation with the government, to resort to certain contractual remedies and the related preparatory discussions and assessments were not as such subject to procedural requirements other than those contractually agreed. In this connection, the Tribunal has concluded [. . .] that the main contractual mechanisms which eventually led to the expulsion of Bayindir [. . .] had not been used in a manner that amounts to a breach of the Treaty [. . .]. **[347]** More importantly, even assuming for the sake of the analysis that due process and procedural fairness govern the internal processes underlying the exercise of contractual rights, the record shows that Bayindir was indeed given the opportunity to present its position on

8 [94] See [. . .] *S.D. Myers, Inc. v. Government of Canada*, NAFTA Arbitration (UNCITRAL Rules), Partial Award of 13 November 2000 (hereafter *S.D. Myers v. Canada*); [. . .] [*Mondev International Ltd. v. United States of America (*ICSID Case No ARB(AF)/99/2), Award of 11 October 2002]; [. . .] [*ADF Group Inc. v. United States of America* (ICSID Case No. ARB(AF)/00/1), Award of 9 January 2003] [. . .].

numerous occasions throughout the relevant period [. . .]. **[348]** [. . .] [T]he Tribunal concludes that Bayindir was not denied due process or procedural fairness primarily because these requirements did not apply in the present context. Secondarily, assuming–*quod non*–that they applied, the record shows that Bayindir was in fact afforded a number of opportunities to present its position during the relevant time period."

[Paras. 344, 345, 346, 347, 348]

B.

I.17.21 NATIONAL TREATMENT
See also: I.17.22; II.1.0

Applicable Standards

"**[387]** Article II(2) [. . .] covers both national treatment and MFN obligations. Its purpose is to provide a level playing field between foreign and local investors as well as between foreign investors from different countries. [. . .] **[388]** [. . .] [T]he Tribunal considers that the scope of the national treatment and MFN clauses in Article II(2) is not limited to regulatory treatment.[9] It may also apply to the manner in which a State concludes an investment contract and/or exercises its rights thereunder. [. . .] **[389]** To decide whether Pakistan has breached Article II(2), the Tribunal must first assess whether Bayindir was in a 'similar situation' to that of other investors. The inquiry into the similar situation is fact specific.[10] In line with *Occidental v. Ecuador*,[11] *Methanex*,[12] and *Thunderbird*,[13] the Tribunal considers that the national treatment clause in Article II(2) must be interpreted in an autonomous manner independently from trade law considerations. **[390]** If the requirement of a similar situation is met, the Tribunal must further inquire whether Bayindir was granted less favourable treatment than other investors. This raises the question whether the test is subjective or objective, i.e., whether an intent to discriminate is required or whether a showing of discrimination of an investor who happens to be a foreigner is sufficient. The Tribunal considers that the second solution is the correct one. This arises from the wording of Article II(2) [. . .][.]"

[Paras. 387, 388, 389, 390]

I.17.21 NATIONAL TREATMENT

National Treatment

"**[400]** [. . .] [T]he Tribunal must start by determining whether there is a relevant comparator to be used for the assessment of NHA's treatment of Bayindir and

9 [103] See Decision on Jurisdiction, [. . .] [paras.] 205–206, 213.

10 [105] [. . .] [*Pope & Talbot Inc v. The Government of Canada* NAFTA Arbitration (UNCITRAL Rules), Award of 10 April 2001, para. 75; see also *S.D. Myers v. Canada*, para. 244].

11 [106] *Occidental v. Ecuador*, [. . .] [paras.] 174–176.

12 [107] *Methanex Corporation v. United States of America*, NAFTA Arbitration (UNCITRAL Rules), Award of 3 August 2005, [. . .] [paras.] 35, 37.

13 [108] [. . .] [*International Thunderbird Gaming Corporation v. United Mexican States*, NAFTA Arbitration (UNCITRAL Rules), Award of 26 January 2006, paras.] 176–178.

PMC-JV [Pakistani Motorway Contractors Joint Venture] [. . .]. **[402]** Turning to the terms and circumstances of the two contractual relationships, Pakistan raises a number of differences especially in the financial terms; the constitution of the two entities; their level of experience and expertise; the scope of work; and the commitment of the two entities to progressing with the works after receiving a sub-clause 46.1 notice. In contrast, Bayindir focuses on the identity of business sector and project. [. . .] [T]he project and business sectors are the same. This may be relevant in a trade law context. Under a free-standing test, however, [. . .] that degree of identity does not suffice to displace the differences between the two contractual relationships. **[411]** As a result, the Tribunal comes to the conclusion that the two contractual relationships are too different for Bayindir and the local contractors to be deemed in 'similar situations.' Consequently, the first requirement for a breach of the national treatment clause embodied in Article II(2) of the Treaty is not met. It thus makes no sense to pursue the analysis of the other requirements."

[Paras. 400, 402, 411]

I.17.22 MFN-TREATMENT

MFN

"**[416]** The Tribunal must [. . .] start assessing the similarity of the situations to be compared. As with national treatment, such similarity must be examined at the level of the contractual terms and circumstances. **[419]** The Tribunal is aware that it was not easy for the Claimant to discharge its burden of proof on this claim. A shift of such burden, if at all permissible, would, however, have required a higher degree of substantiation on the part of the Claimant, at least by reference to one potential comparator. **[420]** Consequently, the Tribunal finds that one of the necessary requirements of a breach of Article II(2), the similarity of the situations, is not met, which rules out a breach of the MFN standard."

[Paras. 416, 419, 420]

C.

I.17.1 EXPROPRIATION
See also: I.17.3

Applicable Standard

"**[441]** [. . .] Article III(1) adopts a broad concept of expropriation, potentially applicable not only to tangible property but also to contractual and other rights, even outside the context of a nationalization. **[442]** [. . .] [T]he assets [. . .], namely [. . .] contractual rights, plant and equipment, and the Mobilisation Advance Guarantees, are within the scope of Article III(1) of the Treaty, and may potentially be subject to an interference amounting to expropriation. **[443]** [. . .] [T]he next step is to identify the allegedly expropriatory conduct. [. . .] [E]xpropriation may arise out of a simple interference by the host State in the investor's rights with the effect of depriving the investor of its investment. [. . .] A critical issue in this regard concerns the intensity or the effect of such conduct with respect to the investor's property.

The Tribunal concurs with *Tecmed*,[14] *CMS*,[15] and *Telenor*,[16] that an expropriation might occur even if the title to the property is not affected, depending on the level of deprivation of the owner[17] [. . .][.] **[444]** The third step in this inquiry consists in examining whether the alleged interference with the property or the rights of the investor has been made in the State's exercise of its sovereign powers. As noted for instance in *Impregilo v. Pakistan* [. . .]: '[O]nly measures taken by Pakistan in the exercise of its sovereign power (*'puissance publique'),* and not decisions taken in the implementation or performance of the Contracts, may be considered as measures having an effect equivalent to expropriation.'[18] **[445]** [. . .] Claimant has suggested that a breach of the Contract as a result of governmental directives would suffice for a finding of expropriation. The Tribunal disagrees. First, not every contract breach deprives an investor of the substance of its investment. Second, even where it does and the breach stems from a governmental directive, it would not necessarily follow that the contractual breach is the result of a sovereign act, as a directive of the State may be given in the framework of the contract. **[446]** The fourth step [. . .] is the analysis of the conditions specified in Article III(1), namely (i) the lack of a public purpose, (ii) discrimination, (iii) the absence of payment of prompt, adequate and effective compensation, and (iv) a breach of 'due process of law and the general principles of treatment provided for in Article II of this Agreement.'"

[Paras. 441, 442, 443, 444, 445, 446]

I.17.3 CONTRACT VIOLATION
See also: I.17.1

Contractual Rights

"**[456]** [. . .] [T]he [. . .] assets allegedly subject to expropriation are Bayindir's rights under the Contract [. . .]. Such rights have an economic value and can potentially be expropriated. **[457]** [. . .] [T]he measures through which Pakistan allegedly deprived Bayindir's contractual rights of their economic value are in essence the notice of expulsion and the taking over of the site. **[458]** [. . .] [T]he Tribunal must review whether Pakistan has interfered with Bayindir's contractual rights to an extent amounting to a deprivation of the economic substance of such rights. In this regard, the fact that Bayindir was expelled is obviously not enough. [. . .] [I]f the expulsion was lawful under the Contract, then there would be no taking of or interference with Bayindir's rights. Moreover, even if the expulsion was conducted

14 [142] *Tecmed v. Mexico*, [. . .] [para.] 116.

15 [139] [. . .] [*CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Award of 12 May 2005, para.] 260–264.

16 [140] *Telenor Mobile Communications AS v. Republic of Hungary* (ICSID Case No. ARB/04/15), Award of 13 September 2006.

17 [141] *Starrett Housing Corp. v. The Government of the Islamic Republic of Iran*, Interlocutory Award of 19 December 1983, 4 Iran-US CTR 122; *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, Award of [29] June 1984, 6 Iran-US CTR 219.

18 [145] [. . .] [*Impregilo SpA v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3), Decision on Jurisdiction of 22 April 2005, para.] 281.

in breach of the Contract, that would not as such be enough for a finding of expropriation under the Treaty. Bayindir submits that its expulsion was contrary to the terms of the Contract as well as in breach of the Treaty. While not a contract judge, the Tribunal must review those facts related to contract interpretation and performance and here particularly related to the exercise of certain contractual remedies to the extent necessary to rule on the Treaty claim. [. . .] [T]he Tribunal has already discussed [. . .] that there is a reasonable interpretation of the Contract according to which the mechanisms leading to Bayindir's expulsion as well as those regarding measures subsequent to the expulsion were used in conformity with the Contract. On the basis of such considerations, the Tribunal concluded that there was no breach of the applicable FET standard. For the same reasons, the Tribunal cannot accept that there is a breach of the treaty provision on expropriation. **[459]** The critical element for a finding of expropriation is the economic effect of the measure rather than the intent underlying it. [. . .] The Tribunal has in any event already found that the record does not show an intent on the part of Pakistan to permanently deprive Bayindir of its residual contractual rights [. . .]. **[461]** In addition, even if the expulsion violated the Contract and deprived Bayindir of the economic substance of its contract rights, a finding of expropriation would only be founded if the acts at issue were sovereign acts. The evidence [. . .] shows that Pakistan can reasonably justify the expulsion by Bayindir's poor performance [. . .] with the consequence that the expulsion must be seen in the framework of the contractual relationship, not as an exercise of sovereign power. [. . .] [G]overnmental involvement is not necessarily equivalent to the exercise of sovereign power when it is grounded on legitimate contractual considerations."

[Paras. 456, 457, 458, 459, 461]

I.17.1 EXPROPRIATION

Machinery, plant, equipment, material, spare parts and office inventory

"**[469]** The Tribunal's reasoning on this head of the expropriation claim is in line with [. . .] the claim for the expropriation of the contract rights. It is true that this claim deals with tangible [. . .] property and that the controversial measures consist in the seizure and confiscation [. . .]. These differences have no bearing [. . .] on the assessment of the existence of an expropriation."

[Para. 469]

III.

II.7.98 ICSID AWARD

"For the reasons set forth above, the Tribunal issues the following Award: a. The Respondent has not breached the fair and equitable treatment standard applicable through the operation of Article 11(2) of the Treaty; b. The Respondent has not breached the national treatment and most favoured nation standards contained in Article 11(2) of the Treaty; c. The Respondent has not expropriated the Claimant in breach of Article 111(1) of the Treaty; d. The measures recommended in PO#1 and PO#11 shall no longer be in effect as of the date of the notification of the present Award; e. The Parties shall bear the costs of the arbitration in equal shares; f. Each Party shall bear its own legal and other costs; g. All other claims are dismissed."

EDF (Services) Limited v. Romania, ARB/05/13, Award, 8 October 2009*

Contents**

I.

II.7.911 REQUEST FOR ICSID ARBITRATION

[In this case a dispute arose between EDF (Services) Limited and Romania. EDF's investment in Romania consisted of its participation in two joint venture companies with Romanian entities owned by the Romanian Government, E.D.F. ASRO S.R.L. ('ASRO') and SKY SERVICES (ROMANIA) S.R.L. ('SKY'). After Romania passed Government Emergency Ordinance No. 104 ('GEO 104'), regulating duty-free business within airports, ASRO's duty-free operations at different airports were either closed or discontinued. SKY had provided in-flight duty free services on board of TAROM's aircraft. After the entry into force of GEO 104, SKY and TAROM obtained new duty-free licenses. Subsequently, TAROM terminated the SKY's services agreement, refused to grant SKY further access to its aircraft and took over for itself the in-flight duty-free business. Claimant contends that Romania violated the BIT between Great Britain and Northern Ireland and Romania.]

II.

I.11.0131 IMPUTABILITY TO THE STATE OF THE CONDUCT OF ITS ORGANS

A.

"**[187]** [. . .] [T]he [. . .] ILC Articles [. . .] set out respectively structural, functional and control tests for determining whether an act or conduct by an entity should be attributed to the State. **[188]** [Concerning] Article 4 [. . .], [i]n the 2002 Commentary of the ILC Articles it is specified:

> '(1) Paragraph 1 […] states the first principle of attribution for the purpose of State responsibility in international law – that the conduct of an organ of the State is attributable

* Summaries prepared by Jane Hofbauer, LL.M., Pre-Doctoral Researcher, and Christina Knahr, MPA, Post-Doctoral Researcher, Department of European, International and Comparative Law, University of Vienna, Austria. The full text of the award is available online at <http://ita.law.uvic.ca/documents/EDFAwardandDissent.pdf>. Original: English. Original footnote numbers are indicated in brackets: [].

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> to that State. The reference to a 'State organ' covers all the individual or collective entities which make up the organization of the State and act on its behalf. […].'[1]

As stated by ILC Article 4 (2), the State's internal law determines whether an entity is a State organ. As mentioned by [. . .] Greenwood, 'once it is established that an entity is an organ of the State, the presumption is that all of its acts are attributable to the State unless the contrary is proven.' [. . .] **[189]** [. . .] Claimant characterizes AIBO [Bucarest Aeroport Otopeni] and TAROM as entities 'acting as an agent of the Romanian state in their conduct with EDF' [. . .], a position that points to the functional test of attribution within the meaning of ILC Article 5 rather than to the structural test under ILC Article 4. However, [. . .] Claimant relies on the attribution of AIBO's and TAROM's conduct [. . .] 'under the structural and control test' [. . .], therefore referring again also to ILC Article 4 (the structural test). **[190]** In the Tribunal's view, neither AIBO nor TAROM, both possessing legal personality under Romanian law separate and distinct from that of the State, may be considered as a State organ. [. . .]"

[Paras. 187, 188, 189, 190]

I.11.0132 IMPUTABILITY TO THE STATE OF ACTS OF INDIVIDUALS OR GROUPS

Article 5

"**[191]** [. . .] [I]n order for an act to be attributed to the State under ILC Article 5, two cumulative conditions must be fulfilled: - first, the act must be performed by an entity empowered by the internal law of the State to exercise elements of governmental authority; - second, the act in question must be performed by the entity in the exercise of the delegated governmental authority. **[193]** The test to determine when an entity falls within the scope of application of ILC Article 5 is a functional one [. . .][.][2] Therefore, in order for an act of a legally independent entity to be attributed to the State, it must be shown that the act in question was an authorized exercise of specified elements of governmental authority. As stated by the ILC Commentary to Article 5, 'It is accordingly a narrow category.'[3] **[194]** [. . .] In the Tribunal's view, neither the auctions organised by AIBO nor the exercise by AIBO and TAROM of their rights as shareholders of ASRO and SKY and under the ASRO Contract and the SKY Contract were exercise of delegated governmental authority. **[195]** [. . .] [T]here is a distinction to be made between the legal regime of public property at the airport (such as runways, embarking or disembarking platforms or taxiways), which is held and managed by AIBO under the terms of a concession with the Ministry of Transportation as public assets regulated by public law, and the legal regime of AIBO's private property which is a part of its own patrimony (such as all retail and other commercial spaces at the airport). Regarding the latter, the evidence before the Tribunal shows that AIBO takes decisions within its own corporate bodies, as any other commercial company operating in Romania. [. . .] This finding is, however, subject to the Tribunal's determination as to ILC Article 8 [. . .]. **[196]** The auctions of commercial spaces at the Otopeni Airport

1 [8] [J. Crawford,] *The International Law Commission Articles on State Responsibility, Introduction, Text and Commentaries*, 2002 (hereinafter "Crawford"), p. 94.

2 [11] Crawford, p. 100, para. 3 [. . .].

3 [12] Crawford, p. 102.

[. . .] fall within the category of the legal regime of AIBO's private property. They were [. . .] acts aiming at the better exploitation by AIBO of commercial spaces, which were part of its private property, and the conduct of its own duty-free business, subject only to its corporate bodies' determinations. **[197]** Likewise, AIBO's and TAROM's contractual relations with EDF under the ASRO Contract and the SKY Contract were [. . .] entered into and performed in pursuit of the corporate objects of a commercial company with the view to making profits, as any other commercial company operating in Romania. **[198]** [. . .] These acts and conduct do not fall within ILC Article 5 and cannot therefore be attributed to Romania under the functional test [. . .]."

[Paras. 191, 193, 194, 195, 196, 197, 198]

I.11.0 STATE RESPONSIBILITY
See also: I.11.0132

Article 8

"**[199]** [Concerning] Article 8 of the ILC Articles [. . .] **[200]** [t]he ILC Commentary makes clear that such attribution is exceptional. In order to attribute the act of a person or group of persons to a State, Article 8 stipulates that the person or group of persons must be acting on the instruction of, or under the direction or control of, the State in carrying out the conduct the attribution of which is in question. [. . .][4] **[201]** The evidence [. . .] indicates that the Ministry of Transportation issued instructions and directions to AIBO and TAROM regarding the conduct these Companies should adopt in the exercise of their rights as shareholders of ASRO. [. . .] [T]he evidence [. . .] indicates that the Romanian State was using its ownership interest in or control of corporations [. . .] specifically 'in order to achieve a particular result' within the meaning of the ILC Commentary above. [. . .] **[203]** [. . .] Respondent maintains that none of the mandates can be understood, either *de jure* or *de facto*, as an order from the Ministry to the Company. [. . .] **[204]** The Tribunal does not share Respondent's interpretation of the role of the mandates issued by the Ministry of Transportation [. . .]. Not *de jure* since, as indicated in [. . .] Order No. 597 [. . .] the mandate is granted [. . .]:

> 'to support the standpoint of the Ministry of Public Works, Transportation and Housing in the General Meetings of Shareholders, Boards of Directors, respectively managing committees at the units under the authority, respectively subordinated to the Ministry . . . .'
> […]

[205] In the Tribunal's view, this is not the kind of language that leads to an understanding that the corporate bodies of companies [. . .] had the initiative to originate, in full independence, proposals to the Ministry [. . .], much less that such bodies were free to decide other than as provided by the mandates. [. . .] **[206]** That Respondent's interpretation cannot be shared also *de facto* is shown by the decision taken by AIBO and TAROM regarding the extension of the ASRO Contract and ASRO's duration. The favourable position [. . .] in that regard by the Board of Directors [. . .] had to await a mandate from the Ministry of Transportation in order to be approved by AIBO's General Assembly [. . .]. No such mandate was ever issued by the new Minister of Transportation [. . .]. **[209]** [. . .] [T]he Tribunal

4 [14] Crawford, pp. 112–113, footnotes omitted, italics added.

concludes that the conduct of AIBO and TAROM in the performance of the ASRO [. . .] and the SKY Contract as shareholders of ASRO and SKY was under the direction and control of the State within the meaning of ILC Article 8. Further, the conduct was carried out in order to achieve the particular result of bringing to an end the contractual arrangements with EDF and ASRO and to institute instead a system of auctions for commercial spaces at the Otopeni Airport. **[210]** In Respondent's [. . .] Submission, the argument is made that the phrase 'in order to achieve a particular result' in the Commentary to Article 8 means an action 'plainly outside of the company's interests . . . .' [. . .]. Support for this position is said to be found in *Foremost Tehran v. Iran*, an award dated April 10, 1986, of the Iran-U.S. Claims Tribunal. But [. . .] *Foremost Tehran* says that decisions may be attributable to the State shareholder of a company where the adopted measures 'went beyond the legitimate exercise by the majority of the shareholders. . .or by its duly elected directors, of their right to manage the company's affairs in what they *perceived* to be its best interests.' The test [. . .] is subjective, not objective, under the 'particular result' formulation of the Commentary to Article 8, if for no other reason than neither this Tribunal nor any tribunal is generally in a position to make a judgment as to what is objectively in the best interests of a company for purposes of State attribution. **[211]** The question of attribution to the State then becomes what the management of AIBO and TAROM perceived to be in the Companies' interest just before the change in government policy regarding the extension of ASRO's term and the ASRO Contract, and the change to a system of auctions. [. . .] **[212]** [. . .] AIBO and TAROM [. . .] changed their position to coincide with the new policy of the Ministry. **[213]** In the Tribunal's view, such conduct, including the subsequent bringing to an end of the contract arrangements and the institution of a system of auctions in their place, was clearly designed to achieve a particular result within the meaning of the Commentary to Article 8 of the ILC Articles [. . .]."

[Paras. 199, 200, 201, 203, 204, 205, 206, 209, 210, 211, 212, 213]

B.

I.17.24 FAIR AND EQUITABLE TREATMENT

"**[215]** [. . .] As in all other investment treaties, there is no definition in the BIT of [. . .] [FET], nor is there a general consensus on the meaning of this phrase by ICSID tribunals. **[216]** The Tribunal shares the view [. . .] that one of the major components of the FET standard is the parties' legitimate and reasonable expectations with respect to the investment they have made. [. . .] This concept was stated [. . .] in *Waste Management v. Mexico* [. . .]:

> 'In applying this standard […] it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.'[5]

[217] The idea that legitimate expectations, and therefore FET, imply the stability of the legal and business framework, may not be correct if stated in an overly-broad and unqualified formulation. The FET might then mean the virtual freezing of the legal regulation of economic activities, in contrast with the State's normal regulatory power and the evolutionary character of economic life. Except where specific

5 [28] *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB/AF/003 (NAFTA), Final Award, April 30, 2004, para. 98.

promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectation would be neither legitimate nor reasonable. **[218]** Further, [. . .] the FET obligation cannot serve the same purpose as stabilization clauses specifically granted to foreign investors. As stated recently [. . .] in *Parkerings-Companiet AS v. Lithuania*:

> 'It is each State's undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a stabilization clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment.'[6]

The same idea was put forward [. . .] in the Argentina case, *Continental*, stating that:

> '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.'[7]

[219] Legitimate expectations cannot be solely the subjective expectations of the investor. They must be examined as the expectations at the time the investment is made, as they 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. As stated [. . .] in the *Saluka* case:

> 'A foreign investor protected by the Treaty may in any case properly expect that the [Government] implements its policies bona fide by conduct that is […], reasonably justifiable by public policies and that such conduct does not violate the requirements of consistency, transparency even-handedness and non-discrimination.'[8]"

[Paras. 215, 216, 217, 218, 219]

II.1.0 BURDEN OF PROOF
See also: I.17.24

"**[221]** The Tribunal shares the Claimant's view that a request for a bribe by a State agency is a violation of the fair and equitable treatment obligation owed to the Claimant pursuant to the BIT, as well as a violation of international public policy, and that 'exercising a State's discretion on the basis of corruption is a [. . .] fundamental breach of transparency and legitimate expectations.' [. . .] There is general consensus among international tribunals and commentators regarding the need for a high standard of proof of corruption. [. . .] The evidence before the Tribunal in the instant case concerning the alleged solicitation of a bribe is far from being clear and convincing. **[232]** The burden of proof lies with the Claimant as the party alleging solicitation of a bribe. [. . .] In the absence of [. . .] evidence, the Tribunal is compelled to draw the conclusion that Claimant did not sustain its burden of proof."

[Paras. 221, 232]

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6 [29] *Parkerings*-[*Compagniet*] *AS v. Lithuania*, ICSID Case No. ARB/05/08, Award of Sept. 11, 2007, para. 332.

7 [30] *Continental Casualty Company v. Argentina Republic*, ICSID Case No. ARB/03/91, Award of 2 September 2006, para. 254.

8 [31] *Saluka v. Czech Republic*, Ad hoc UNCITRAL, Partial Award of March 17, 1996, para 307.

I.17.3 CONTRACT VIOLATION
See also: I.17.24

"**[239]** [. . .] The Tribunal has [. . .] to examine whether AIBO's and TAROM's acts and conduct complained of [. . .] are in breach of the FET standard under the BIT [. . .][.] **[240]** To conclude that Romania breached its FET obligations when directing certain acts or conduct by AIBO and TAROM in the performance of the ASRO Contract or the SKY Contract presupposes that the acts or the conduct in question were in breach of [. . .] contractual obligations. Since Claimant, at the time of concluding the ASRO Contract and the SKY Contract, could not have legitimate expectations other than the due and proper performance by AIBO and TAROM of the contractual obligations they were going to undertake, there would obviously be no breach of FET (at least insofar as legitimate expectations are concerned [. . .]) to the extent that AIBO's and TAROM's acts and conduct were in compliance [. . .] with said obligations. **[241]** The analysis has therefore to turn to AIBO's and TAROM's obligations under the ASRO [. . .] and the SKY Contract and whether [. . .] they were carried out in light of the law applicable to such contracts, which is Romanian law."

[Paras. 239, 240, 241]

I.17.2 TREATMENT OBLIGATIONS
See also: I.17.24

"**[243]** Claimant's [. . .] main argument appears to be that Claimant had a legitimate and reasonable expectation regarding the duration of ASRO since it was led to believe that the term would be extended for at least an additional ten year term. [. . .] **[244]** The reasons adduced by Claimant as ground for its expectation [. . .] are based on circumstances related to the negotiation and performance of the contract with AIBO regarding ASRO. Likewise, [. . .] regarding the SKY contract. As noted, however, such expectations cannot but relate to the due and proper performance by the other parties to the ASRO Contract and the SKY Contract of their contractual obligations. **[245]** [. . .] This provision [to possibly extend the contract for further periods], which is customary in these kinds of agreements and in a company's articles of association, cannot constitute a valid basis for a legitimate and reasonable expectation that there would necessarily be an extension of the Company's duration or that there was a legal obligation to extend the term beyond the initial ten-year period [. . .][.] **[246]** [. . .] In the Tribunal's judgment [. . .] there is nothing improper about not extending a ten-year contract when there is no legal obligation to do so [. . .]. **[247]** [. . .] [T]he Tribunal concludes that no 'arbitrary and improper motives' [. . .] are to be found in AIBO's and TAROM's acts and conduct. Such acts and conduct are to be evaluated in [. . .] Romanian law, which is the law applicable to the Parties' contractual relations.[9] [. . .] [T]he claim in question does not rise therefore to the level of a treaty claim for breach of the FET obligation."

[Paras. 243, 244, 245, 246, 247]

9 [61] The application of Romanian law is also prescribed by Article 42(1) of the ICSID Convention.

I.1.44 INTERNAL LAW WITHIN THE INTERNATIONAL LEGAL ORDER
See also: I.11.013; I.17.24

"**[279]** Claimant contends that the investigation of ASRO's activities exercised by the Financial Guard in 2002, with the confiscation of ASRO's revenues leading to the Company's bankruptcy, represented the culmination of the process of the taking and destruction of its investment. [. . .] **[280]** [. . .] Being clearly attributable to Romania, the Financial Guard's conduct is first and foremost to be examined in the light of Romanian law. Even if consistent [. . .], the Financial Guard's conduct is in any case to be examined as well under international law (including the provisions of the BIT) since wrongfulness of the State's conduct according to international law is not excluded by its conformity with internal law.[10] **[286]** [. . .] This conduct did not lack proportionality, transparency and good faith, was not improper and discreditable and was far from constituting 'an act that shocks or at least surprises a sense of judicial propriety,' as asserted by Claimant. [. . .]"

[Paras. 279, 280, 286]

I.2.011 ACTS AND DECISIONS OF STATE ORGANS
See also: I.17.24

"**[287]** On September 5, 2002, GEO 104 came into force, abolishing duty-free activities at airports. Claimant has contended that GEO 104 specifically targeted EDF. [. . .] **[290]** The Tribunal [. . .] has taken note that [. . .]:

> a) […] [no] document filed in the course of the legislative process and in evidence in these proceedings makes reference to the need to align the customs regime of the duty-free sale of goods to the EU requirements; […]
>
> b) the Substantiation Note indicates that the main purpose […] was to reorganise the retail sale of goods for foreign currency in a duty-free regime […][.]

[291] It is difficult to believe that such a complex procedure [of legislative process] [. . .] was put in place merely for the purpose of enacting legal provisions directed against EDF [. . .]. **[292]** [. . .] GEO 104 was [. . .] a measure falling within the police power of the State, taken in the public interest. **[293]** As held by other tribunals, in addition to a legitimate aim in the public interest there must be 'a reasonable relationship of proportionality between the means employed and the aim sought to be realized'; that proportionality would be lacking if the person involved 'bears an individual and excessive burden.'[11] The aim of GEO 104 to combat corruption was certainly legitimate and in the public interest. In addition, the proportionality requirement was met as [. . .] [t]he compensation claimed by Claimant in that regard amounts to USD 400,000.00, [. . .] which is not an excessive burden in itself and in the context of Claimant's overall claim for compensation of USD 132.576.000,00. [. . .]"

[Paras. 287, 290, 291, 292, 293]

10 [100] ILC Articles, Article 3: "The characterisation of an act of a State as internationally wrongful is governed by international law. Such characterisation is not affected by the characterization of the same act as lawful by internal law."

11 [126] *Azurix Corp. v. The Argentina Republic*, Award of 14 July 2006, para. 311, quoting approvingly the European Court of Human Rights' Judgm. of February 21, 1986 in *James v. United Kingdom*, paras. 50 and 63 [. . .].

I.17.24 FAIR AND EQUITABLE TREATMENT
See also: I.17.3

"**[298]** Claimant's claims regarding SKY are of a contractual nature [. . .]. As such, no breach of the FET obligation may properly be invoked by Claimant since 'the legitimate expectations that TAROM continue the joint venture with EDF,' relied upon by Claimant [. . .] with respect to this aspect of the case, found a basis, if any, only in the SKY Contract. Legitimate expectations that TAROM continue the joint venture with EDF could have come from many sources beyond the Contract itself. Such expectations could have come from specific assurances in writing from Government representatives, statutes, regulations or other commitments by the Government. To validly claim a breach of the FET standard under the BIT, Claimant should have proven not only a breach of the SKY Contract, but also that such other assurances had been given by the Government and had been breached. Claimant has failed to provide such proof. **[299]** The same considerations apply to the Constanta joint venture. The loss of ASRO's rights to engage in duty-free activities for the residual term of its license [. . .] was the result of the legitimate and non-discriminatory exercise by the State of its police power in the public interest. Having concluded that the issuance of GEO 104 does not entail any State responsibility, this conclusion applies also with regard to Claimant's operations at Constanta airport to the extent they had been affected by GEO 104."

[Paras. 298, 299]

C.

I.17.26 UNREASONABLE AND DISCRIMINATORY MEASURES

"**[303]** In an attempt to give a content to general expressions such as 'unreasonable or discriminatory measures,' Claimant relies on the categories of measures that its legal expert, Professor Christoph Schreuer, has described in his opinion as 'arbitrary':

a. a measure that inflicts damage on the investor without serving any apparent legitimate purpose;

b. a measure that is not based on legal standards but on discretion, prejudice or personal preference;

c. a measure taken for reasons that are different from those put forward by the decision maker;

d. a measure taken in wilful disregard of due process and proper procedure. [. . .]

The Tribunal will consider the claim of 'unreasonable or discriminatory measures' according to the terms proposed by Claimant. **[305]** As to the individual categories that are listed, [. . .] it is sufficient to recall that:

a. there is no evidence of measures applied to Claimant without a legitimate purpose; on the contrary, the [. . .] [measures] have all been held by the Tribunal as justified either by the terms of the contract binding the Parties or by the exercise of the State's police power in the public interest;

b. none of such measures was based on discretion, prejudice or personal preference [. . .];

c. no evidence has been proffered indicating that any such measures were taken for reasons other than those stated by the decision maker;

d. as shown by the numerous recourses by Claimant to legal procedures in Romania [. . .], due process and proper procedural requirements appear to have been satisfied [. . .]."

[Paras. 303, 305]

D.

I.17.1 EXPROPRIATION
See also: II.0.6

"**[308]** [. . .] The only possible takings in the instant case were the sanctions of the Financial Guard, for which there was a judicial recourse, and GEO 104, which was a non-compensable police power measure. In the Tribunal's view, the measures in question, also taken in their aggregate effect, do not constitute a creeping expropriation, in addition to which there was no evidence of a coordinated pattern adopted by the State for their implementation. **[313]** The Tribunal has duly noted the fact that due process was assured to Claimant by Romania and that the maintenance of the sanction applied by the Financial Guard to ASRO was due to ASRO's failure to comply with procedural requirements. These requirements, which were known or should have been known to Claimant and ASRO, are, in the Tribunal's view, in keeping with normal procedural rules. [. . .] [T]he BIT is not an appropriate instrument to provide the investor with a means to enforce rights available to it under the applicable legal system but that it failed to duly and timely invoke."

[Paras. 308, 313]

E.

I.17.4 UMBRELLA CLAUSES
See also: I.11.013; I.17.3

"**[314]** Article 2(2) of the BIT provides [. . .]: '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.' **[316]** Claimant's position is untenable since it is based on a misconception of the provision of Article 2(2) of the BIT. This provision [. . .] clearly refers to obligations entered into by Romania with regard to Claimant's investments. There is no evidence of the assumption by Respondent of direct obligations toward Claimant, whether by contract or otherwise. **[317]** [. . .] The 'obligations entered into,' to which Article 2(2) of the BIT refers, are obligations assumed by the Romanian State. The breach of contractual obligations by a party entails such party's responsibility at the contractual level. There is in principle no responsibility by the State for such breach in the instant case since the State, not being a party to the contract, has not directly assumed the contractual obligations the breach of which is invoked. **[318]** It is unclear whether Claimant relies on the attribution to the State of certain acts and conduct of AIBO and TAROM on the assumption of their being in breach of the ASRO [. . .] or the SKY Contract in order to impute to the State the responsibility for such breach. If so, this construction of

the umbrella clause would be incorrect since the attribution to Respondent of AIBO's and TAROM's acts and conduct does not render the State directly bound by the ASRO Contract or the SKY Contract for purposes of the umbrella clause. **[319]** Attribution does not change the extent and content of the obligations arising under the ASRO [. . .] and the SKY Contract [. . .][12] nor does it make Romania party to such contracts. [. . .] [A]bsent a breach of the ASRO [. . .] or the SKY Contract under the governing law, there can be no State responsibility [. . .] for violation of the umbrella clause. [. . .]"

[Paras. 314, 316, 317, 318, 319]

III.

II.7.98 ICSID AWARD

"**[330]** Having carefully considered the Parties' arguments in their written pleadings and oral submission and the evidence filed by each of them, for the reasons above stated the Tribunal unanimously decides and orders as follows: 1. Respondent did not breach its obligations to Claimant under the BIT. 2. Accordingly, the claims of Claimant are dismissed with prejudice. 3. The Parties shall share equally all fees and expenses of the Tribunal as well as ICSID's administrative charges, which are paid out of the advances made by the Parties. 4. Claimant is ordered to pay Respondent the sum of USD 6,000,000.00 (six million United States Dollars) on account of Respondent's legal fees and other costs. 5. All other claims and requests by the Parties are dismissed."

[Para. 330]

12 [151] As held by the ad hoc Committee in *CMS v. Argentina*: "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 is its proper law. If this is so, it would appear that the *parties* to the obligation (i.e., the person bound by it and entitled to rely on it) are likewise not changed by reason of the umbrella clause" (Decision of September 25, 2007, para. 95(c), emphasis in the text).

M.C.I. Power Group L.C. and New Turbine Inc. v. Republic of Ecuador, ARB/03/6, Decision on Annulment, 19 October 2009*

Contents**

I.

II.7.983 ANNULMENT OF ICSID AWARD

[This annulment decision concerned a dispute between M.C.I. Power Group L.C. and New Turbine Inc., which own and control Seacoast, Inc., and the Republic of Ecuador. In 1995 Seacoast had entered into a contract with the Instituto Ecuatoriano de Electrificacion (*INECEL)*, a state organ of Ecuador, for the sale of electricity. The Applicants request annulment of the Award for the alleged failure of the Arbitral Tribunal to *'[a]ddress the Claimants' US$24.2 Million claim that Ecuador breached the Ecuador-US BIT through its failure to pay accounts receivable that it owes to the Claimants* [. . .]' and, in the alternative, for the Tribunal's *'manifest excess of powers and failure to state reasons*' with regard to its '*implicit decision that it had no jurisdiction over the treaty aspects of the claims*' under the BIT since it concerned '*a dispute arising before the Treaty came into force.*' The same was put forth with regard to the contractual aspects of the claim.]

II.

II.7.983 ANNULMENT OF ICSID AWARD
See also: II.7.984

A.

"**[24]** It appears clearly from Article 53 [. . .] that the only permissible remedies against an award are those provided for in the Convention, which include a request for annulment but not an appeal. Ad hoc committees are therefore not courts of appeal. Their mission is confined to controlling the legality of awards [. . .] and [. . .] [i]t is an overarching principle that [. . .] [they] are not entitled to examine the substance [. . .] but are only allowed to look at the award insofar as the list of

* Summaries prepared by Jane Hofbauer, LL.M., Pre-Doctoral Researcher, and Christina Knahr, MPA, Post-Doctoral Researcher, Department of European, International and Comparative Law, University of Vienna, Austria. The full text of the decision is available online at <http://ita.law.uvic.ca/documents/MCI-Annulment.pdf>. Original: English and Spanish. Original footnote numbers are indicated in brackets: [].

** This is not the reproduction of the Table of Contents of the Decision.

grounds contained in Article 52 [. . .] requires.[1] This was reaffirmed by many committees [. . .].[2] Consequently, the role of an ad hoc committee is [. . .] restricted to assessing the legitimacy of the award and not its correctness. [. . .] The annulment mechanism is not designed to bring about consistency in the interpretation and application of international investment law. The responsibility for ensuring consistency in the jurisprudence and for building a coherent body of law rests primarily with the investment tribunals. They are assisted in their task by the development of a common legal opinion and the progressive emergence of *'une jurisprudence constante'* [. . .]. **[25]** [. . .] [A]ccording to Article 53 [. . .] the award is only binding on the parties to the dispute. It does not constitute a binding precedent on other tribunals. [. . .] Nevertheless, an increasing number of awards and decisions of tribunals and annulment committees are published by ICSID [. . .]. As a result, the reporting of cases and the commentaries of scholars and practitioners are extensive and undeniably promote the consistent application of investment law [. . .]."

[Paras. 24, 25]

B.

II.7.933 CONSENT TO ICSID ARBITRATION THROUGH BITs
See also: II.7.983

"**[37]** [. . .] Ad hoc committee decisions [. . .] recognize that a tribunal's failure to apply the applicable law may constitute a manifest excess of powers pursuant to Article 52(1)(b).[3] In *Klöckner (I)*, the ad hoc Committee thus ruled that *'[e]xcess of powers may consist of the non-application by the arbitrator of the rules contained in the arbitration agreement.'*[4] [. . .] In the present case, Article VI(3)(a)(i) of the U.S.-Ecuador BIT identifies ICSID as a possible forum to be selected by the investor. [. . .] When

1 [14] [. . .] [*Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, (ICSID Case No. ARB/81/2)], Decision on Annulment, 3 May 1985, 2 ICSID Reports, para. 3 [. . .] [(hereinafter *Klöckner (I)*)].

2 [15] *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Decision on Annulment, 25 September 2007, paras. 43, 135–136 (hereinafter *CMS v. Argentina*); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment, 3 July 2002, para. 62 (hereinafter *Vivendi v. Argentina*); *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Decision on Annulment, 16 May 1986, 1 ICSID Reports 509, para. 23 (hereinafter *Amco I*); *Maritime International Nominees Establishment v. Republic of Guinea* (ICSID Case No. ARB/84/4), Decision on Annulment, 22 December 1989, 4 ICSID Reports 79, paras. 5.04–5.08 (hereinafter *MINE*); *Wena Hotels Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Decision on Annulment, 5 February 2002, paras. 34–37 (hereinafter *Wena v. Egypt*); *Patrick Mitchell v. Democratic Republic of the Congo* (ICSID Case No. ARB/99/7), Decision on Annulment, 1 November 2006, para. 19 (hereinafter *Patrick Mitchell v. Congo*); *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7), Decision on Annulment, 21 March 2007, 13 ICSID Reports 516, paras. 31, 52 (hereinafter *MTD v. Chile*); *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7), Decision on Annulment, 5 June 2007, para. 20 (hereinafter *Soufraki v. UAE*); *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru* (ICSID Case No. ARB/03/4), Decision on Annulment, 5 September 2007, para. 101 (hereinafter *Lucchetti v. Peru*).

3 [57] See e.g. Decisions of the annulment Committees in [. . .] *Amco I*, *supra* note 15, paras. 23, 95; *MINE*, *supra* note 15, para. 6.40; *CMS v. Argentina*, *supra* note 15, para. 49; *Soufraki v. UAE*, *supra* note 15, paras. 37 and 85.

4 [58] *Klöckner (I)*, *supra* note 14, para. 59.

a unilateral offer of ICSID arbitration is given in a BIT to qualified investors [. . .], the Tribunal which is established bases its competence on both Article 25 [. . .] and the BIT for the conditions of consent.[5]"

[Para. 37]

II.7.923 ICSID JURISDICTION *RATIONE TEMPORIS*
See also: I.1.01; I.1.12; I.1.20

"**[38]** The main jurisdictional issue raised by Ecuador [. . .] was that of the temporal scope of its offer of arbitration. [. . .] The U.S.-Ecuador BIT which came into force on May 11, 1997 does not contain any provision on retroactivity apart from Article XII(1) which provides that the Treaty '*shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter*.' The Tribunal noted [. . .] [r]elying on Article 28 in the Convention on the Law of Treaties [. . .]: '*The non-retroactivity of the BIT excludes its application to disputes arising prior to its entry into force* [. . .]. *The silence of the text of the BIT with respect to its scope in relation to disputes prior to its entry into force does not alter the effects of the principle of the non-retroactivity of treaties*.' [. . .] **[40]** The Tribunal finally held '*that it has Competence over events subsequent to the entry into force of the BIT when those acts are alleged to be violations of the BIT*' and that '*[p]rior events may only be considered by the Tribunal for purposes of understanding the background, the causes, or scope of violations of the BIT that occurred after its entry into force*.' [. . .] **[41]** In examining the implications of the principle of non-retroactivity of treaties for the temporal and jurisdictional provisions of the U.S.-Ecuador BIT, the Tribunal can be considered to have complied with its earlier declaration: '*The Tribunal will decide on the objections to Jurisdiction* [. . .] *in accordance with the provisions of the ICSID Convention, the BIT, and the applicable norms of general international law, including the customary rules recognized in the* [. . .] *Draft Articles on the Responsibility of States for Internationally Wrongful Acts with commentaries. [. . .] For purposes of interpreting the treaties applicable to the objections* [. . .], *the Tribunal will be guided by the rules contained in the 1969 Vienna Convention on the Law of Treaties [. . .] that reflect customary law on the subject. [. . .] The Tribunal will refer to precedents that state the legal implications of binding norms of conventional and customary international law that are applicable only to the extent that and insofar as they specially relate to the present case*.' [. . .] It is another matter–over which the ad hoc Committee has only a very limited competence–whether the Tribunal's application of the law was well-founded and legally tenable."

[Paras. 38, 40, 41]

II.7.94 LAW APPLIED BY ICSID
See also: II.7.983

"**[42]** The non-application of the proper law which may be sanctioned by Article 52(1)(b) should indeed not be confused with the erroneous or incorrect application [. . .] which is not a ground for annulment as consistently underlined in numerous

5 [61] *CMS v. Argentina*, *supra* note 15, para. 68; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan* (ICSID Case No. ARB/02/13), Decision on Jurisdiction, 29 November 2004, paras. 62–63 [. . .].

decisions of ad hoc committees.[6] [. . .] A distinction should therefore be drawn between [. . .] what was decided by the tribunal, which concerns a manifest excess of powers, and [. . .] how it was decided by the tribunal, which in principle escapes the scrutiny of annulment under Article 52(1)(b) [. . .]. **[43]** However, the freedom which the tribunal enjoys in the application of the law is not unlimited, since the arbitrators are required to remain within their terms of reference as remarked upon in the *MINE* annulment decision [. . .] and not to exceed their powers. The *Soufraki v. UAE* ad hoc Committee recognized that *'[m]isinterpretation or misapplication of the proper law may, in particular cases, be so gross or egregious as substantially to amount to failure to apply the proper law.'*[7] [. . .]"

[Paras. 42, 43]

I.1.15 TREATY APPLICATION
See also: I.1.12; I.1.20

"**[43**] [. . .] The Applicants [. . .] argue that the Tribunal's interpretation of the principle of non-retroactivity of treaties was egregiously wrong and so grave as to be tantamount to an abrogation of the BIT. **[44]** [. . .] [T]he relevant '*omission*' is Ecuador's failure to fulfill its obligation to pay US$24.2 million [. . .]. The alleged payment obligation is [. . .] based on the Seacoast Contract [and] [. . .] started before the BIT had entered into force [. . .] but continued beyond that date. In the absence of special rules in the [. . .] BIT, the only relevant temporal restriction is the limitation applicable to treaties in general, as reflected in Article 28 of the Vienna Convention [. . .]. **[45]** Although Article 28 refers to an '*act*,' it must be assumed that an '*omission*' which is claimed to be a breach of treaty obligations is to be assimilated to an '*act*' [. . .]. It is important to note that the relevant point in time in Article 28 is not when a dispute arose but the time when an act or fact took place or a situation ceased to exist. [. . .] The Tribunal stated, *inter alia*, as follows: '*The non-retroactivity of the BIT excludes its application to disputes arising prior to its entry into force.* [. . .] *Prior disputes that continue after the entry into force of the BIT are not covered by the BIT.*' [. . .] **[47**] [. . .] [T]he Tribunal concluded that the acts and omissions alleged by the Claimants as having occurred prior to the entry into force of the BIT did not constitute continuing and composite acts under the BIT. [. . .] **[48]** [. . .] This may explain the Tribunal's further conclusion that the present dispute falls outside the temporal limitations of the BIT, although the relevant element under Article 28 of the Vienna Convention would be the date when the act occurred or the situation ceased to exist rather than the date when the dispute arose."

[Paras. 43, 44, 45, 47, 48]

II.7.983 ANNULMENT OF ICSID AWARD
See also: I.1.20; I.1.3

"**[49]** In any case, what is required for annulment under Article 52(1)(b) [. . .] is a '*manifest excess of powers*' which should be understood as tantamount to a safety valve allowing for the rejection of arbitrary or unreasonable decisions. [. . .] [T]he

6 [71] [. . .] *Klöckner (I)*, *supra* note 14, para. 60; [. . .] *MTD v. Chile*, *supra* note 15, para. 47; *CMS v. Argentina*, *supra* note 15, paras. 49–52. [. . .] *MINE*, *supra* note 15, paras. 5.03–5.04 [. . .][.]

7 [74] *Soufraki v. UAE*, *supra* note 15, para. 86.

manifest excess requirement in Article 52(1)(b) suggests a somewhat higher degree of proof than a searching analysis of the findings of the Tribunal. **[50]** [. . .] The Tribunal concluded that '[. . .] *the intention of the contracting Parties* [of the BIT] *with respect to its retrospective application is not evident from its clauses or in any other manner. In accordance with the norms of general international law codified in the Vienna Convention, and particularly in Article 28, the Tribunal notes that because of the fact that the BIT applies to investments existing at the time of its entry into force, the temporal effects of its clauses are not modified.*' [. . .] It is common ground that Article 28 is a dispositive rule and that the Contracting States may wish to derogate from it by conferring retroactive applicability to their BIT. [. . .] **[51]** The present case is not a case where the Tribunal admitted a legal principle and then willfully decided to disregard it. [. . .] As the ad hoc Committee in *Soufraki v. UAE* declared, *'[s]uch gross and consequential misinterpretation or misapplication of the proper law which no reasonable person ('*bon père de famille'*) could accept needs to be distinguished from simple error–even a serious error–in the interpretation of the law which in many national jurisdictions may be the subject of ordinary appeal* [. . .].'[8] An egregious violation of the law would assume that there is a departure from a legal principle or legal norm which is clear and cannot give rise to divergent interpretations. [. . .] Should more than one interpretation of a legal norm or rule be possible, no serious violation can ensue where one of these interpretations has been chosen. [. . .] **[52]** [. . .] The parties' competing contentions and the investment cases referred to in one way or another in support of their positions provide sufficient evidence that temporal applicability of consent to disputes that arose before the coming into force may be subject to debate. Moreover, the Applicants' interpretation of Article VI of the BIT is not the only reasonable interpretation of the Treaty. Other views are also possible and could not necessarily be discarded as being fundamentally wrong. The refusal of the Tribunal to exercise jurisdiction over the accounts receivable appears to the ad hoc Committee to be a debatable solution [. . .]. **[53]** [. . .] [W]hilst it is not the task of the Committee to make its own choice between different interpretations of the applicable BIT, special weight must be given to the Tribunal's interpretation which the Committee can only set aside in the narrow circumstances provided by Article 52 [. . .]. **[55]** [. . .] [J]urisdiction does not give the ad hoc Committee a wider competence [. . .]. The standards for reviewing the Tribunal's decision about competence are therefore the same as those [. . .] when they review any other matters. [. . .] **[56]** A decision that there is no jurisdiction may result in a manifest excess of powers when the Tribunal has acted outside the proper bounds of its competence. [. . .]"

[Paras. 49, 50, 51, 52, 53, 55, 56]

C.

II.7.983 ANNULMENT OF ICSID AWARD

"**[66]** [. . .] Although failure to deal with questions submitted [. . .] is not a separate ground for annulment under Article 52 [. . .], there is a pattern of past decisions of ad hoc committees that have considered that such failure amounts to a failure to state reasons. For example, the [. . .] ad hoc Committee decision in *Wena v. Egypt* [. . .]

8 [96] *Soufraki v. UAE*, *supra* note 15, para. 86.

specified that *'[t]he ground for annulment under Article 52(1)(e) includes therefore the case where the Tribunal omitted to decide upon a question submitted to it to the extent such supplemental decision may affect the reasoning supporting the Award.'*[9] **[67]** [. . .] The obligation in Article 48(3) [. . .] to deal with every question applies to every argument which is relevant and in particular to arguments which might affect the outcome of the case. On the other hand, it would be unreasonable to require a tribunal to answer each and every argument which was made in connection with the issues that the tribunal has to decide [. . .].[10] This explains why the tribunal must address all the parties' 'questions' [. . .] but is not required to comment on all arguments when they are of no relevance to the award. **[68]** The *Wena v. Egypt* Committee also declared that Article 48(3) makes a distinction between the tribunal's duty to deal with every question submitted to it and the requirement that the award shall state the reasons upon which it is based [. . .]. **[69]** [. . .] [I]n the *Amco I* decision [. . .] [t]he ad hoc Committee stated that the obligation set out in Article 48(3) [. . .] can find its sanction under Article 52(1)(e) while Article 49 offers a remedy for unintentional omissions to decide any question.[11] [. . .]"

[Paras. 66, 67, 68, 69]

I.17.4 UMBRELLA CLAUSES
See also: I.17.3; II.7.9211; II.7.9215

"**[70]** In their Notice for arbitration, M.C.I. and New Turbine specified that their request concerned an '*investment dispute*' within the meaning of Article VI of the BIT [. . .] and they submitted that Ecuador had acted in a manner inconsistent with the umbrella clause of Article II(3)(c) of the U.S.-Ecuador BIT, which states that *'[e]ach Party shall observe any obligation it may have entered into with regard to investments.'* [. . .] In elevating the breach of a contractual obligation to treaty level, an umbrella clause increases the Contracting States' accountability, and this is particularly the case when the contract is signed by a State entity, such as here, INECEL [. . .][.] When an umbrella clause exists, [. . .] the distinction between a treaty claim and a contract claim loses much of its interest. [. . .] **[71]** [. . .] [I]t appears [. . .] that the Tribunal took cognizance of alleged Treaty breaches as well as contractual breaches [. . .][.] In fact, according to Article VI(4) of the BIT, [. . .] the treaty-based Tribunal has competence on '*any investment dispute*,' regardless of the legal basis [. . .][.] The Applicants' complaint is [. . .] that the Tribunal failed to address the issue of jurisdiction over their claims for the outstanding accounts receivable and for breach of the contract, which [. . .] is an issue of sufficient significance, with the consequence that the Tribunal failed to state the reasons [. . .]."

[Paras. 70, 71]

II.7.9211 QUALIFICATION AS INVESTMENT
See also: I.1.12; I.1.16

"**[72]** [. . .] Article VI(4) of the BIT allows the submission to arbitration of '*any investment dispute*' within the broad meaning of Article VI(1), regardless of whether

9 [114] *Wena v. Egypt*, *supra* note 15, para. 101. *See* also, *MINE*, *supra* note 15, para. 6.99.

10 [115] *Klöckner (I)*, *supra* note 14, para. 131.

11 [117] *Amco I*, *supra* note 15, paras. 32–34.

the investment dispute is based on a violation of the BIT [. . .] or originates in a violation of contract [. . .][.] The Tribunal [. . .] interpreted Article 1(a) of the BIT as giving a broad definition of investment and decided that the rights and interests alleged by the Applicants to have subsisted after the entry into force of the BIT, including the intangible assets of 'accounts receivable,' would fit that definition. [. . .] The inclusion of their claims within the definition of '*investment*' in Article 1(a) did not mean that the 'accounts receivable' were necessarily valid legal claims. [. . .] This [. . .] would be a matter to be examined at the stage of the merits of the proceedings. [. . .] **[73]** When addressing the question of the temporal application of the BIT to the investments of Seacoast in Ecuador, the Tribunal remarked that *'[t]he Claimants' arguments with respect to the relevance of prior events considered to be breaches of the Treaty posit a contradiction since, before the entry into force of the BIT, there was no possibility of breaching it.*' [. . .] While recognizing that the subsistence of an investment on the date of entry into force of the BIT should be taken into account, the Tribunal did not conclude that it had competence over all claims [. . .]. The claims for breach of the Seacoast Contract, which included the failure to pay the alleged US$24.2 million outstanding accounts receivable, [. . .] had arisen before the entry into force of the BIT [. . .][.]"

[Paras. 72, 73]

I.11.0 STATE RESPONSIBILITY
See also I.1.12; I.11.012; II.7.983

"**[74]** The Award records the allegation of M.C.I. and New Turbine that Ecuador breached its BIT obligations by continuing and composite wrongful acts. [. . .] **[75]** The Tribunal examined the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts, [. . .] in particular Articles 14 and 15 thereof. [. . .] It explained that wrongful acts must be internationally wrongful acts which [. . .] meant that '*they must be identified with the violation of a norm of international law*' [. . .] existing at the time when the act extending in time begins or when it is consummated. [. . .] It further found that *'[t]he non-retroactivity of treaties as a general rule postulates that only from the entry into force of an international obligation does the latter give rise to rights and obligations for the parties*' and that *'[t]herefore, for any internationally wrongful act to be considered as consummated, continuing, or composite, there must be a breach of a norm of international law attributed to a State.*' [. . .] In addition, the Tribunal examined the possible breach of a norm of customary international law before the entry into force of the BIT, but concluded, by reference to the NAFTA award in *Mondev v. United States* [. . .], that the existence of such breach before a BIT enters into force would not give [. . .] a right to have recourse to the treaty-based Tribunal. [. . .] [T]he Tribunal decided that '[. . .] *in accordance with the principle of non-retroactivity of treaties, the Tribunal holds that the acts and omissions alleged by the Claimants as being prior to the entry into force of the BIT do not constitute continuing and composite wrongful acts under the BIT.*' [. . .] **[77]** [. . .] The Tribunal's finding that the acts and omissions accepted by the Claimants as being prior to the entry into force of the BIT did not constitute continuing and composite wrongful acts under the BIT [. . .] would seem to imply acceptance of Ecuador's view that the refusal to pay the accounts receivable was an instantaneous and not a continuing act. While this is not clearly stated in the Award, it can be deduced from the Tribunal's reasoning. [. . .] It is of course another matter whether or not the reasons

given by the Tribunal were convincing. **[80]** [. . .] [F]or the purposes of Article 52(1)(e) [. . .], it is sufficient to point out that the Tribunal must be considered to have answered the Applicants' argument [. . .] by indicating that [. . .] there was no continuing or composite act in respect of the refusal to pay the alleged accounts receivable. The Applicants actually criticize the Tribunal's interpretation of continuing and composite acts and propose another interpretation [. . .]. This Committee cannot from such a divergence of opinions conclude that the Tribunal failed to state reasons in its Award. **[82]** [. . .] According to the *CDC v. Seychelles* Committee, Article 52(1)(e) '*does not provide us with the opportunity to opine on whether the Tribunal's analysis was correct or its reasoning persuasive*.'[12] [. . .] The ad hoc committee can only take the award as it is, [. . .] it may not substitute its judgment for that of the tribunal. Otherwise, this would make the award the commencement and not the end of litigation. **[84]** Ad hoc committees have considered that insufficient, inadequate or contradictory reasons may be assimilated to a failure to state reasons. [. . .] **[85]** However, contradictory reasons should be distinguished from reasons which are claimed to be legally or factually wrong, the latter escaping [. . .] from review [. . .][.] **[86]** The Applicants consider that the Award rests on contradictory reasons because none of the reasons given by the Tribunal can be identified as an adequate ground for its conclusion. However, to the extent that the Applicants' complaint is based on an alleged improper interpretation and application by the Tribunal of Article 28 of the Vienna Convention, it is not within the ambit of Article 52(1)(e) but that of Article 52(1)(b). The Award may reflect reasoning and contain a conclusion that is legally correct or incorrect, but the Committee's opinion on this matter is irrelevant for the scrutiny of the award under Article 52(1)(e) of the Washington Convention [. . .]."

[Paras. 74, 75, 77, 80, 82, 84, 85, 86]

III.

II.7.983 ANNULMENT OF ICSID AWARD

"For the foregoing reasons, the ad hoc Committee decides: (1) to reject, pursuant to Article 52(1) of the Washington Convention, the application for annulment of the ICSID Tribunal's Award of July 31, 2007 (ICSID Case No. ARB/03/6), (2) that M.C.I. Power Group L.C. and New Turbine Inc. shall jointly bear the full costs incurred in connection with this annulment proceeding, (3) that each Party shall bear its own costs for legal representation and expenses in the annulment proceeding."

12 [159] *CDC v. Seychelles*, [. . .] para. 70.

Systematic Index of the Sub-Section*

* *See* Systematic Classification Scheme, at page 255.