INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID)

INTRODUCTORY NOTE

From Contested Jurisdiction to Indirect Expropriation and Fair and Equitable Treatment—Developments in ICSID Arbitration in 2004

I. Introduction

Direct arbitration between investors and host States as it is offered by the ICSID Convention[1] on the settlement of investment disputes between States and private parties has been a "growth industry" over the last decade. This trend has continued during 2004. It led to a number of important decisions on jurisdictional as well as substantive issues. Excerpts of the relevant ICSID decisions are contained in the section on legal maxims of *Global Community* for the first time. This introductory piece is aimed at giving a short overview of how ICSID arbitration works in general. It will then highlight some of the main themes addressed in the decisions and awards rendered in 2004.

II. Investment Arbitration under the ICSID Convention

Investment disputes may be settled before different fora. They may lead to litigation before national courts, to *ad hoc* or more institutionalised arbitration under UNCITRAL,[2] ICC,[3] Stockholm,[4] LCIA,[5] or other arbitration rules.[6] Through diplomatic protection home States of investors may also espouse their nationals' claims and settle disputes by negotiations or inter-State arbitration or even through recourse to the International Court of

1 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 UNTS 159; 4 International Legal Materials 532 (1965). *See also* Aron Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 136 Recueil des Cours 331 (1972-II); Lucy Reed, Jan Paulsson & Nigel Blackaby, Guide to ICSID Arbitration (2004); Christoph Schreuer, The ICSID Convention: A Commentary (2001); UNCTAD (ed.), Course on Dispute Settlement (2003).

2 UNCITRAL Arbitration Rules 1976, adopted by U.N. GA Res. 31/98, 15 December 1976, 15 International Legal Materials 701 (1976).

3 ICC Rules of Arbitration 1998, *in* ICC (ed.), ICC Rules of Arbitration, Publication No. 808 (2001).

4 Rules of the Arbitration Institute of the Stockholm Chamber of Commerce 1999, 38 International Legal Materials 1674 (1999).

5 London Court of International Arbitration, Arbitration Rules 1998, 37 International Legal Materials 669 (1998).

6 *See* August Reinisch, *Selecting the Appropriate Forum for Investment Disputes*, *in* Course on Dispute Settlement, *supra* note 1.

Justice as witnessed by the unsuccessful Belgian attempt in the *Barcelona Traction* Case[7] or by the *ELSI* Case.[8] However, there is clearly one form of dispute settlement which prevails today for a number of practical reasons. This is arbitration according to the ICSID Convention which has become a very significant and successful method of settling international investment disputes.[9]

The ICSID Convention is specifically designed for mixed investment arbitration. It establishes the "Centre" endowed with separate international legal personality[10] which provides the institutional support for the arbitration of investment disputes.[11] This includes keeping lists ("panels") of possible arbitrators,[12] screening and registering arbitration requests,[13] assisting in the constitution of arbitral tribunals and the conduct of proceedings,[14] and other administrative tasks.

Awards under the ICSID Convention are final and binding and are recognized in all Contracting State Parties to the Convention like final judgments of their domestic courts.[15] Thus, the risks inherent in setting aside or non-recognition proceedings before national courts known in ordinary commercial arbitration according to the New York Convention[16] are largely excluded. The only remaining obstacle to the enforcement of ICSID awards in domestic courts is the fact that the Convention expressly permits States to apply their rules on State immunity in enforcement proceedings.[17]

The ICSID Convention offers, however, a rather unique control feature by providing for a special annulment procedure according to which an award may be set aside by an *ad hoc* committee if the tribunal was not properly constituted; the tribunal manifestly exceeded its powers; there was corrup-

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7 Barcelona Traction, Light and Power Company (Belgium v. Spain), Judgment, 1970 ICJ REPORTS 3 (Feb. 5, 1970).

8 Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy), Judgment, 1989 ICJ REPORTS 15 (July 20, 1989).

9 In practice ICSID conciliation has been used relatively infrequently. As of December 2004 only four requests for conciliation have been filed. Cf. the ICSID homepage at <http://www.worldbank.org/icsid/cases/cases.htm>.

10 Articles 1 and 18 ICSID Convention.

11 Article 1 ICSID Convention.

12 Articles 12 *et seq*. ICSID Convention.

13 Article 36(3) ICSID Convention.

14 Article 38 ICSID Convention.

15 Article 54(1) ICSID Convention provides: "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. [...]"

16 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 UNTS 38, 7 INTERNATIONAL LEGAL MATERIALS 1046 (1968).

17 Article 55 ICSID Convention provides: "Nothing in Article 54 shall be construed as derogation from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution." See also *Letco v. Liberia*, 659 F.Supp 606 (D.D.C. 1987); *Benvenuti & Bonfant v. Congo*, Cour d'Appel de Paris, 6 June 1981, 20 INTERNATIONAL LEGAL MATERIALS 878 (1981).

tion on the part of a member of the tribunal; there was a serious departure from a fundamental rule of procedure; or the award failed to state the reasons on which it was based.[18] The rather broad scope of review exercised by the first two *ad hoc* committees[19] provoked substantial criticism.[20] It has been narrowed down, however, in subsequent cases.[21] Nevertheless, the increased number of ICSID cases since the late 1990s has led to new annulment proceedings.[22] There are also discussions[23] to introduce a true appellate system within ICSID possibly similar to the one available under the WTO Dispute Settlement Understanding.[24]

According to Article 25 of the Convention the subject-matter jurisdiction (*ratione materiae*) of the Centre is limited to "legal disputes" arising "directly" out of an "investment." Its personal jurisdiction (*ratione personae*) extends over "Contracting States (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State)", on the one hand, and "nationals of another Contracting State", on the other. Article 25(1) ICSID Convention provides in full:

> "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."

The requirement that the parties must have given their "consent in writing" has been broadly interpreted by ICSID tribunals to include, in addition to ICSID clauses in direct investor-host State agreements, "offers" in national legislation or in bilateral investment treaties ("BITs") which can be

18 Article 52(1) ICSID Convention.

19 *Klöckner v. Kameroon*, ICSID Case No. ARB/81/2, Ad hoc Committee decision of 3 May 1985, 2 ICSID Reports 95; *Amco Asia v Indonesia*, ICSID Case No. ARB/81/1, Ad hoc Committee decision of 16 May 1986, 1 ICSID Reports 509; 25 International Legal Materials 1441 (1986).

20 *See* W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 4 Duke Law Journal 739 (1989); David D. Caron, *Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction between Annulment and Appeal*, 7 ICSID Review—Foreign Investment Law Journal 21 (1992).

21 *MINE v. Guinea*, ICSID Case No. ARB/84/4, Ad hoc Committee decision of 22 December 1989, 4 ICSID Reports 79.

22 See the recent decisions in *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Ad hoc Committee decision of 5 February 2002, 41 International Legal Materials 933 (2002) (annulment rejected); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic*, ICSID Case No. ARB/97/3, Ad hoc Committee decision of 3 July 2002, 41 International Legal Materials 1135 (2002) (partial annulment).

23 *See* ICSID Secretariat, *Possible Improvements of the Framework for ICSID Arbitration*, Discussion Paper, 22 October 2004.

24 WTO DSU, 33 International Legal Materials 1226 (1994).

"accepted" by investors through instituting arbitral proceedings.[25] Today in the vast majority of ICSID cases jurisdiction is founded upon BITs—without any direct contractual agreement between the parties.[26]

ICSID arbitration works "to the exclusion of any other remedy."[27] Though a Contracting State "may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration"[28], such exhaustion is normally not a precondition for instituting ICSID proceedings. Also diplomatic protection is expressly excluded where ICSID arbitration has been consented to.[29] The only exception to this exclusion applies if the Contracting State fails to abide by and comply with an ICSID award.[30]

Because the ICSID Convention requires that both the host State and the home State of the investor must be Contracting Parties of the ICSID Convention some disputes are excluded from the Centre's jurisdiction even if both parties are willing to submit them. This motivated the adoption of the ICSID Additional Facility Rules in 1978.[31] Most importantly it provides access to conciliation or arbitration of investment disputes where only one side is either a party to the ICSID Convention or a national of a party to the ICSID Convention. Thus, Additional Facility arbitration has become very important in the context of NAFTA[32] since only the United States is a party to the ICSID Convention, while Canada and Mexico are not. In practice, most investment arbitrations according to NAFTA Chapter 11[33] have been conducted pursuant to ICSID Additional Facility Rules.

III. Jurisdictional Issues

In 2004 a number of decisions on jurisdiction were rendered by ICSID tribunals clarifying important issues with regard to the scope of investment arbitration available under the ICSID Convention.

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25 See with regard to BITs: *AAPL* v. *Sri Lanka*, ICSID Case No. ARB/87/3, Award of 27 June 1990, 4 ICSID Reports 246; *Fedax* v. *Venezuela*, ICSID Case No. ARB/96/3, ICSID Decision on Jurisdiction of 11 July 1997, 37 International Legal Materials 1378 (1998); with regard to national legislation: *SPP* v. *Egypt*, ICSID Decision on Jurisdiction I of 27 November 1985, 3 ICSID Reports 101, 112, ICSID Decision on Jurisdiction II of 14 April 1988, 3 ICSID Reports 131, 140; *Tradex* v. *Albania*, ICSID Decision on Jurisdiction of 24 December 1996, 14 ICSID Review—Foreign Investment Law Journal 161, 187 (1999).

26 *See* Jan Paulsson, *Arbitration without Privity*, 10 ICSID Review—Foreign Investment Law Journal 232 (1995).

27 Article 26 ICSID Convention.

28 *Ibid*.

29 Article 27(1) ICSID Convention.

30 *Ibid*.

31 Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings, ICSID Doc. 11, 1979. Available at <http://www.worldbank.org/icsid/facility/facility.htm>.

32 North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States, and the Government of the United States of America, 17 December 1992, 32 International Legal Materials 289 (1993).

33 Article 1120 NAFTA, *supra* note 32.

A. Investment

One of the jurisdictional requirements under the ICSID Convention is that the dispute must have arisen "directly out of an investment."[34] The Convention, however,—not quite unintentionally—does not define what constitutes an "investment". The World Bank Executive Directors' Report, a significant explanatory text of the ICSID Convention, stated in this respect that "no attempt was made to define the term 'investment' given the essential requirement of consent by the parties [. . .]."[35] Thus, the relevant notion of investment may be found in investment agreements, in national legislation as well as in BITs. The latter regularly include very broad definitions of "investments", often including intangible rights and monetary claims.[36] Nevertheless, the parties are not completely free to define the notion of an investment which carries an "objective meaning" beyond their disposition.[37] The typical features an investment would normally exhibit are a certain duration, a certain regularity of profit and return, an element of risk for both sides, a substantial commitment and a significance for the host State's development.[38]

While, in the past, ICSID-tribunals used to accept a broad interpretation of "investment" for jurisdictional purposes, they seem to become more restrictive lately. This trend started with *Mihaly*,[39] where a tribunal declined to exercise jurisdiction because it considered that pre-investment costs incurred on the basis of a letter of intent, outlining a negotiation framework for a construction contract, did not constitute an investment. It was followed in 2004 by the *Joy Mining* decision.[40] This case arose from a contract between an English company and Egypt concerning the provision and installation of phosphate mining equipment and the release of letters of guarantee serving as security in exchange for the delivery of the machinery. Joy Mining considered the Egyptian refusal to release the security a

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34 Article 25(1) ICSID Convention.

35 Report of the World Bank Executive Directors, para. 27, reprinted in 1 ICSID Reports 23, 28.

36 Cf. the definition in the 1989 Germany-Guyana BIT: "the term 'investments' comprises every kind of asset, in particular: (a) movable and immovable property as well as other rights in rem, such as mortgages, liens and pledges; (b) shares of companies and other kinds of interest in companies; (c) claims to money which has been used to create an economic value or claims to any performance having an economic value; (d) copyrights, industrial property rights, technical processes, trademarks, trade-names, know-how, and good-will; (e) business concessions under public law, including concessions to search for, extract and exploit natural resources [. . .]" cited in Rudolf Dolzer & Margrete Stevens, Bilateral Investment Treaties 27 (1995).

37 Christoph H. Schreuer, The ICSID Convention: A Commentary 125 (2001).

38 Schreuer, *supra* note 37, at 140. Approvingly cited in *Joy Mining*, *infra* note 40, para. 53.

39 *Mihaly International Corporation* v. *Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award of 15 March 2002, 17 ICSID Review—Foreign Investment Law Journal 142 (2002).

40 *Joy Mining Machinery Limited* v. *Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Decision on Jurisdiction of 6 August 2004, 44 International Legal Materials 73 (2005).

breach of the UK-Egypt BIT according to which various activities were to be considered as investments, including pledges, claims to money, all kinds of assets and other matters. The arbitral tribunal, however, qualified the guarantee as "simply a contingent liability" which did not constitute an investment.[41] In the tribunal's view, it led to a mere commercial dispute over which it lacked jurisdiction.[42] The *Mihaly* Case was, however, not relied upon in *PSEG v. Turkey*[43] where the respondent State argued that a concession contract for the construction and operation of an electricity plant in Turkey had not become legally binding and thus did not yet constitute an investment. In the tribunal's view the contract was valid and binding and thus constituted an investment in the sense of Article 25 ICSID Convention.[44]

B. Investor

The most important *ratione personae* requirement of the ICSID Convention is that the dispute arises between a "Contracting State", on the one hand, and "nationals of another Contracting State", on the other.[45] According to the Convention "national of another Contracting State" means "any natural person who had the nationality of a Contracting State other than the State party to the dispute [. . .] but does not include any person who [. . .] also had the nationality of the Contracting State party to the dispute."[46] This language clearly excludes dual nationals from instituting ICSID proceedings against one of their home States even if their other nationality is the effective one.[47] In this respect the standing requirements for claimants are clearly more restrictive than those before other tribunals also hearing investment disputes such as the Iran-US Claims Tribunal.[48] The latter determined that it had jurisdiction over claims of dual US-Iranian nationals

41 *Joy Mining*, *supra* note 40, para. 44.

42 *Id.*, para. 79.

43 *PSEG Global Inc., The North American Coal Corporation, and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi* v. *Republic of Turkey*, ICSID Case No. ARB/02/5, Decision on Jurisdiction of 4 June 2004, 44 International Legal Materials 465 (2005).

44 *PSEG* v. *Turkey*, *supra* note 43, para. 104.

45 Article 25(1) ICSID Convention.

46 Article 25(2)(a) ICSID Convention.

47 *See Champion Trading Company* v. *Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Decision on Jurisdiction of 21 October 2003, 19 ICSID Review—Foreign Investment Law Journal 275 (2004), where the tribunal dismissed the claim of three US-Egyptian dual nationals for lack of jurisdiction.

48 Based on the Algiers Claims Settlement Declaration of 19 January 1981, Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 20 International Legal Materials 230 (1981). *See also* Charles Brower & Jason Brueschke, The Iran-United States Claims Tribunal (1998).

against Iran as long as the claimants' dominant and effective nationality was that of the United States.[49]

To date it is, however, unclear whether the effective nationality principle applies in ICSID proceedings were the claimant possesses multiple nationalities other than those of the host State. In the 2004 *Soufraki* Case[50] the arbitral tribunal would have had an opportunity to rule on this issue. The respondent challenged the tribunal's jurisdiction based on the fact that the claimant, who relied on the offer of ICSID arbitration contained in the Italian-United Arab Emirates BIT, possessed both Canadian and Italian nationality of which allegedly the Canadian one was the effective one. The tribunal, however, felt no need to address this question since it determined that the claimant had lost his Italian nationality and was thus unable to invoke the dispute settlement provisions of the Italian-United Arab Emirates BIT.[51]

With regard to legal persons the ICSID Convention defines "national of another Contracting State" as "any juridical person which had the nationality of a Contracting State other than the State party to the dispute [. . .] and any juridical person which had the nationality of the Contracting State party to the dispute [. . .] and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purpose of this Convention."[52] In ICSID practice corporate nationality is usually determined by the test of incorporation or seat (*siège social*) and not by the control theory.[53] This approach was confirmed in *Tokios Tokelés v. Ukraine*[54] though it led to the interesting situation where the presiding arbitrator dissented from the majority opinion of the two party-appointed arbitrators upholding their jurisdiction. The case was instituted by a company incorporated in Lithuania whose shares were almost entirely held by Ukrainian nationals. The Ukrainian challenge to the effect that this did not really involve a foreign investment protected under the ICSID Convention but rather an indirect investment of Ukrainian nationals in Ukraine was rejected by the tribunal's majority which was of the opinion that only the establishment under the laws of Lithuania was determinative for the ques-

49 *Case No. A/18 Concerning the Question of Jurisdiction over Claims of Persons with Dual Nationality*, 5 Iran-U.S. C.T.R. 252, at 260 (1984 I). See already *Esphahanian* v. *Bank Tejarat* (Case No. 157), 2 Iran-U.S. C.T.R. 157, at 168 (1983).

50 *Hussein Nuaman Soufraki* v. *The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Jurisdiction of 7 July 2004, available at <http://ita.law.uvic.ca/documents/Soufraki_000.pdf>.

51 *Soufraki* v. *United Arab Emirates, supra* note 50, para. 84.

52 Article 25(2)(b) ICSID Convention.

53 *See* SCHREUER, *supra* note 37, at 279. In this respect ICSID practice is in conformity with the *Barcelona Traction* Case, *supra* note 7.

54 *Tokios Tokelés* v. *Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction of 29 April 2004, available at <http://www.worldbank.org/icsid/cases/tokios-decision.pdf>.

tion of the claimant's nationality.[55] The strong dissent considered that this decision was "at odds with the object and purpose of the ICSID Convention and might jeopardize the future of the institution."[56]

Indeed, the majority opinion opens another avenue for treaty shopping by incorporating foreign companies for dispute settlement purposes. However, the wording of the ICSID Convention does not indicate that nationality on the basis of incorporation should be disregarded when a company is controlled by nationals of the host State. Rather, it is the inverse situation where a company incorporated in the host State is controlled by nationals of other ICSID Contracting Parties that—according to Article 25(2)(b) ICSID Convention[57]—may lead to disregarding the nationality based on incorporation. This provision ensures that foreign investments made through locally incorporated companies (frequently as a result of legal requirements by the host State) are not excluded from ICSID dispute settlement. In the past, ICSID tribunals have construed the requirement of an agreement that a locally incorporated company should be treated as a foreign one rather liberally and accepted implied agreements.[58] This approach was endorsed in the 2004 *MTD v. Chile* Case.[59]

C. Contract vs. Treaty Claims and the Effect of So-called Umbrella Clauses

In 2004 the controversial issue whether and to what extent contractual claims may be adjudicated by ICSID tribunals[60] was addressed in a number of decisions. It goes back to the 2003 decision on jurisdiction in the *SGS v. Pakistan* Case[61] where an ICSID tribunal held that it lacked jurisdiction to adjudicate on mere contract claims although it based its decision on a BIT which broadly provided for settlement of "disputes with respect to invest-

55 *Tokios Tokelés* v. *Ukraine*, *supra* note 54, para. 38.

56 *Tokios Tokelés* v. *Ukraine*, *supra* note 54, Dissenting Opinion of the Presiding Arbitrator Prosper Weil, para. 1.

57 According to Article 25(2)(b) ICSID Convention "national of another Contracting State" means: "any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention."

58 *Amco Asia* v. *Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction of 25 September 1983, 1 ICSID Reports 389, 394; *SOABI* v. *Senegal*, ICSID Case No. ARB/82/1, Decision on Jurisdiction of 1 August 1984, 2 ICSID Reports 175, 180.

59 *MTD Equity* v. *Chile*, ICSID Case No. ARB/01/7, Award of 25 May 2004, 44 International Legal Materials 91 (2005), para. 94.

60 *See* Stanimir A. Alexandrov, *Breaches of Contract and Breaches of Treaty*, 5 The Journal of World Investment & Trade 556 (2004); Christoph H. Schreuer, *Travelling the BIT Route. Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 The Journal of World Investment & Trade 231 (2004); Thomas Waelde, *The Umbrella Clause in Investment Arbitration. A Comment on Original Intentions and Recent Issues*, 6 The Journal of World Investment & Trade 183 (2005).

61 *SGS Société Générale de Surveillance S.A.* v. *Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction of 6 August 2003, 18 ICSID Review—Foreign Investment Law Journal 301 (2003); 42 International Legal Materials 1290 (2003).

ments between a Contracting Party and an investor of the other Contracting Party."[62] In the tribunal's view, that phrase "while descriptive of the *factual subject matter* of the disputes, does not relate to the *legal basis* of the claims, or the *cause of action* asserted in the claims. In other words, from that description alone, without more, we believe that no implication necessarily arises that both BIT and purely contract claims are intended to be covered by the Contracting Parties in Article 9."[63] While this reasoning was largely followed in the *Joy Mining* Case,[64] it was openly rejected by another ICSID tribunal in *SGS v. Philippines*.[65] The dispute settlement provision in the Swiss-Philippines BIT, equally applicable to "disputes with respect to investments", was interpreted as comprising both treaty and contractual claims.[66] The panel contrasted this broad language with the narrower dispute settlement provisions contained in other BITs referring, for instance, to "disputes regarding the interpretation or application of the provisions of this Agreement" which would limit "arbitration to claims concerning breaches of the substantive standards contained in the BIT."[67]

Both *SGS* cases arose from similar underlying contracts with the two respondent States. The Swiss company SGS claimed that its pre-shipment-inspection agreements according to which it would have performed various services in connection with the classification and verification of imported goods had been breached by the host governments.

In both cases the claimant also tried to rely on so-called umbrella clauses[68] arguing that they had the effect of transforming breaches of contract into treaty breaches over which ICSID tribunals could exercise jurisdiction. Again the two ICSID tribunals reached different results. In *SGS v. Pakistan* 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

62 Article 9(1) Switzerland-Pakistan BIT as cited in *SGS* v. *Pakistan*, *supra* note 61, para. 80.

63 *SGS v. Pakistan, supra note 61, para. 161.*

64 The tribunal thought that "it could not be held that an umbrella clause inserted in the Treaty, and not very prominently, could have the effect of transforming all contract disputes into investment disputes under the Treaty, unless of course there would be a clear violation of the Treaty rights and obligations or a violation of contract rights of such a magnitude as to trigger the Treaty protection, which is not the case." *Joy Mining*, *supra* note 40, para. 81.

65 *SGS Société Générale de Surveillance S.A.* v. *Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction of 29 January 2004, 8 ICSID Reports 515.

66 *SGS* v. *Philippines*, *supra* note 65, para. 131 ff.

67 *Id.*, para. 132.

68 Article 11 of the Swiss-Pakistan BIT provided: "Each Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party." Article X(2) of the Swiss-Philippines BIT stipulated: "Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party."

claims could only be brought under Article 11 'under exceptional circumstances'."[69] 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."[70]

In *Salini v. Jordan*,[71] another 2004 ICSID award concerning a dispute between an Italian company and Jordan arising from a procurement contract providing for the construction of a dam, the arbitral tribunal also addressed the issue of umbrella clauses. Noting the peculiar wording of the applicable BIT provision invoked by the claimant,[72] the tribunal found, however, that it only committed the host State to create and maintain in its territory a "legal framework" favourable to investments, and did not bind it "to 'observe' any 'obligation' it had previously assumed with regard to specific investments of investors of the other contracting Party."[73]

D. The Scope of MFN-Clauses

Next to the controversy with regard to treaty vs. contract claims there is another split of opinion concerning the implication of MFN-clauses frequently contained in BITs. The issue dates back to the 2000 decision on jurisdiction of the ICSID tribunal in the *Maffezini* Case.[74] There the tribunal thought that the applicable MFN-clause[75] was not limited to substantive standards of treatment, but extended to procedural issues. It thus permitted an Argentine investor to rely on the more favourable dispute settlement provisions contained in the Spain-Chile BIT, thereby avoiding an 18 months waiting period contained in the Spain-Argentina BIT.[76] A

69 *SGS* v. *Pakistan*, *supra* note 61, para. 172.

70 *SGS* v. *Philippines*, *supra* note 65, para. 128.

71 *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, 44 International Legal Materials 573 (2005).

72 Article 2(4) of the Jordan-Italy BIT provided: "Each Contracting Party shall create and maintain in its territory a legal framework apt to guarantee to investors the continuity of legal treatment, including the compliance, in good faith, of all undertakings assumed with regard to each specific investor."

73 *Salini* v. *Jordan*, *supra* note 71, para. 126.

74 *Emilio Agustín Maffezini* v. *Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction of 25 January 2000, 40 International Legal Materials 1129 (2001), 16 ICSID Review—Foreign Investment Law Journal 212 (2001).

75 Article IV(2) of the Argentina-Spain BIT provided: "In all matters subject to this Agreement, this treatment shall not be less favorable than that extended by each Party to the investments made in its territory by investors of a third country."

76 "[. . .] [I]f a third party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests than those in the basic treaty, such pro-

broad interpretation of MFN-clauses was also followed in *MTD v. Chile*[77] with regard to substantive treatment standards, while it was rejected in *Tecmed v. Mexico*[78] for purposes of retroactive application of BIT standards. Two 2004 ICSID panels had to address the *Maffezini*-type jurisdictional implications of MFN clauses and came to diverging results: While the tribunal in *Siemens v. Argentina*[79] drew extremely investor-friendly conclusions from an MFN-clause, the ICSID panel in *Salini v. Jordan*[80] rejected the *Maffezini*-doctrine.

The *Siemens* Case concerned a German technology company whose contract to provide an identification system for Argentina was unilaterally cancelled by the host government. Like in *Maffezini* the *Siemens* tribunal permitted the claimant to bypass the obligation contained in the applicable Germany-Argentina BIT to pursue local remedies for 18 months before commencing arbitration. It did so on the basis of a dispute settlement provision contained in the Argentina-Chile BIT "imported" through the MFN-clause of the Germany-Argentina BIT. What is of particular interest in *Siemens* is the fact that the tribunal allowed the investor to "pick and choose" single aspects of the "imported" dispute settlement provisions. While the Argentina-Chile BIT did not provide for a waiting period before initiating arbitration, it contained a so-called "fork-in-the-road" provision according to which the investor had to choose between local remedies or international arbitration with the implication that once an option has been pursued the other becomes unavailable. By rejecting the Argentine argument that Siemens should be prevented from instituting ICSID arbitration as a result of administrative proceedings started earlier before Argentine tribunals, the *Siemens* panel literally provided most-favourable-treatment to the investor.[81]

In the *Salini* Case, however, an ICSID tribunal rejected the *Maffezini* and *Siemens* approach. The tribunal held that the applicable MFN-clause in the Jordan-Italy BIT[82]—as opposed to the MFN clause in *Maffezini* referring to "all matters" subject to the agreement—was not broad enough to form the

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visions may be extended to the beneficiary of the most favored nation clause [. . .]." *Maffezini* v. *Spain*, Decision on Jurisdiction 2000, *supra* note 74, para. 54.

77 *MTD Equity* v. *Chile*, *supra* note 59, para. 103.

78 *Technicas Medioambientales Tecmed S.A.* v. *Mexico*, ICSID Case No. ARB/AF/00/2, Award of 29 May 2003, 43 International Legal Materials 133 (2004), para. 69.

79 *Siemens A.G.* v. *The Argentine Republic,* ICSID Case No. ARB/02/8, Decision on Jurisdiction of 3 August 2004, 44 International Legal Materials 138 (2005).

80 *Salini* v. *Jordan, supra* note 71.

81 *Siemens* v. *Argentina*, *supra* note 79, para. 120.

82 The combined national treatment and MFN Clause in Article 3(1) of the Jordan-Italy BIT provided as follows: "Both Contracting Parties, within the bounds of their own territory, shall grant investments effected by, and the income accruing to, investors of the Contracting Party no less favour-

basis for ICSID jurisdiction provided for in other BITs of the host State. Instead, it found that it lacked jurisdiction as a result of the applicable dispute settlement provisions in the Jordan-Italy BIT giving preference to the remedies directly provided for in the investment agreement between the investor and the host State.[83]

It remains to be seen in how far these different case outcomes truly reflect an inconsistent case-law or whether they may be reconciled. It should be recognised that both in *Maffezini* and *Siemens* MFN-clauses were successfully invoked in order to avoid procedural obstacles to dispute settlement obligations between the investors and the respondent States which existed already in principle. In *Salini*, however, claimants tried to create a jurisdiction that would not have existed otherwise.

IV. Substantive Issues

Though most of the 2004 decisions by ICSID tribunals concerned jurisdictional questions, a number of important substantive issues were addressed in particular in the *Waste Management* award.

A. Expropriation

One of the core issues of investment law, both under customary international law and according to most bi—and multilateral investment treaties, is the protection of foreign investments against expropriation. Typically, BITs prohibit the expropriation of foreign investments except for a public purpose, in a non-discriminatory fashion and in accordance with due process of law and unless accompanied by financial compensation. They frequently adopt a variation of the *Hull* formula[84] calling for adequate, prompt and effective compensation.[85]

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able treatment than that accorded to investments effected by, and income accruing to, its own nationals or investors of Third States."

83 *Salini* v. *Jordan, supra* note 71, para. 119.

84 Based on a diplomatic note sent by the US Secretary of State Cordell Hull to his Mexican counterpart in which he demanded: "The Government of the United States merely adverts to a self-evident fact when it notes that the applicable and recognized authorities on international law support its declaration that, under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate and effective payment therefore." Green Haywood Hackworth, 3 Digest of International Law 658-59 (1942), at § 288.

85 Article III US Model BIT, for instance, provides: "Investments shall not be expropriated or nationalized either directly of indirectly through measures tantamount to expropriation or nationalization ("expropriation") except: for a public purpose; in a nondiscriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(2)." Cited in Dolzer & Stevens, *supra* note 36, at 245.

Over the last twenty years, outright expropriations involving a transfer of assets from the foreign investor to the host State have become rare in practice. Thus, more recent arbitrations had to focus on the issue of indirect expropriation,[86] equally prohibited by most investment treaties as "measures having equivalent effect"[87] or "measures tantamount to nationalization or expropriation."[88] One of the most difficult questions in this regard is the exact delimitation between an indirect expropriation and a legitimate regulatory measure.[89] ICSID tribunals have addressed this problem in the past. For instance, in *Metalclad* an ICSID Additional Facility tribunal held:

> "Thus, expropriation [. . .] includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favor of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be expected economic benefit of property even if not necessarily to the obvious benefit of the host State."[90]

In a similar way, another NAFTA Chapter 11 tribunal in the *Feldman* Case considered that "[i]n the past, confiscatory taxation, denial of access to infrastructure or necessary raw materials, imposition of unreasonable regula-

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See also Article 1110 NAFTA, *supra* note 32; Article 13 Energy Charter Treaty, Annex 1 to the Final Act of the European Energy Charter Treaty Conference, 17 December 1994; 34 INTERNATIONAL LEGAL MATERIALS 381 (1995).

Similarly, the Draft Multilateral Agreement on Investment provided: "A Contracting Party shall not expropriate or nationalise directly or indirectly an investment in its territory of an investor of another Contracting Party or take any measure or measures having equivalent effect (hereinafter referred to as "expropriation") except:

a) for a purpose which is in the public interest,

b) on a non-discriminatory basis,

c) in accordance with due process of law, and

d) accompanied by payment of prompt, adequate and effective compensation."

OECD Negotiating Group on the Multilateral Agreement on Investment (MAI), The Multilateral Agreement on Investment Draft Consolidated Text 6, OECD Doc. DAFFE/MAI(98)7/REV1, 22 April 1998. Available at <http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf>.

86 *See* Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 RECUEIL DES COURS 263 (1982-III); W. Michael Reisman & Robert D. Sloane, *Indirect Expropriation and Its Valuation in the BIT Generation*, 74 BRITISH YEAR BOOK OF INTERNATIONAL LAW 115 (2003).

87 Article 13 Energy Charter Treaty, *supra* note 85.

88 Article 1110 NAFTA, *supra* note 32. See also Article 5 United Kingdom Model BIT, cited in DOLZER & STEVENS, *supra* note 36, at 232.

89 *See* Thomas Waelde & Abba Kolo, *Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law*, 50 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 811 (2001); Rudolf Dolzer, *Indirect Expropriations: New Developments?*, 11 NEW YORK UNIVERSITY ENVIRONMENTAL LAW JOURNAL 64 (2002).

90 *Metalclad Corp.* v. *United Mexican State*s, ARB(AF)/97/1, Award, 30 August 2000, 16 ICSID REVIEW – FOREIGN INVESTMENT LAW JOURNAL 168, 195 (2001), para. 103.

tory regimes, among others, have been considered to be expropriatory actions."[91]

A further difficult problem of identifying expropriatory action concerns the qualification of a breach of contract on the part of the State party. In the 2004 award in the *Waste Management* Case[92] an arbitration tribunal expressly stated that "an enterprise is not expropriated just because its debts are not paid or other contractual obligations towards it are breached."[93] The case concerned a dispute over an exclusive waste disposal concession granted by the Mexican city of Acapulco to a Mexican company wholly owned by the US claimant. It involved, among others, the failure of making payments according to contractually agreed terms. Waste Management claimed that this constituted a prohibited indirect expropriation under Article 1110 NAFTA as well as a breach of the obligation to be fairly and equitably treated according to Article 1105 NAFTA.[94] The *Waste Management* tribunal pointed out that NAFTA did not include an umbrella clause "committing the host State to comply with its contractual commitments."[95] Thus, showing that there was a breach of contract was not enough to lead to a NAFTA violation. And since there was no "outright repudiation" of the transaction, the mere failure to honour contractual obligations did not amount to an expropriation. The tribunal added that it was "not the function of Article 1110 to compensate for failed business ventures, absent arbitrary intervention by the State amounting to a virtual taking or sterilising of the enterprise."[96]

In the tribunal's opinion the mere non-performance of a contractual obligation was not only no taking of property, it neither constituted an act "tantamount to expropriation"—"unless accompanied by other elements."[97] The tribunal identified three groups of cases which might cross this threshold.[98] First, "cases where a whole enterprise is terminated or frustrated because its functioning is simply halted by decree or executive act." Secondly, "cases where there has been an acknowledged taking of property, and associated contractual rights are affected in consequence."

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91 *Marvin Feldmann* v. *Mexico*, ARB(AF)/99/1, 16 December 2002, 18 ICSID Review—Foreign Investment Law Journal 488 (2003), para. 103.

92 *Waste Management, Inc.* v. *United Mexican States*, Case No. ARB(AF)/00/3, ICSID Additional Facility Award of 30 April 2004, 43 International Legal Materials 967 (2004).

93 *Waste Management* v. *Mexico, supra* note 92, para. 160.

94 *See infra* text starting at note 101.

95 *Waste Management* v. *Mexico, supra* note 92, para. 73.

96 *Id.*, para. 160.

97 *Id.*, para. 174.

98 *Id.*, para. 172 ff.

Finally, with regard to "cases where the only right affected is incorporeal" the tribunal said:

> "Any private party can fail to perform its contracts, whereas nationalization and expropriation are inherently governmental acts, as is envisaged by the use of the term "measure" in Article 1110(1). It is true that, having regard to the inclusive definition of "measure", one could envisage conduct tantamount to an expropriation which consisted of acts and omissions not specifically or exclusively governmental. All the same, the normal response by an investor faced with a breach of contract by its governmental counter-party (the breach not taking the form of an exercise of governmental prerogative, such as a legislative decree) is to sue in the appropriate court to remedy the breach. It is only where such access is legally or practically foreclosed that the breach could amount to a definitive denial of the right (i.e., the effective taking of the chose in action) and the protection of Article 1110 be called into play."[99]

Since in the case at hand there was no "final refusal to pay (combined with effective obstruction and denial of legal remedies)," but rather "neglect and failure at the contractual level", the acts attributable to Mexico did not constitute a measure tantamount to expropriation.

This view was also adhered to in the *SGS v. Philippines* case where the tribunal stated already in its jurisdictional decision that "[a] mere refusal to pay a debt is not an expropriation of property, at least where remedies exist in respect of such a refusal. *A fortiori* a refusal to pay is not an expropriation where there is an unresolved dispute as to the amount payable."[100]

B. Fair and Equitable Treatment

The 2004 decision in the *Waste Management* Case is also important with regard to the question when a State is in breach of its treaty obligation to provide "fair and equitable treatment" to foreign investors. This is a standard of treatment typically included in BITs,[101] but also featuring in multilateral agreements.[102]

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99 *Id.*, para. 174.

100 *SGS v. Philippines, supra note 65, para. 161.*

101 Dolzer & Stevens, *supra* note 36, at 58.

102 Article 1105 NAFTA, *supra* note 32; Article 10(1) Energy Charter Treaty, *supra* note 85. *See also* Stephen Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, 70 British Year Book of International Law 99 (1999); UNCTAD (ed.), Fair and Equitable Treatment, UNCTAD Series on Issues in International Investment Agreements (1999); Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 The Journal of World Investment & Trade 357 (2005).

The distinctive formulation of this standard in the NAFTA[103] has led to the controversy whether "fair and equitable" treatment is identical with the international minimum standard or goes beyond it. A 2001 interpretation by the NAFTA Free Trade Commission[104] effectively equalising the two standards has been followed in most NAFTA Chapter 11 cases,[105] though some arbitral tribunals expressly rejected that view.[106]

In *Waste Management* an ICSID Additional Facility panel characterised a violation of fair and equitable treatment as follows:

> "[T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. 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."[107]

The tribunal also found a positive formulation for this standard which comprises a "basic obligation of the State under Article 1105(1) [. . .] to act in good faith and form, and not deliberately to set out to destroy or frustrate the investment by improper means."[108]

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103 Article 1105 NAFTA, *supra* note 32, provides: "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."

104 "1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. 2. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens." NAFTA Free Trade Commission Clarifications Related to NAFTA Chapter 11, Decision of 31 July 2001, available at <http://www.ustr.gov/regions/whemisphere/nafta-chapter11.PDF>.

105 *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, ICSID Additional Facility Award of 11 October 2002, 6 ICSID Reports 192; 42 International Legal Materials 85 (2003), para. 122; *United Parcel Service of America Inc. v. Government of Canada*, Decision on Jurisdiction of 22 November 2002, para. 97; *ADF Group Inc. v. United States of America*, Case No. ARB(AF)/00/1, ICSID Additional Facility Award of 9 January 2003, 6 ICSID Reports 470, 527, para. 199.

106 *Pope & Talbot v Canada*, UNCITRAL Arbitration Award in Respect of Damages of 31 May 2002, 41 International Legal Materials 1347 (2002). See also for a non-NAFTA case *CME Czech Republic B.V. v. The Czech Republic, Partial Award,* UNCITRAL Arbitration Award of 13 September 2001, World Trade and Arbitration Materials 109 (2002), para. 156: "The broad concept of fair and equitable treatment imposes obligations beyond customary international requirements of good faith treatment."

107 *Waste Management* v. *Mexico*, *supra* note 92, para. 98.

108 *Id.*, para. 138.

With regard to the persistent failure of the Mexican authorities to make payments according to the concession agreement, the tribunal found that this did not constitute behaviour in a "wholly arbitrary way or in a way that was grossly unfair." In its view "even the persistent non-payment of debts by a municipality is not to be equated with a violation of Article 1105, provided that it does not amount to an outright and unjustified repudiation of the transaction and provided that some remedy is open to the creditor to address the problem. In the present case the failure to pay can be explained, albeit not excused, by the financial crisis which meant that at key points the City could hardly pay its own payroll. There is no evidence that it was motivated by sectoral or local prejudice."[109]

The *Waste Management* tribunal equally rejected the claim that the way in which Mexican legal proceedings were conducted constituted a denial of justice equally amounting to a violation of the fair and equitable treatment standard. In the tribunal's view, "[t]he Mexican court decisions were not, either *ex facie* or on closer examination, evidently arbitrary, unjust or idiosyncratic."[110]

Also in *MTD v. Chile*[111] the fair and equitable standard was in issue. According to the ICSID tribunal it "should be understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment. Its terms are framed as a pro-active statement—"to promote", "to create", "to stimulate"—rather than prescriptions for a passive behavior of the State or avoidance of prejudicial conduct to the investors."[112] The *MTD* tribunal expressly endorsed the *Tecmed* finding which held that the fair and equitable treatment standard protects "basic expectations" of investors "that the host State acts in a consistent manner, free from ambiguity and totally transparent."[113] It found a violation of this standard in the host State's approval of a real estate development project which was against its own zoning rules and thus later led to the abandonment of the investment.

V. Conclusions

The year 2004 has significantly contributed to the gradual evolution of an ICSID jurisprudence which will guide future arbitration panels in settling investment disputes between States and private parties. While there is still a predominance of jurisdictional decisions, witnessing the resistance of

109 *Id.*, para. 115.
110 *Id.*, para. 130.
111 *MTD* v. *Chile*, *supra* note 59.
112 *Id.*, para. 113.
113 *Tecmed* v. *Mexico*, *supra* note 78, para. 154.

States to be subjected to international arbitration by private investors, the increasing number of awards on the merits helps to interpret and shape the meaning of substantive standards in the law of foreign investment.

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LEGAL MAXIMS: SUMMARIES AND EXTRACTS FROM SELECTED CASE LAW*

Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ARB/01/3, Decision on Jurisdiction, 14 January 2004

SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ARB/02/6, Decision on Jurisdiction, 29 January 2004

Tokios Tokelés v. Ukraine, ARB/02/18, Decision on Jurisdiction, 29 April 2004

LG&E Energy Corp. v. Argentine Republic, ARB/02/1, Decision on Jurisdiction, 30 April 2004

Waste Management, Inc. v. United Mexican States, ARB(AF)/00/3, Award, 30 April 2004

MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ARB/01/7, Award, 25 May 2004

PSEG Global Inc., The North American Coal Corporation, and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey, ARB/02/5, Decision on Jurisdiction, 4 June 2004

Hussein Nuaman Soufraki v. United Arab Emirates, ARB/02/7, Award, 7 July 2004

Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ARB/01/3, Decision on Jurisdiction, Ancillary Claim, 2 August 2004

Siemens A.G. v. Argentine Republic, ARB/02/8, Decision on Jurisdiction, 3 August 2004

Joy Mining Machinery Limited v. The Arab Republic of Egypt, ARB/03/11, Decision on Jurisdiction, 6 August 2004

Salini Costruttori S.p.A. and Italstrade S.p.A. v. the Hashemite Kingdom of Jordan, ARB/02/13, Decision on Jurisdiction, 29 November 2004

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

Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ARB/01/3, Decision on Jurisdiction, 14 January 2004*

Original: English

Present: Orrego Vicuña, *President of the Tribunal*
Gros Espiell, Tschanz, *Arbitrators*

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* Summaries prepared by Christina Knahr, Ph.D. Candidate, Research Assistant, Department for European, International and Comparative Law, University of Vienna, Austria. The full text of the Decision is available at <http://ita.law.uvic.ca/documents/Enron-Jurisdiction_000.pdf>. Original footnote numbers are indicated in brackets: [ ].

II.4.911 REQUEST FOR ARBITRATION
See also I.17.011

I. PROCEDURE

[1] "On February 26, 2001, the International Centre for Settlement of Investment Disputes (ICSID or the Centre) received from Enron Corporation and Ponderosa Assets L.P., a Request for Arbitration against the Argentine Republic. [. . .] The Request concerns certain tax assessments allegedly imposed by some Argentinean provinces in respect to a gas transportation company in which the Claimants participated through investments in various corporate arrangements that will be described below. In the Request, the Claimants invoke the provisions of the 1991 Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investments ('the Bilateral Investment Treaty' or 'Bilateral Treaty').[1]"

[Para. 1]

II.4.99 ANCILLARY CLAIM

[16] "On March 25, 2003, the Claimants filed before the Centre a new request for arbitration against the Argentine Republic." | **[17]** "On April 25, 2003, after having examined the Claimants' new request for arbitration and the observations submitted by both parties in this respect, the Tribunal decided to accept the new request for arbitration as a claim ancillary to the present case and to have both cases proceed on separate tracks until the Tribunal has decided on jurisdiction in respect of both claims. [. . .]"

[Paras. 16, 17]

II. THE DISPUTE

A. Subject-matter of the Claim

[20] "The Claimants in this dispute [. . .] is a participant in the privatization program that that government undertook beginning in 1989. The investments the Claimants seek to protect were made in the important gas industry of Argentina, the privatization of which was carried out under the terms of the Gas Law and related instruments.[2] The Claimants satisfy the requirements of the Argentina-United States Bilateral Investment Treaty as to having substantial business activities in the United States and not being

1 [1] Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment of November 14, 1991, in force from October 20, 1994.

2 [2] Law 24.076 of 1992 on the Privatisation of the Gas Sector; Decree 1738/92 of 1992 on the implementation of the Gas Law.

controlled by nationals of a third country, a matter in respect of which Argentina had requested a clarification." | **[21]** "Claimants' participation concerns the privatization of Transportadora de Gas del Sur ('TGS'), one of the major networks for the transportation and distribution of gas produced in the provinces of the South of Argentina. [. . .]"

[Paras. 20, 21]

B. Ancillary Claim

[22] "This part of the Claimants' dispute before ICSID concerns only a question of tax assessments by some Argentine provinces. An auxiliary claim has been introduced for disputes concerning tariffs, devaluation and other financial measures adopted by the Government of the Argentine Republic. Jurisdictional issues as to the additional claim will be dealt with in due course by this Tribunal in a separate decision."

[Para. 22]

III. CONSIDERATIONS OF THE TRIBUNAL

I.2.03 TERRITORIAL SOVEREIGNTY

A. Argentinean Tax Policies

[29] "This Tribunal will not sit in judgement over the general tax policies pursued by the Argentine Republic or the Provinces, nor for that matter of the arrangements the provinces have with the Federal Government of the Argentine Republic. This is a matter exclusively appurtenant to the sovereignty of the Argentine Republic."

[Para. 29]

I.1.14 OBSERVANCE OF TREATY OBLIGATIONS

B. No Power of ICSID Tribunal to Rule on Economic Policies

[30] "The Tribunal, however, has the duty to establish in connection with the merits of the case whether such assessments violate the rights accorded to foreign investors under treaties, legislation, contracts and other commitments. As decided by an ICSID Tribunal in an earlier case with reference to the role of bilateral investment treaties,

> '. . .these treaties cannot entirely isolate foreign investments from the general economic situation of a country. They do provide for standards of fair and equitable treatment, non-discrimination, guarantees in respect of expropriation and other matters, but they cannot prevent a country from pursuing its own economic choices. These choices are not under the Centre's jurisdiction and ICSID tribunals cannot pass judgement on whether such

policies are right or wrong. Judgement can only be made in respect of whether the rights of investors have been violated.'[3]"

[Para. 30]

I.11.0 STATE RESPONSIBILITY

C. Responsibility of a State for Unlawful Acts of Its Agencies and Subdivisions

[32] "[. . .] The Tribunal is mindful in this respect that under international law the State incurs international responsibility and liability for unlawful acts of its various agencies and subdivisions.[4] The same holds true under Article XIII of the Bilateral Investment Treaty when providing that this '. . . Treaty shall apply to the political subdivisions of the Parties'."

[Para. 32]

II.4.94 APPLICABLE LAW

D. Relevance of ICSID Precedents

[40] "The Tribunal is of course mindful that decisions of ICSID or other arbitral tribunals are not a primary source of rules. The citations of and references to those decisions respond to the fact that the Tribunal in examining the claim and arguments of this case under international law, believes that in essence the conclusions and reasons of those decisions are correct."

[Para. 40]

II.4.9211 QUALIFICATION AS INVESTMENT

E. Definition of Investment in the BIT

[42] "As the ICSID Convention did not attempt to define 'investment', this task was left largely to the parties to bilateral investment treaties or other expressions of consent. It has been aptly commented that there is, however, a limit to this discretion of the parties because they could not validly define as investment in connection with the Convention something absurd or entirely incompatible with its object and purpose.[5] The definition of investment relevant to this case is set out in Article I (1) of the Bilateral Investment Treaty, which provides in part:

'(a) 'investment' means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies

3 [4] CMS, [*CMS v. Argentina*, Decision on Objections to Jurisdiction of July 17, 2003] paragraph 29.

4 [5] James Crawford: The International Law Commission's Articles on State Responsibility, 2002, Comments on Article 4 at 94-99.

5 [9] Christoph H. Schreuer: The ICSID Convention: A Commentary, 2001, paragraph 89.

of the other Party, such as equity, debt, and service and investment contracts; and includes without limitation:

(. . .)

(ii) a company or shares of stock or other interests in a company or interests in the assets thereof . . .'" |

[43] "As noted above, in the view of the Argentine Republic neither TGS nor CIESA qualify as an investment or as investor under the Bilateral Investment Treaty. While it is admitted that the investment made by the Claimants is protected under the Treaty this would only allow for claims affecting their rights qua shareholders. This view, as also noted, is contested by the Claimants." | **[44]** "The Tribunal notes, as did the Tribunal in *Lanco* and also the Committee on Annulment in *Compañía de Aguas del Aconquija or Vivendi*, the latter in respect of a different but comparable bilateral investment treaty, that the definition of investment set out above is broad indeed. It is apparent that this definition does not exclude claims by minority or non-controlling shareholders. Neither is there anything unreasonable in this definition that would make it incompatible with the object and purpose of the ICSID Convention."

[Paras. 42, 43, 44]

I.1.16 TREATY INTERPRETATION
See also I.17.011; II.4.9211; II.4.92232

F. Rights of Shareholders

[45] "The Argentine Republic has made in this context the argument that when treaties have wished to include within their scope indirect damages of the sort claimed in this case, they have done so expressly. The North American Free Trade Agreement (NAFTA) and the Algiers Claims Settlement Declaration establishing the jurisdiction of the Iran-United States Claims Tribunal have been invoked as examples of this express reference. This, it is further explained, is also the case of the Argentina-United Kingdom Bilateral Investment Treaty. Most treaties, in the Respondent's view, allow for claims of locally incorporated companies only when controlled by foreign nationals, a situation not given in the instant case. The silence of the Bilateral Investment Treaty on the question of claims for indirect damage cannot be held, in the Respondent's argument, against the principles established in the legislation of Argentina or international law." | **[46]** "The fact that a treaty may have provided expressly for certain rights of shareholders does not mean that a treaty not so providing has meant to exclude such rights if this can be reasonably inferred from the provisions of such treaty. Each instrument must be interpreted autonomously in the light of its own context and in the light of its interconnections with international law.

Moreover, the United States model investment treaties are based on a rather broad interpretation of investment that was included with the express intention of overriding the eventual restrictive effects that could result from the *Barcelona Traction* decision." | **[47]** "The rules governing the interpretation of treaties under the Vienna Convention on the Law of Treaties lead to a similar conclusion in so far as the parties to the treaties concerned are different.[6] Indeed, the interpretation of a bilateral treaty between two parties in connection with the text of another treaty between different parties will normally be the same, unless the parties express a different intention in accordance with international law. A similar logic is found in Article 31 of the Vienna Convention in so far as subsequent agreement or practice between the parties to the same treaty is taken into account regarding the interpretation of the treaty. There is no evidence in this case that the intention of the parties to the Argentina-United States Bilateral Treaty might be different from that expressed in other investment treaties invoked."

[Paras. 45, 46, 47]

II.4.922 JURISDICTION *RATIONE PERSONAE*
See also I.17.011; II.4.92232

G. Rights of Minority Shareholders under the BIT

[49] "This Tribunal must accordingly conclude that under the provisions of the Bilateral Investment Treaty, broad as they are, claims made by investors that are not in the majority or in the control of the affected corporation when claiming for violations of their rights under such treaty are admissible. Whether the locally incorporated company may further claim for the violation of its rights under contracts, licences or other instruments, does not affect the direct right of action of foreign shareholders under the Bilateral Investment Treaty for protecting their interests in the qualifying investment."

[Para. 49]

II.1.121 ADMISSIBILITY OF THE APPLICATION
See also II.4.93

H. Admissibility of Claims Brought by Minority Shareholders

[50] "[. . .] The Argentine Republic has rightly raised a concern about the fact that if minority shareholders can claim independently from the affected corporation, this could trigger an endless chain of claims, as any shareholder making an investment in a company that makes an invest-

6 [10] Convention on the Law of Treaties, May 23, 1969, Article 31.

ment in another company, and so on, could invoke a direct right of action for measures affecting a corporation at the end of the chain." | **[52]** "The Tribunal notes that while investors can claim in their own right under the provisions of the treaty, there is indeed a need to establish a cut-off point beyond which claims would not be permissible as they would have only a remote connection to the affected company. As this is in essence a question of admissibility of claims, the answer lies in establishing the extent of the consent to arbitration of the host State. If consent has been given in respect of an investor and an investment, it can be reasonably concluded that the claims brought by such investor are admissible under the treaty. If the consent cannot be considered as extending to another investor or investment, these other claims should then be considered inadmissible as being only remotely connected with the affected company and the scope of the legal system protecting that investment."

[Paras. 50, 52]

IV. OBJECTIONS TO JURISDICTION

II.4.9214 DISPUTE ARISING DIRECTLY OUT OF AN INVESTMENT
See also II.1.211; II.4.9211

A. Objection Concerning Direct Connection Between Dispute and Investment

[58] "[. . .] [T]he Argentine Republic has raised a jurisdictional objection on the ground that the dispute does not arise directly out of an investment as required by the ICSID Convention. In the Respondent's view, as neither TGS nor CIESA qualify as investments or investors under the Treaty, and the dispute concerns only tax obligations of TGS, the claims in this case do not arise directly out of an investment made by the Claimants. The investment in shares is recognized by the Argentine Republic as an investment protected under the Treaty, but only in respect of rights that might be invoked by the Claimants qua shareholders [. . .]." | **[59]** "The Claimants have explained in this connection that they do not consider the TGS Share Transfer Agreement as an investment agreement or as an investment in and of itself, but that the investment they have made in shares of CIESA and TGS does qualify as an investment under the Treaty. Their right of action, the argument goes on, is related to the protection the Treaty gives to their investment in those shares and, accordingly, the dispute arises directly out of an investment." | **[60]** "The Tribunal has noted above that the rights of the Claimants can be asserted independently from the rights of TGS or CIESA. As the Claimants have a separate cause of action under the Treaty in connection with the investment made, the Tribunal concludes

that the present dispute arises directly out of the investment made and that accordingly there is no obstacle to a finding of jurisdiction on this count."

[Paras. 58, 59, 60]

I.17.1 EXPROPRIATION
See also I.17.011; I.17.24; II.1.211

B. Objection Concerning Application of the BIT and Invoking Expropriation in Connection with Tax Matters

[61] "Article XII of the Bilateral Investment Treaty governs tax matters. Paragraph 1 of this Article states the overall policy on taxation, the Parties undertaking to 'strive to accord fairness and equity in the treatment of investment of nationals and companies of the other Party'. [. . .]" | **[62]** "The Argentine Republic has argued that the claim made in this case exceeds the limits set out in Article XII [. . .]. [. . .] Moreover [. . .] not even the complaint about violation of fair and equitable treatment could be brought in connection with tax matters as the Treaty only requires the parties to 'strive' in this respect." | **[63]** "The Respondent is also of the view that the Claimants cannot invoke expropriation or the violation of an investment agreement or authorization as these questions are unrelated to the tax assessments affecting TGS and, furthermore, there is no investment agreement or authorization. The Treaty [. . .] does not apply to the present claim under Article XII as it concerns only tax matters; nor are the remedies sought by the Claimants allowed for under this Article or the Treaty." | **[64]** "The Claimants hold a different view. First, in their opinion fairness and equity as invoked in paragraph 1 of the Article are not meaningless, and 'to strive' involves a commitment that cannot be ignored in the implementation of tax policies. Second, the Claimants argue that they are specifically invoking expropriation as part of their claim on the merits, as the tax assessed constitutes a measure tantamount to expropriation. And third, the Claimants believe that fair and equitable treatment and other standards set out in Article II (2) of the Treaty do apply as they are conditions for legal expropriation under Article IV of the Treaty." | **[65]** "The Tribunal notes that there is no disagreement about the fact that the dispute concerns a tax matter. However, it is also quite apparent that in the Claimants' submissions expropriation is a prominent cause for action under the Treaty. The Treaty builds in this connection a chain of linkages between the pertinent provisions. First, it is quite true that to strive under paragraph 1 of Article XII is not a meaningless reference. It is even less so in the present case, where the Federal Government of the Argentine Republic shares the concerns of the Claimants about the tax assessments by the Provinces. Second, if expropriation is invoked and there is a finding upholding this allegation, then the Treaty becomes applicable without question. This finding is of course a matter that can only be considered on the merits." | **[66]** "It is also important to note

that once expropriation is invoked, as indeed it has been, then the connection between Article IV and the standards of treatment under Article II (2) of the Treaty becomes operational, including fair and equitable treatment, full protection and security and treatment not less than that required by international law. In turn, this brings in the meaning of paragraph 1 of Article XII. It is in this context, and not in isolation, that the questions of transparency and the availability of effective remedies also become relevant. And, above all, the whole discussion is then governed by Article VII of the Treaty on the settlement of disputes." | **[67]** "The Claimants have satisfied the requirement of having a present interest to bring action under the Treaty, particularly in view of the fact that is has been alleged that the tax assessments resulted in the violation of specific provisions and standards of treatment established in the Treaty. These allegations can only be considered at the merits phase of the case, but prima facie they are sufficient to justify the exercise of the right of action by the Claimants. Accordingly, the Tribunal upholds jurisdiction to consider the matter on the merits as far as this objection is concerned."

[Paras. 61, 62, 63, 64, 65, 66, 67]

II.4.9211 QUALIFICATION AS INVESTMENT
See also II.1.211; II.4.92

C. Objection Concerning Investment Agreement and Authorization

[70] "The Tribunal notes in this context that an investment is indeed a complex process including various arrangements, such as contracts, licences and other agreements leading to the materialization of such investment, a process in turn governed by the Treaty. This particular aspect was explained by an ICSID tribunal as 'the general unity of an investment operation'[7] and by one other tribunal considering an investment based on several instruments as constituting 'an indivisible whole'.[8]" | **[71]** "The Tribunal must examine these various aspects to reach a conclusion about the claim and particularly about the manner in which tax measures might have affected the protected investment. Such a determination again belongs to the merits, particularly in so far there is a need to establish whether the requirements of indemnification have or have not been met. Accordingly, jurisdiction to consider these other aspects of the claim must also be upheld."

[Paras. 70, 71]

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7 [17] Pierre Lalive: "The First 'World Bank' Arbitration (*Holiday Inns v. Morocco*)—Some Legal Problems", British Year Book of International Law, Vol. 51, 1980, p. 123.

8 [18] *Klöckner v. Cameroon*, ICSID Award of October 21, 1983, ICSID Reports, Vol. 2, p. 3.

II.2.2 INTERIM PROTECTION
See also II.1.211

D. Objection Concerning the Tribunal's Power to Order Injunctive Relief

[75] "[. . .] The first objection relates to the question that any remedy would really have its effect on TGS, which cannot benefit from the claim as not being in the Respondent's view an investment or an investor under the Treaty. [. . .] Whether a remedy, in addition to protecting the investors' rights, benefits a separate but related corporate entity is not a ground for objection to jurisdiction." | **[76]** "The second objection [. . .] concerns the power of the Tribunal to order injunctive relief. In the Respondent's view the Tribunal lacks such a power under the Convention and the Treaty, and it could only either issue a declaratory statement that might satisfy the investor or else determine the payment of compensation based on a finding that a certain measure is wrongful. In particular it is argued that an ICSID tribunal cannot impede an expropriation that falls exclusively within the ambit of State sovereignty; that tribunal could only establish whether there has been an expropriation, its legality or illegality and the corresponding compensation." | **[77]** "The Claimants agree on the point that a tribunal has the power to issue a declaratory statement, but in addition they believe that it can order injunctive relief concerning the performance or non-performance of certain acts. To this end, an award can deal both with pecuniary and non-pecuniary determinations, including specific performance and an injunction. In the present case the Claimants have indeed requested that the taxes assessed be declared expropriatory and in breach of the Treaty and unlawful, and that they be annulled and their collection permanently enjoined." | **[79]** "An examination of the powers of international courts and tribunals to order measures concerning performance or injunction and of the ample practice that is available in this respect, leaves this Tribunal in no doubt about the fact that these powers are indeed available. [. . .]" | **[80]** "The same holds true under the ICSID Convention. In *Goetz v. Burundi* such a power was indeed resorted to by the Tribunal, and the fact that it was based on a settlement agreement between the parties does not deprive the decision of the tribunal of its own legal force and standing. A scholarly opinion invoked by the Claimants is also relevant in this context, having an author concluding that it is

> '. . .entirely possible that future cases will involve disputes arising from ongoing relationships in which awards providing for specific performance or injunctions become relevant'.[9]" |

[81] "The Tribunal accordingly concludes that, in addition to declaratory powers, it has the power to order measures involving performance or in-

9 [25] Schreuer, op. cit, at 1126, paragraph 73, as cited in Claimants' Counter-Memorial on Jurisdiction, footnote 100.

junction of certain acts. Jurisdiction is therefore also affirmed on this ground. [. . .]"

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

II.4.9215 CONTRACT CLAIMS-TREATY CLAIMS
See also I.17.011; II.1.211; II.4.92

E. Objection Concerning the Indemnity Clause of the Transfer Agreement

[92] "The issue for the Tribunal is [. . .] whether the indemnity clause of the Transfer Agreement is just a contractual provision subject to the jurisdiction of the courts of the Argentine Republic, or if it is in addition a clause that concerns the rights of the investors under the Treaty. In the latter case the Tribunal has jurisdiction in so far as those rights are concerned." | **[93]** "The indemnity clause is no doubt a contractual provision that relates to tax indemnification of the investors, together with other parties to the Transfer Agreement, if certain conditions are met. The present dispute concerns tax assessments by the Provinces that in the opinion of the Claimants trigger the operation of that clause. Should this be so, then the breach of the clause becomes instantly a violation of the Treaty rights. This effect is independent of whether the investors alone can benefit by resorting to ICSID jurisdiction or others might benefit from such action as well, just as it is independent of whether TGS might benefit from a certain action brought about by the investors. There is no practical way in this context to separate the operation of the indemnity clause from the treaty rights, particularly in so far as it has been noted above that Article XII of the Treaty is intertwined with both Article VII on dispute settlement and with Article II on the substantive treatment owed to the investors." | **[94]** "The Tribunal accordingly concludes that it also has jurisdiction to consider this matter on the merits."

[Paras. 92, 93, 94]

II.4.96 FORK IN THE ROAD CLAUSE
See also I.2.05; II.1.211; II.4.92; II.4.9215

F. Objection Concerning the Triggering of the "Fork in the Road" Clause Through Submissions to Local Courts

[95] "The Argentine Republic has made a jurisdictional objection in the alternative on the ground that TGS has applied to various courts of the Argentine Republic seeking remedies in respect of the tax measures affecting it. This, it is affirmed, amounts to the choice of local courts under the Treaty and hence the 'fork in the road' provision has been triggered. In that argument the jurisdiction of an ICSID tribunal would thus be precluded." | **[96]** "The Claimants are of the view that the claimants, the respondents and the subject matter of the actions before Argentine courts being different from those involved in the present arbitration, there could be no triggering of

the 'fork in the road'. They explain to this end that before local courts it is TGS and not the investors who is claiming, that the Respondents are the Provinces and not the government of the Argentine Republic, and that the subject matter concerns a violation of the legislation of Argentina and not a violation of treaty rights." | **[97]** "This Tribunal is mindful of various decisions of ICSID Tribunals also discussing this very issue, particularly *Compañía de Aguas del Aconquija, Genin, and Olguín*.[10] In all these cases the difference between the violation of a contract and the violation of a treaty, as well as the different effects that such violations might entail, have been admitted, not ignoring of course that the violation of a legal rule will always have similar negative effects irrespective of its nature. It has accordingly been held that even if there was recourse to local courts for breach of contract this would not prevent resorting to ICSID arbitration for violation of treaty rights, or that in any event, as held in *Benvenuti & Bonfant*, any situation of lis pendens would require identity of the parties.[11] Neither will these considerations be repeated here." | **[98]** "The Tribunal notes that in the present case the Claimants have not made submissions before local courts and those made by TGS are separate and distinct. Moreover, the actions by TGS itself have been mainly in the defensive so as to oppose the tax measures imposed, and the decision to do so has been ordered by ENARGAS, the agency entrusted with the regulation of the gas sector. The conditions for the operation of the principle electa una via or 'fork in the road' are thus simply not present. The Tribunal accordingly dismisses the objection to jurisdiction on this other ground."

[Paras. 95, 96, 97, 98]

II.4.97 DECISION ON JURISDICTION

V. DECISION

[101] "For the reasons stated above the Tribunal decides that the present dispute is within the jurisdiction of the Centre and the competence of the Tribunal. The Order necessary for the continuation of the procedure pursuant to Arbitration Rule 41(4) has, accordingly, been made."

[Para. 101]

10 [32] *Olguín v. Paraguay*, ICSID Decision on Jurisdiction of August 8, 2000.

11 [33] *Benvenuti & Bonfant v. Congo*, ICSID Award of August 8, 1980, International Legal Materials, Vol. 21, 1982, p. 740, as cited in Claimants' Counter-Memorial on Jurisdiction, footnote 142.

SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ARB/02/6, Decision on Jurisdiction, 29 January 2004*

Original: English

Present: El-Kosheri, *President of the Tribunal*
Crawford, Crivellaro, *Arbitrators*

Declaration: *Professor* Crivellaro

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* Summaries prepared by Christina Knahr, Ph.D. Candidate, Research Assistant, Department for European, International and Comparative Law, University of Vienna, Austria. The full text of the Decision is reprinted in 8 ICSID Reports 515 and available online at <http://www.worldbank.org/icsid/cases/SGSvPhil-final.pdf>. Original footnote numbers are indicated in brackets: [ ].

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

II.4.911 REQUEST FOR ARBITRATION
See also I.17.011

I. THE DISPUTE

A. Subject-matter of the Dispute

[1] "On 26 April 2002, the International Centre for Settlement of Investment Disputes (ICSID) received from SGS Société Générale de Surveillance S.A. (SGS) a request for arbitration dated 24 April 2002 against the Republic of the Philippines (hereafter the Philippines or the Respondent, as the context requires). SGS is a large Swiss corporation providing verification, testing, monitoring and certification services in respect of various products, to the private sector as well as to governments and international institutions. On 23 August 1991, SGS concluded an agreement with the Philippines regarding the provision of comprehensive import supervision services (the CISS Agreement), under which SGS would provide specialized services to assist in improving the customs clearance and control processes of the Philippines. A dispute having arisen between the parties concerning alleged breaches of the CISS Agreement, SGS invoked in the request for arbitration the provisions of a bilateral Agreement of 1997 between the Swiss Confederation and the Republic of the Philippines on the Promotion and Recipro-

cal Protection of Investments (the BIT).[1]" | **[15]** "SGS submitted to the Philippines certain monetary claims [. . .] In substance its claim was for monies unpaid under the amended CISS Agreement, amounting to CHF202,413,047.36 (approximately US$140m), in addition to which SGS sought interest on the amount unpaid."

[Paras. 1, 15]

II.4.9215 CONTRACT CLAIMS-TREATY CLAIMS
See also II.4.92

B. Contractual Disputes

[29] "It is clear from the general language of Article 25(1) that ICSID jurisdiction may extend to disputes which are purely contractual in character.[2] For example a dispute arising out of an investment contract between a State or constituent subdivision or agency could be covered,[3] and this could be the case even though the dispute exclusively concerns issues arising under the proper law of the contract. There is no distinction drawn in Article 25, or in Article 42(1), between purely contractual and other disputes (e.g. claims for breach of treaty)."

[Para. 29]

II.4.9211 QUALIFICATION AS INVESTMENT
See also I.17.011; I.17.4; II.4.92; II.4.9215

II. OVERVIEW OF THE ISSUES CONSIDERED BY THE TRIBUNAL

[92] "In the Tribunal's view, the arguments and submissions of the parties recited above raise five main issues:

(a) whether a contract for the provision of services performed mostly (but not wholly) outside the territory of the host State may nonetheless constitute an investment in its territory for the purposes of Article II of

1 [1] Swiss Confederation-Republic of the Philippines, Agreement on the Promotion and Reciprocal Protection of Investments, 31 March 1997 (in force, 23 April 1999).

2 [5] This is accepted as axiomatic in the literature. See, e.g., C Schreuer, *The ICSID Convention: A Commentary* (Cambridge, Cambridge University Press, 2001) 127-34.

3 [6] In the case of a contractual dispute between an investor and a constituent subdivision or agency of a contracting State, there are two further conditions for jurisdiction: first, the constituent subdivision or agency must have been designated to the Centre by the State (Article 25(1)); secondly, the approval of that State must have been given or waived (Article 25(3)). By contrast, where a claim is made against a Contracting State for breach of a treaty, normal international law principles of attribution apply and the provisions of Article 25(1) concerning designation of constituent subdivisions or agencies are irrelevant: see *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic* (ARB/97/3), (2002) 6 ICSID Reports 340, 360 (para. 75), agreeing in this respect with the conclusions of the Tribunal in that case: (2000) 5 ISCID Reports 296, 313-15 (paras. 49-52).

the BIT, having regard to the circumstances of the present case and the provisions of the CISS Agreement;

(b) whether the so-called 'umbrella clause' (Article X(2) of the BIT) gives the Tribunal jurisdiction over essentially contractual claims against the Respondent State;

(c) alternatively, whether the general description of a 'dispute concerning an investment' (Article VIII(1) of the BIT) encompasses claims of an essentially contractual character;

(d) whether the Tribunal can or should exercise jurisdiction in the present case, notwithstanding the exclusive jurisdiction clause, Article 12 of the CISS Agreement, requiring contractual disputes to be referred to the courts of the Philippines; and

(e) whether the Tribunal has jurisdiction over the present claims as claims for breach of treaty independently of the CISS, under Articles IV and/or VI of the BIT."

[Para. 92]

II.4.9211 QUALIFICATION AS INVESTMENT
See also I.17.011; II.4.92; II.4.9215

A. Decision in *SGS v. Pakistan* as Relevant to the Present Case

[96] "So far as the five questions enumerated in paragraph 92 above are concerned, the Tribunal in *SGS v. Pakistan* gave the following answers: [. . .]

(a) There was an investment 'in the territory of the host State' within the meaning of the BIT because there had been an 'injection of funds into the territory of Pakistan for the carrying out of SGS's engagements under the PSI Agreement.'[4] It did not matter that most of SGS's expenses were incurred outside Pakistan: some expenditure in Pakistan had been 'necessary to enable [SGS] to perform its obligations under the PSI Agreement'[5] and that was sufficient for this purpose. It was also relevant that, as described by Pakistan in the Swiss proceedings (in which it successfully claimed sovereign immunity) 'the functions delegated to SGS' were considered as functions *jure imperii* performed in aid of the collection of tax revenue by Pakistan.[6]

(b) Article 11 of the Swiss-Pakistan BIT, providing that each State Party 'shall constantly guarantee the observance of the commitments it has

4 [19] *SGS v. Pakistan*, para. 136
5 [20] *SGS v. Pakistan,* para. 137.
6 [21] *SGS v. Pakistan,* para. 138-9.

entered into with respect to the investments of the investors of the other Contracting Party', could not have the far-reaching effect of 'automatically 'elevat[ing]' to the level of breaches of international treaty law' breaches of investment contracts entered into by the State.[7] 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'.[8]

(c) The phrase 'disputes with respect to investments' in Article 9(1) of the Swiss-Pakistan BIT does not encompass claims of an essentially contractual character. In the Tribunal's view, there was nothing 'in Article 9 or in any other provision of the BIT that can be read as vesting . . . jurisdiction over claims resting *ex hypothesi* exclusively on contract'.[9]

(d) The Tribunal's jurisdiction being limited to claims under the BIT, i.e. to claims for breaches of international obligations, that jurisdiction was not affected by the exclusive jurisdiction clause in the Inspection Agreement. Since the Tribunal lacked any purely contractual jurisdiction, there was no need to consider whether the effect of the BIT was to override exclusive jurisdiction clauses in contracts. Nor was it necessary to consider the effect of Article 26 of the ICSID Convention.[10] However the Tribunal expressed doubts that it could have been intended by general language in the BIT to 'supersede and set at naught all otherwise valid non-ICSID forum selection clauses in all earlier agreements between Swiss investors and the Respondent.'[11]

(e) In principle it was for the Claimant to formulate its claim: 'if the facts asserted by the Claimant are capable of being regarded as alleged breaches of the BIT, consistently with the practice of ICSID tribunals, the Claimant should be able to have them considered on their merits.'[12] That was the case with SGS's claim against Pakistan. Accordingly the Tribunal had, and should exercise, jurisdiction over the Claimant's treaty claims as distinct from its contract claims, notwithstanding the pending arbitration of the contractual claims in Pakistan.[13]"

[Para. 96]

7 [22] *SGS v. Pakistan,* para. 166.
8 [23] *SGS v. Pakistan,* para. 172.
9 [24] *SGS v. Pakistan,* para. 161.
10 [25] *SGS v. Pakistan,* para. 174.
11 [26] *SGS v. Pakistan,* para. 161.
12 [27] *SGS v. Pakistan,* para. 145.
13 [28] *SGS v. Pakistan,* para. 187-9.

II.1.08 *RES JUDICATA*
See also II.4.984

B. *Res Judicata*

[97] "This Tribunal will revert to these questions as they arise in the somewhat different legal and factual context of the present dispute. As will become clear, the present Tribunal does not in all respects agree with the conclusions reached by the *SGS v. Pakistan* Tribunal on issues of the interpretation of arguably similar language in the Swiss-Philippines BIT. This raises a question whether, nonetheless, the present Tribunal should defer to the answers given by the *SGS v. Pakistan* Tribunal. The ICSID Convention provides only that awards rendered under it are 'binding on the parties' (Article 53(1)), a provision which might be regarded as directed to the *res judicata* effect of awards rather than their impact as precedents in later cases. In the Tribunal's view, although different tribunals constituted under the ICSID system should in general seek to act consistently with each other, in the end it must be for each tribunal to exercise its competence in accordance with the applicable law, which will by definition be different for each BIT and each Respondent State. [. . .] Moreover there is no doctrine of precedent in international law, if by precedent is meant a rule of the binding effect of a single decision. [. . .] There is no hierarchy of international tribunals, and even if there were, there is no good reason for allowing the first tribunal in time to resolve issues for all later tribunals. It must be initially for the control mechanisms provided for under the BIT and the ICSID Convention, and in the longer term for the development of a common legal opinion or *jurisprudence constante*, to resolve the difficult legal questions discussed by the *SGS v. Pakistan* Tribunal and also in the present decision."

[Para. 97]

III. ISSUES CONSIDERED BY THE TRIBUNAL

II.4.9211 QUALIFICATION AS INVESTMENT
See also I.1.16

A. Investment in the Territory of the Philippines

[99] "In accordance with Article II, the BIT applies to 'investments in the territory of the one Contracting Party made in accordance with its laws and regulations by investors of the other Contracting Party, whether prior to or after the entry into force of the Agreement'. The language is clear in

requiring that investments be made 'in the territory of' the host State,[14] and this requirement is underlined by other references to the territory of the host State in the BIT (see Preamble, para. 2, Articles II(1), (2), IV(1), (2), (3), VIII(2) and X(2)). In accordance with normal principles of treaty interpretation,[15] investments made outside the territory of the Respondent State, however beneficial to it, would not be covered by the BIT. For example the construction of an embassy in a third State, or the provision of security services to such an embassy, would not involve investments in the territory of the State whose embassy it was, and would not be protected by the BIT." | **[102]** "[. . .] A substantial and non-severable aspect of the overall service was provided in the Philippines, and SGS's entitlement to be paid was contingent on that aspect. Article 6.3 of the Agreement provided that. . .

> 'SGS shall be entailed to such fees regardless of whether the seller fails to provide the necessary information for the issuance of a Clean Report and/or does not proceed with the shipment of goods for any reason . . . provided, SGS has rendered the required service and supplies the Government with reasonable information regarding its inspections and price comparison.'

Article 8.1 required SGS 'in performing services hereunder [to] exercise reasonable care'. It is clear that this obligation extended to exercising such care in making the various reports to the Government required by the Agreement. [. . .]" | **[103]** "These elements taken together are sufficient to qualify the service as one provided in the Philippines. Since it was a cost to SGS to provide it, this is enough to amount to an investment in the Philippines within the meaning of the BIT." | **[106]** "[. . .] A Swiss company within the SGS Group funded the Liaison Office as a part of the provision of an overall service—essentially an informational service—which for the reasons given had its focus in the Philippines. The fact that the bulk of the cost of providing the service was incurred outside the Philippines is not decisive. Nor is it decisive that SGS was paid in Switzerland. In any event, the agreed forum for suit if SGS was not paid was the Regional Trial Court in Manila or Makati." | **[107]** "The Respondent argued that SGS's conduct demonstrated its acceptance that the investment was made abroad; even that it amounted to an estoppel. The Tribunal does not agree. The fact that for tax purposes SGS's services were treated as performed abroad is not decisive. The tax treatment of investments is a matter for local law with its own regime of rules as to where income is considered to have been earned, a regime distinct from that of the BIT. [. . .]" | **[111]** "The most relevant decision is that in *SGS v. Pakistan*, where, as noted, the Tribunal held that equivalent

14 [31] The term "territory" is defined in Article I(4) as "the territory of the State concerned as defined by the respective Constitution and other pertinent law". This definition was extensively discussed by the Parties in negotiating the BIT.

15 [32] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, Arts. 31-33.

pre-inspection services were provided 'in the territory of the host State" because there had been an "injection of funds into the territory of Pakistan for the carrying out of SGS's engagements under the PSI Agreement.'[16] The Tribunal agrees with this reasoning. Indeed the present case seems even stronger, given the scale and duration of SGS's activity and the significance of the activities of the Manila Liaison Office." | **[112]** "For these reasons the present Tribunal concludes that SGS made an investment 'in the territory of" the Philippines under the CISS Agreement, considered as a whole. Moreover the present dispute concerns the service so provided and arises directly out of it, within the meaning of Article 25(1) of the ICSID Convention. There was no distinct or separate investment made elsewhere than in the territory of the Philippines but a single integrated process of inspection arranged through the Manila Liaison Office, itself unquestionably an investment 'in the territory of' the Philippines. Thus the present dispute falls within the scope of the BIT in accordance with Article II."

[Paras. 99, 102, 103, 106, 107, 111, 112]

B. Umbrella Clause

II.4.943 RELATIONSHIP BETWEEN INTERNATIONAL LAW AND DOMESTIC LAW
See also I.17.011

1. Article X(1) of the BIT

[114] "One must begin with the actual text of Article X.[17] It is headed 'Other Commitments'. Article X(1) is a kind of 'without prejudice' clause, providing that legislative provisions or international law rules more favourable to an investor shall to that extent 'prevail over this Agreement'. It deals with the relation between commitments under the BIT and distinct commitments under host State law or under other rules of international law. It does not appear to impose any additional obligation on the host State in the framework of the BIT.[18]"

[Para. 114]

16 [44] *SGS v. Pakistan*, para. 136.

17 [45] See paragraph 34. The BIT was concluded in English and French, with the English text prevailing in case of any "divergence of interpretation". Examination of the French text does not reveal any relevant divergence.

18 [46] The phrase "shall prevail over", used in relation to other commitments, may not have the effect of incorporating those commitments into a BIT. See *Yaung Chi Oo Trading Pte. Ltd. v. Government of the Union of Myanmar* (ASEAN I.D. Case No. ARB 01/1), (2003) 42 ILM 540, 556-7 (paras. 79-82).

I.17.05 NATIONAL LAW
See also I.17.011

2. Article X(2) of the BIT

[115] "Article X(2) is different. It reads:

> 'Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party.'

This is not expressed as a without prejudice clause, unlike Article X(1). It uses the mandatory term 'shall', in the same way as substantive Articles III-VI. The term 'any obligation' is capable of applying to obligations arising under national law, e.g. those arising from a contract; indeed, it would normally be under its own law that a host State would assume obligations 'with regard to specific investments in its territory by investors of the other Contracting Party'. Interpreting the actual text of Article X(2), it would appear to say, and to say clearly, that each Contracting Party shall observe any legal obligation it has assumed, or will in the future assume, with regard to specific investments covered by the BIT.[19] Article X(2) was adopted within the framework of the BIT, and has to be construed as intended to be effective within that framework."

[Para. 115]

I.1.16 TREATY INTERPRETATION
See also I.17.011

3. Object and Purpose of the BIT

[116] "The object and purpose of the BIT supports an effective interpretation of Article X(2). The BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended 'to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other'. It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments."

[Para. 116]

19 [47] It was not suggested by the Respondent that Article X(2) only applies to obligations already assumed at the time of entry into force of the BIT. Like other provisions of the BIT, Article X is ambulatory in effect.

II.4.94 APPLICABLE LAW

4. Commitments by a Host State

[117] "Moreover it will often be the case that a host State assumes obligations with regard to specific investments at the time of entry, including investments entered into on the basis of contracts with separate entities. Whether collateral guarantees, warranties or letters of comfort given by a host State to induce the entry of foreign investments are binding or not, i.e. whether they constitute genuine obligations or mere advertisements, will be a matter for determination under the applicable law, normally the law of the host State. But if commitments made by the State towards specific investments do involve binding obligations or commitments under the applicable law, it seems entirely consistent with the object and purpose of the BIT to hold that they are incorporated and brought within the framework of the BIT by Article X(2)."

[Para. 117]

I.17.4 UMBRELLA CLAUSES

5. Umbrella Clause in the Swiss-Pakistan BIT

[119] "This provisional conclusion—that Article X(2) means what is says—is however contradicted by the decision of the Tribunal in *SGS v. Pakistan*, the only ICSID case which has so far directly ruled on the question. [. . .] It should be noted that the 'umbrella clause' in the Swiss-Pakistan BIT was formulated in different and rather vaguer terms than Article X(2) of the Swiss-Philippines BIT. Article 11 of the Swiss-Pakistan BIT provides that:

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

Apart from the phrase 'shall constantly guarantee' (what could an inconstant guarantee amount to?), the phrase 'the commitments it has entered into with respect to the investments' is likewise less clear and categorical than the phrase 'any obligation it has assumed with regard to specific investments in its territory' in Article X(2) of the Swiss-Philippines BIT."

[Para. 119]

I.1.16 TREATY INTERPRETATION
See also I.17.011; II.4.94

6. Interpretation of Art. X(2) of the BIT

[126] "[. . .] Article X(2) of the Swiss-Philippines Treaty [. . .] does not convert non-binding domestic blandishments into binding international obli-

gations. It does not convert questions of contract law into questions of treaty law. In particular it does not change the proper law of the CISS Agreement from the law of the Philippines to international law. Article X(2) addresses not the *scope* of the commitments entered into with regard to specific investments but the *performance* of these obligations, once they are ascertained.[20] It is a conceivable function of a provision such as Article X(2) of the Swiss- Philippines BIT to provide assurances to foreign investors with regard to the performance of obligations assumed by the host State under its own law with regard to specific investments—in effect, to help secure the rule of law in relation to investment protection. In the Tribunal's view, this is the proper interpretation of Article X(2)." | **[127]** "To summarize, for present purposes Article X(2) includes commitments or obligations arising under contracts entered into by the host State. The basic obligation on the State in this case is the obligation to pay what is due under the contract, which is an obligation assumed with regard to the specific investment (the performance of services under the CISS Agreement). But this obligation does not mean that the determination of how much money the Philippines is obliged to pay becomes a treaty matter. The extent of the obligation is still governed by the contract, and it can only be determined by reference to the terms of the contract." | **[128]** "[. . .] Article X(2) makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments. But it does not convert the issue of the *extent* or *content* of such obligations into an issue of international law. That issue (in the present case, the issue of how much is payable for services provided under the CISS Agreement) is still governed by the investment agreement. In the absence of other factors it could be decided by a tribunal constituted pursuant to Article VIII(2). The proper law of the CISS Agreement is the law of the Philippines, which in any event this Tribunal is directed to apply by Article 42(1) of the ICSID Convention. On the other hand, if some other court or tribunal has exclusive jurisdiction over the Agreement, the position may be different."

[Paras. 126, 127, 128]

20 [61] This is not a novel distinction. It is made for example in the UNCTAD Study, *Bilateral Investment Treaties* (Graham & Trotman, NY, 1988) 55-6: "Its effect [sc. of the umbrella clause] is not to transform the provisions of a State contract into international obligations. . . However, it makes the respect of such contracts. . . an obligation under the treaty" (emphasis in original). The subsequent UNCTAD study, *Bilateral Investment Treaties in the Mid-1990s* (NY, 1998) 56, is less precise but likewise concludes that "as a result of this provision, violations of commitments regarding investment by the host country would be redressible through the dispute-settlement procedures of a BIT."

C. Contract Claims—Treaty Claims

II.4.9215 CONTRACT CLAIMS-TREATY CLAIMS
See also II.4.94; II.4.95

1. Article VIII of the BIT

[130] "Article VIII of the BIT provides for settlement of 'disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party'. If a dispute is not resolved by consultations between the parties pursuant to Article VIII(1), the investor may submit the dispute 'either to the national jurisdiction of the Contracting Party in whose territory the investment has been made or to international arbitration', and in the latter case, at the investor's option, to ICSID or UNCITRAL arbitration." | **[131]** "*Prima facie*, Article VIII is an entirely general provision, allowing for submission of all investment disputes by the investor against the host State. [. . .] The term 'disputes with respect to investments' ('différends relatifs à des investissements' in the French text) is not limited by reference to the legal classification of the claim that is made. A dispute about an alleged expropriation contrary to Article VI of the BIT would be a 'dispute with respect to investments'; so too would a dispute arising from an investment contract such as the CISS Agreement." | **[132]** "This *prima facie* conclusion is supported by a number of further considerations, both within the BIT itself and extrinsic to it:

> (a) Each of the forums contemplated by Article VIII(2) (the national courts of the host State, ICSID panels and *ad hoc* tribunals established under the UNCITRAL Rules) has the competence to apply the law of the host State, including its law of contract. Indeed, if the BIT has not been implemented internally, the national courts may *only* be competent to apply their own law.
>
> (b) The general term 'disputes with respect to investments' may be contrasted with the more specific term '[d]isputes. . . regarding the interpretation or application of the provisions of this Agreement' in Article IX. If the States Parties to the BIT had wanted to limit investor-State arbitration to claims concerning breaches of the substantive standards contained in the BIT, they would have said so expressly, using this or similar language.
>
> (c) As noted already, the purpose of the BIT is to promote and protect foreign investments. Allowing investors a choice of forum for resolution of investment disputes of whatever character is consistent with this aim.[. . .] By contrast drawing technical distinctions between causes of action arising under the BIT and those arising under the investment agreement is capable of giving rise to overlapping proceedings and jurisdictional uncertainty. It may be necessary to draw such distinctions in some cases, but it should be avoided to the extent possible, in the interests of the efficient resolution of investment disputes by the single chosen forum.
>
> (d) By definition, investments are characteristically entered into by means of contracts or other agreements with the host State and the local investment

partner (or if these are different entities, with both of them). The specific link between investments and contracts is acknowledged by the line of cases dealing with pre-contractual claims. ICSID tribunals have been very reluctant to acknowledge that an investment has actually been made until the contract has been signed or at least approved and acted on.[21] Thus the phrase 'disputes with respect to investments' naturally includes contractual disputes; the same is true of the phrase 'legal dispute arising directly out of an investment' in Article 25(1) of the ICSID Convention.

(e) In other investment protection agreements, when investor-State arbitration is intended to be limited to claims brought for breach of international standards (as distinct from contractual or other claims under national law), this is stated expressly. A well-known example is Chapter 11 of the North American Free Trade Agreement (NAFTA), under which investors may only bring claims for breaches of specified provisions of Chapter 11 itself.[22]"

[Paras. 130, 131, 132]

II.4.9215 CONTRACT CLAIMS-TREATY CLAIMS
See also I.17011; II.4.92; II.4.95

2. Comparison to the Decision in *SGS v. Pakistan*

[133] "[. . .] [A] different view of the matter was apparently taken by the ICSID Tribunal in *SGS v. Pakistan*, and it is necessary to consider the reasons given for their conclusion. The equivalent provision of the BIT in that case, Article 9, used the phrase 'disputes with respect to investments': this is the same as Article VIII of the Swiss-Philippines BIT. The relevant passage of the decision reads as follows:

'161. We recognize that disputes arising from claims grounded on alleged violation of the BIT, and disputes arising from claims based wholly on supposed violations of the PSI Agreement, can both be described as 'disputes with respect to investments,' the phrase used in Article 9 of the BIT. That phrase, however, while descriptive of the *factual subject matter* of the disputes, does not relate to the *legal basis* of the claims, or the *cause of action* asserted in the claims. In other words, from that description alone, without more, we believe that no implication necessarily arises that both BIT and purely contract claims are intended to be covered by the Contracting Parties in Article 9. Neither, accordingly, does an implication arise that the Article 9 dispute settlement mechanism would supersede and set at naught all otherwise valid non-ICSID forum selection clauses in all earlier agreements between Swiss investors and the Respondent. Thus, we do not see anything in

21 [64] See, e.g., *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, Award of 15 March 2002, 6 ICSID Reports 308, 319-20 (paras. 48, 51) (entry into an investment coextensive with conclusion of a binding contract).

22 [65] To similar effect see e.g., the *Vivendi Annulment* decision, (2002) 6 ICSID Reports 340, 356 (para. 55). The issue there was a slightly different one, viz., whether in pursuing ICSID arbitration rather than local proceedings for breach of contract the investor had taken the "fork in the road" under the BIT. But it involved the interpretation of similar general language in the BIT.

> Article 9 or in any other provision of the BIT that can be read as vesting this Tribunal with jurisdiction over claims resting *ex hypothesi* exclusively on contract. Both Claimant and Respondent have already submitted their respective claims sounding solely on the PSI Agreement to the PSI Agreement arbitrator. We recognize that the Claimant did so in a qualified manner and questioned the jurisdiction of the PSI Agreement arbitrator, albeit on grounds which do not appear to relate to the issue we here address. We believe that Article 11.1 of the PSI Agreement is a valid forum selection clause *so far as concerns the Claimant's contract claims which do not also amount to BIT claims,* and it is a clause that this Tribunal should respect. We are not suggesting that the parties cannot, by special agreement, lodge in this Tribunal jurisdiction to pass upon and decide claims sounding solely in the contract. Obviously the parties can. But we do not believe that they have done so in this case. And should the parties opt to do that, our jurisdiction over such contract claims will rest on the special agreement, not on the BIT.
>
> 162. We conclude that the Tribunal has no jurisdiction with respect to claims submitted by SGS and based on alleged breaches of the PSI Agreement which do not also constitute or amount to breaches of the substantive standards of the BIT.' [. . .]"

[Para. 133]

II.4.92 JURISDICTION
See also I.17.011; II.4.9215

3. Conclusion of the Tribunal

[134] "The present Tribunal agrees with the concern that the general provisions of BITs should not, unless clearly expressed to do so, override specific and exclusive dispute settlement arrangements made in the investment contract itself. On the view put forward by SGS it will have become impossible for investors validly to agree to an exclusive jurisdiction clause in their contracts; they will always have the hidden capacity to bring contractual claims to BIT arbitration, even in breach of the contract, and it is hard to believe that this result was contemplated by States in concluding generic investment protection agreements. But there are two different questions here: the interpretation of the general phrase 'disputes with respect to investments' in BITs, and the impact on the jurisdiction of BIT tribunals over contract claims (or, more precisely, the admissibility of those claims) when there is an exclusive jurisdiction clause in the contract. It is not plausible to suggest that general language in BITs dealing with all investment disputes should be limited because in some investment contracts the parties stipulate exclusively for different dispute settlement arrangements. As will be seen, it is possible for BIT tribunals to give effect to the parties' contracts while respecting the general language of BIT dispute settlement provisions." | **[135]** "Interpreting the text of Article VIII in its context and in the light of its object and purpose, the Tribunal accordingly concludes that in

principle (and apart from the exclusive jurisdiction clause in the CISS Agreement) it was open to SGS to refer the present dispute, as a contractual dispute, to ICSID arbitration under Article VIII(2) of the BIT.[23]"

[Paras. 134, 135]

D. Forum Selection Clause

II.4.95 FORUM SELECTION CLAUSE

1. Article 12 of the CISS Agreement

[137] "[. . .] Article 12 of the CISS Agreement provides that:

> 'All actions concerning disputes in connection with the obligations of either party to this Agreement shall be filed at the Regional Trial Courts of Makati or Manila.' [. . .]"

[Para. 137]

II.4.92 JURISDICTION

2. Exclusive Jurisdiction

[138] "It has been suggested that in some legal systems, a clause referring to national courts or tribunals may be legally ineffective to confer or affect that jurisdiction, and should be construed as a mere acknowledgement of a jurisdiction already existing by virtue of the non-derogable law of the host State. This was suggested of the law of Argentina in the *Lanco* case.[24] But the Tribunal does not interpret Article 12 of the CISS Agreement as a mere acknowledgement which does not impose a contractual obligation upon SGS as to the use of the Philippines courts to resolve contractual disputes. SGS did not dispute that under Philippine law (the proper law of the CISS Agreement), a contractual stipulation to accept the exclusive jurisdiction of the Regional Trial Courts is effective in law and binding on the parties. In accordance with general principle, courts or tribunals should respect such a stipulation in proceedings between those parties, unless they are bound *ab exteriore*, i.e., by some other law, not to do so. Moreover it should not matter whether the contractually-agreed forum is a municipal court (as here) or domestic arbitration (as in *SGS v. Pakistan*) or some other form of arbitration, e.g. pursuant to the UNCITRAL or ICC Rules. The basic principle in

23 [67] The same conclusion was reached by an ICSID Tribunal in *Salini Costruttori SpA v. Kingdom of Morocco*, (2001) 6 ICSID Reports 398, 415 (para. 61).

24 [68] *Lanco International, Inc. v. Argentine Republic*, (1998) 5 ICSID Reports 367, 378 (para. 26). The Tribunal would observe, however, that the mere fact that "administrative jurisdiction cannot be selected by mutual agreement" does not prevent the investor agreeing by contract not to resort to any other forum.

each case is that a binding exclusive jurisdiction clause in a contract should be respected, unless overridden by another valid provision.[25]"

[Para. 138]

II.4.92 JURISDICTION

a. Exclusive Jurisdiction Overridden by the BIT?

a.1 Art. VIII(2) of the BIT

[140] "One possibility is that this right is conferred by Article VIII(2) of the BIT itself, which gives the investor a choice to submit the dispute 'either to the national jurisdiction of the Contracting Party in whose territory the investment has been made or to international arbitration', and in the latter case, a further choice between ICSID and UNCITRAL arbitration. The question is whether Article VIII(2) was intended to override an exclusive jurisdiction clause in an investment contract, so far as contractual claims are concerned."

[Para. 140]

a.2 "Generalia Specialibus non Derogant"

[141] "Two considerations lead the majority of the Tribunal to give a negative answer to this question. [. . .] The first consideration involves the maxim *generalia specialibus non derogant*. Article VIII is a general provision, applicable to investment arrangements whether concluded 'prior to or after the entry into force of the Agreement' (Article II). The BIT itself was not concluded with any specific investment or contract in view. It is not to be presumed that such a general provision has the effect of overriding specific provisions of particular contracts, freely negotiated between the parties. As Schreuer says, '[a] document containing a dispute settlement clause which is more specific in relation to the parties and to the dispute should be given precedence over a document of more general application.'[26] The second consideration derives from the character of an investment protection agreement as a framework treaty, intended by the States Parties to support and supplement, not to override or replace, the actually negotiated investment arrangements made between the investor and the host State."

[Para. 141]

25 [69] For an express provision see Article II(1) of the Claims Settlement Declaration, 19 January 1981, which expressly overrides exclusive jurisdiction clauses except for those relating to Iranian courts: 1 Iran-US CTR 9.

26 [71] Schreuer, 362.

a.3 "Lex Posterior Derogat Legi Priori"

[142] "It is suggested that, while BIT provisions for investor-State arbitration do not override exclusive jurisdiction clauses in later investment contracts, at least they have that effect for earlier contracts, by application of the maxim *lex posterior derogat legi priori*.[27] But there is no textual basis in the BIT for drawing such a distinction. The distinction would tend to operate in an arbitrary way: in the present case, for example, the BIT is renewable after 10 years and thereafter every five years (Article XI(1)); the CISS itself was renewed on the same terms as to dispute settlement on several occasions. In such circumstances, which is the prior agreement and which is the subsequent one? But the decisive point is that the *lex posterior* principle only applies as between instruments of the same legal character. By contrast what we have here is a bilateral treaty, which provides the public international law framework for investments between the two States, and a specific contract governed by national law. It must be presumed that whatever effect the BIT has on contracts it has on a continuing basis, as new contracts are concluded and new investments admitted. A distinction between earlier and later exclusive jurisdiction clauses in contracts cannot therefore be accepted—unless expressly provided for, which is not the case with the BIT which the Tribunal has to interpret."

[Para. 142]

a.4 Conclusion of the Tribunal

[143] "[. . .] [I]n the Tribunal's view, the BIT did not purport to override the exclusive jurisdiction clause in the CISS Agreement, or to give SGS an alternative route for the resolution of contractual claims which it was bound to submit to the Philippine courts under that Agreement."

[Para. 143]

b. Exclusive Jurisdiction Overridden by the ICSID Convention?

I.1.16 TREATY INTERPRETATION

b.1 Interpretation of Art. 26 ICSID Convention

[146] "[. . .] [T]he *travaux préparatoires* of Article 26 [. . .] make it clear that Article 26 was intended as a rule of interpretation, not a mandatory rule.[28]" |
[147] "[. . .] Article 26 is concerned with the consent of the parties to ICSID arbitration (not the consent of the States Parties to a BIT). In that context the immediately succeeding phrase 'unless otherwise stated' must include

27 [72] See, e.g., the discussion in *Lanco International, Inc. v. Argentine Republic*, (1998) 5 ICSID Reports 367, 377 (para. 24).

28 [73] See the summary in Schreuer, 388-90.

a contrary statement or agreement by those parties. This is the conclusion reached by Schreuer:

> 'This exclusive remedy rule of Art. 26 is subject to modification by the parties. The words 'unless otherwise stated' in the first sentence give the parties the option to deviate from it by agreement.'[29]

Moreover he applies this principle not only to other forms of arbitration but also to domestic forum clauses:

> 'Explicit reference to domestic courts means that the exclusive remedy rule of Art. 26 does not apply since the parties have stated otherwise.'[30]" |

[148] "[. . .] [T]he view that Article 26 provides a mandatory override of previously agreed dispute settlement clauses would mean that in the common case under a BIT (such as the Swiss-Philippines BIT) where the parties have a choice between ICSID arbitration and UNCITRAL arbitration in respect of the same dispute, that choice would materially affect their legal rights. A party to a contract containing an exclusive jurisdiction clause would obtain an override if it opted for ICSID arbitration (by virtue of Article 26), but not if it opted for UNCITRAL arbitration (since the UNCITRAL Rules contain no equivalent provision). The Tribunal does not believe that this could have been intended."

[Paras. 146, 147, 148]

II.4.92 JURISDICTION
See also II.4.9215; II.4.95

b.2 Conclusion of the Tribunal

[153] "[. . .] [I]t is one thing for a defined class of existing claims to be referred to an international tribunal 'without exception', and another for a government to agree to the adjudication for the future of an indefinite range of cases in a number of different forums with different rules. The Tribunal cannot accept that standard BIT jurisdiction clauses automatically override the binding selection of a forum by the parties to determine their contractual claims. As the *ad hoc* Committee said in the *Vivendi* case:

> 'where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract.'[31]"

[Para. 153]

29 [74] Schreuer, 347.

30 [75] Schreuer, 363.

31 [82] (2001) 6 ICSID Reports 340, 366 (para. 98).

II.4.92 JURISDICTION
See also II.1.121; II.4.9215

c. Admissibility and Jurisdiction

[154] "[. . .] [T]his principle is one concerning the admissibility of the claim, not jurisdiction in the strict sense. The jurisdiction of the Tribunal is determined by the combination of the BIT and the ICSID Convention. It is, to say the least, doubtful that a private party can by contract waive rights or dispense with the performance of obligations imposed on the States parties to those treaties under international law. Although under modern international law, treaties may confer rights, substantive and procedural, on individuals,[32] they will normally do so in order to achieve some public interest. Thus the question is not whether the Tribunal has jurisdiction: unless otherwise expressly provided, treaty jurisdiction is not abrogated by contract. The question is whether a party should be allowed to rely on a contract as the basis of its claim when the contract itself refers that claim exclusively to another forum. In the Tribunal's view the answer is that it should not be allowed to do so, unless there are good reasons, such as *force majeure*, preventing the claimant from complying with its contract. This impediment, based as it is on the principle that a party to a contract cannot claim on that contract without itself complying with it, is more naturally considered as a matter of admissibility than jurisdiction.[33]"

[Para. 154]

II.4.92 JURISDICTION
See also I.17.011; II.4.9215

3. Conclusion Regarding Art. 12 CISS Agreement

[155] "[. . .] [T]he Tribunal's [. . .] jurisdiction is defined by reference to the BIT and the ICSID Convention. But the Tribunal should not exercise its jurisdiction over a contractual claim when the parties have already agreed on how such a claim is to be resolved, and have done so exclusively. SGS should not be able to approbate and reprobate in respect of the same contract: if it claims under the contract, it should comply with the contract in respect of the very matter which is the foundation of its claim. The Philippine courts are available to hear SGS's contract claim. Until the question of

32 [83] Cf. *LaGrand Case (Germany v. United States of America)*, ICJ Reports 2001 p. 466 at 494 (paras. 77-78); ILC Articles on Responsibility of States for Internationally Wrongful Acts, annexed to GA Res 56/83, 12 December 2001, Art. 33(2).

33 [84] It may be noted that the analogous rule of exhaustion of local remedies is normally a matter concerning admissibility rather than jurisdiction in the strict sense: I Brownlie, *Principles of Public International Law* (6th edn, Oxford, 2003) 681; CF Amerasinghe, *Local Remedies in International Law* (2nd edn, Cambridge, CUP, 2004) 293-4.

the scope or extent of the Respondent's obligation to pay is clarified [. . .] a decision by this Tribunal on SGS's claim to payment would be premature."

[Para. 155]

E. BIT Claims Independent of the CISS Agreement

II.4.92 JURISDICTION
See also II.1.41

1. General Principle

[157] "In accordance with the basic principle formulated in the *Oil Platforms* case (above, paragraph 26), it is not enough for the Claimant to assert the existence of a dispute as to fair treatment or expropriation. The test for jurisdiction is an objective one and its resolution may require the definitive interpretation of the treaty provision which is relied on. On the other hand, as the Tribunal in *SGS v. Pakistan* stressed,[34] it is for the Claimant to formulate its case. Provided the facts as alleged by the Claimant and as appearing from the initial pleadings fairly raise questions of breach of one or more provisions of the BIT, the Tribunal has jurisdiction to determine the claim. By extension, in international arbitration a Claimant must state its claim in its initial application, and wholly new claims cannot thereafter be added during the pleadings.[35] On the other hand, a Claimant is not limited to the facts set out in its Request for Arbitration: it may assert and prove additional facts, including those occurring at a subsequent time up to the closure of the proceedings, provided these fall within the scope of its original claim.[36]"

[Para. 157]

I.17.1 EXPROPRIATION

2. Expropriation (Art. VI of the BIT)

[161] "In the Tribunal's view, on the material presented by the Claimant no case of expropriation has been raised. Whatever debt the Philippines may owe to SGS still exists; whatever right to interest for late payment SGS had it still has. There has been no law or decree enacted by the Philippines at-

34 [85] See above, paragraph 96. See also *United Parcel Service of America, Inc. v. Government of Canada*, Decision on Jurisdiction, 22 November 2002, para. 33.

35 [86] See *Case Concerning Certain Phosphate Lands in Nauru (Nauru v. Australia)* , ICJ Reports 1992 p. 240 at 265-70 (paras. 64-70).

36 [87] See *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections*, ICJ Reports 1998 p. 275 at 317-19 (paras. 96-101); *Request for Interpretation of the Judgment of 11 June 1998 in the case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Nigeria v. Cameroon), Preliminary Objections*, ICJ Reports 1999 p. 31 at 38 (para. 15).

tempting to expropriate or annul the debt, nor any action tantamount to an expropriation. The Tribunal is assured that the limitation period for proceedings to recover the debt before the Philippine courts under Article 12 has not expired. [. . .] A mere refusal to pay a debt is not an expropriation of property, at least where remedies exist in respect of such a refusal. *A fortiori* a refusal to pay is not an expropriation where there is an unresolved dispute as to the amount payable."

[Para. 161]

I.17.24 FAIR AND EQUITABLE TREATMENT

3. Fair and Equitable Treatment (Art. IV of the BIT)

[162] "Turning to Article IV (fair and equitable treatment), the position is less clear-cut. Whatever the scope of the Article IV standard may turn out to be—and that is a matter for the merits—an unjustified refusal to pay sums admittedly payable under an award or a contract at least raises arguable issues under Article IV. As noted already (see paragraphs 36-41), the Philippines did appear to acknowledge that a large proportion of the amount claimed was payable. In the circumstances the Tribunal reaches the same conclusion on Article IV as it does on Article X(2). At the level of jurisdiction, a claim has in its view been stated by SGS under both provisions. But, there being an unresolved dispute as to the amount payable, for the Tribunal to decide on the claim in isolation from a decision by the chosen forum under the CISS Agreement is inappropriate and premature."

[Para. 162]

II.4.92 JURISDICTION

4. Conclusion of the Tribunal

[163] "The Tribunal holds that it has jurisdiction over SGS's claim under Articles X(2) and IV of the BIT, but that in respect of both provisions, SGS's claim is premature and must await the determination of the amount payable in accordance with the contractually-agreed process."

[Para. 163]

F. Retrospectivity

II.4.923 JURISDICTION *RATIONE TEMPORIS*
See also I.1.16

1. Art. II of the BIT

[166] "According to Article II of the BIT, it applies to investments 'made whether prior to or after the entry into force of the Agreement'. Article II

does not, however, give the substantive provisions of the BIT any retrospective effect. The normal principle stated in Article 28 of the Vienna Convention on the Law of Treaties applies: the provisions of the BIT 'do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty'. The application of this principle to BIT claims was explored in some detail by a NAFTA Tribunal in *Mondev International Ltd. v. United States of America*.[37] As the Tribunal said (discussing the substantive standards under Chapter 11 of NAFTA): 'events or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State after that date which is itself a breach.'[38]"

[Para. 166]

I.17.3 CONTRACT VIOLATION

2. International Practice

[167] "[. . .] [I]n international practice a rather different approach is taken to the application of treaties to procedural or jurisdictional clauses than to substantive obligations. It is not, however, necessary for the Tribunal to consider whether Article VIII of the BIT applies to disputes concerning breaches of investment contracts which occurred and were completed before its entry into force. At least it is clear that it applies to breaches which are continuing at that date, and the failure to pay sums due under a contract is an example of a continuing breach."

[Para. 167]

II.4.92 JURISDICTION
See also I.17.2

3. The Present Case

[168] "In the present case the Tribunal has held that its jurisdiction in the present case depends primarily on Article X(2) of the BIT, which is a substantive and not merely a procedural provision. As to Article X(2), it is clear that the failure to observe obligations arising under the CISS Agreement could not have occurred before the recommendation made by BOC to the Secretary of Finance in December 2001 as to the total amount payable under the CISS Agreement. [. . .] This was well after the entry into force of the BIT, and there is accordingly no problem of the retrospective application of

37 [92] (2002) 6 ICSID Reports 192, 208-9 (paras. 68-70).

38 [93] Ibid., 209 (para. 70).

the BIT in the present case. Similar considerations apply to SGS's case under Article IV of the BIT."

[Para. 168]

II.4.9211 QUALIFICATION AS INVESTMENT
See also II.4.92; II.4.9215

IV. CONCLUSIONS OF THE TRIBUNAL

[169] "For the reasons given above, the Tribunal concludes as follows:

(1) SGS made an investment in the territory of the Philippines within Article II of the BIT. The present dispute is one with respect to that investment and arises directly from it (see above, paragraphs 99-112).

(2) Under Article X(2) of the BIT, the Respondent is required to observe the obligation to pay sums properly due and owing under the CISS Agreement; but this obligation is dependent on the amounts owing being definitively acknowledged or determined in accordance with the CISS Agreement (see above, paragraphs 113-129).

(3) Under Article VIII(2) of the BIT, the Tribunal has jurisdiction with respect to a claim arising under the CISS Agreement, even though it may not involve any breach of the substantive standards of the BIT (see above, paragraphs 130-135).

(4) But such a contractual claim, brought in breach of the exclusive jurisdiction clause embodied in Article 12 of the CISS Agreement, is inadmissible, since Article 12 is not waived or over-ridden by Article VIII(2) of the BIT or by Article 26 of the ICSID Convention (see above, paragraphs 136-155).

(5) No claim for breach of Article VI of the BIT can be sustained on the facts as presented by the Claimant (see above, paragraphs 156-164).

(6) SGS's claims under Articles X(2) and IV, in association with Article VIII(2), fall within the temporal scope of the BIT and are not excluded on grounds of retrospectivity (see above, paragraphs 165-168)."

[Para. 169]

II.4.97 DECISION ON JURISDICTION

V. DECISION OF THE TRIBUNAL

[177] "For these reasons the Tribunal:

(a) holds that it has jurisdiction over the present dispute under Article VIII(2) of the BIT in combination with Articles X(2) and IV;

(b) dismisses the claim so far as it is based on Article VI of the BIT;

(c) by majority, stays the present arbitration proceedings pending a decision on the amount due but unpaid under the CISS Agreement, a matter which (if not agreed by the parties) is to be determined by the agreed contractual forum under Article 12 of the CISS Agreement;

(d) decides that the proceedings will resume on the request of either party as soon as the condition for admissibility set out above has been satisfied;

(e) reserves all questions concerning the costs and expenses of the Tribunal and the costs of the parties for subsequent determination. [. . .]"

[Para. 177]

Tokios Tokelés v. Ukraine, ARB/02/18, Decision on Jurisdiction, 29 April 2004*

Original: English

Present: Weil, *President of the Tribunal*
Bernardini, Price, *Arbitrators*

Dissenting Opinion: *President* Weil

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

I. THE DISPUTE

[1] "The Claimant, Tokios Tokelës, is a business enterprise established under the laws of Lithuania. [. . .]" | **[2]** "In 1994, Tokios Tokelës created Taki spravy, a wholly owned subsidiary established under the laws of Ukraine. [. . .]" | **[3]** "The Claimant, Tokios Tokelës, alleges that governmental authorities in Ukraine engaged in a series of actions with respect to Taki spravy that breach the obligations of the bilateral investment treaty between Ukraine and Lithuania ('Ukraine-Lithuania BIT' or 'Treaty').[1] [. . .]"

[Paras. 1, 2, 3]

II. OBJECTIONS TO JURISDICTION

A. Qualification as Investor

II.4.9223 NATIONAL OF ANOTHER CONTRACTING STATE
See also I.17.011; II.1.211; II.4.92232

1. Considerations of the Tribunal

[25] "[. . .] [W]e begin our analysis of this jurisdictional requirement by underscoring the deference this Tribunal owes to the definition of corporate nationality contained in the agreement between the Contracting Parties, in this case, the Ukraine-Lithuania BIT. As Mr. Broches explained, the purpose of Article 25(2)(b) is not to define corporate nationality but to:

> '. . .indicate the outer limits within which disputes may be submitted to conciliation or arbitration under the auspices of the Centre with the consent of the parties thereto. Therefore *the parties should be given the widest possible latitude to agree on the meaning of 'nationality' and any stipulation of nationality made*

1 [1] Agreement between the Government of Ukraine and the Government of the Republic of Lithuania for the Promotion and Reciprocal Protection of Investments, Feb. 8, 1994 (entered into force on Feb. 27, 1995) ("Ukraine-Lithuania BIT"). The Treaty was done in the "Ukrainian, Lithuanian and English languages, both texts being equally authentic. In case of devergency [sic] of interpretation the English text shall prevail." *Id.* at 11.

in connection with a conciliation or arbitration clause which is based on a reasonable criterion.'[2]" |

[26] "In the specific context of BITs, Professor Schreuer notes that the Contracting Parties enjoy broad discretion to define corporate nationality: '[d]efinitions of corporate nationality in national legislation or in treaties providing for ICSID's jurisdiction will be controlling for the determination of whether the nationality requirements of Article 25(2)(b) have been met.'[3] He adds, '[a]ny reasonable determination of the nationality of juridical persons contained in national legislation or in a treaty should be accepted by an ICSID commission or tribunal.'[4]"

[Paras. 25, 26]

I.1.16 TREATY INTERPRETATION

a. Treaty Interpretation

[27] "As have other tribunals, we interpret the ICSID Convention and the Treaty between the Contracting Parties according to the rules set forth in the Vienna Convention on the Law of Treaties, much of which reflects customary international law.[5] Article 31 of the Vienna Convention provides that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.'[6]"

[Para. 27]

II.4.9212 QUALIFICATION AS INVESTOR
See also I.17.011

b. Interpretation of Art. 1(2) of the BIT

[28] "Article 1(2)(b) of the Ukraine-Lithuania BIT defines the term 'investor,' with respect to Lithuania, as 'any *entity established* in the territory of the

2 [9] *Id.* [Aron Broches, "The Convention on the Settlement of Investment Disputes between States and Nationals of Other States," 136 Recueil des Cours 331, [. . .] (1972-II)] at 361 (emphasis added); *see also* C.F. Amerasinghe, "Interpretation of Article 25(2)(B) of the ICSID Convention," in International Arbitration in the 21st Century: Towards "Judicialization" and Uniformity 223, 232 (R. Lillich and C. Brower Eds. 1993).

3 [10] Schreuer [Christoph H. Schreuer, The ICSID Convention: A Commentary [. . .] (2001)] at 286.

4 [11] *Id.*

5 [12] *See, e.g.*, *Mondev Int'l Ltd v. United States of America*, Award, Case No. ARB(AF)/99/2 (Oct. 11, 2002) 42 I.L.M. 85 (2003), at para. 43; *Emilio Agustín Maffezini v. Kingdom of Spain*, Decision on Jurisdiction, Case No. ARB/97/7 (Jan. 25, 2000), at para. 27; *Waste Management, Inc. v. United Mexican States*, Award, Case No. ARB(AF)/98/2 (June 2, 2000), 40 I.L.M. 56 (2001), at n. 2.

6 [13] Vienna Convention on the Law of Treaties, art. 31(1) (May 22, 1969).

Republic of Lithuania in conformity with its laws and regulations.'[7] The ordinary meaning of 'entity' is '[a] thing that has a real existence.'[8] The meaning of 'establish' is to '[s]et up on a permanent or secure basis; bring into being, found (a. . .business).'[9] Thus, according to the ordinary meaning of the terms of the Treaty, the Claimant is an 'investor' of Lithuania if it is a thing of real legal existence that was founded on a secure basis in the territory of Lithuania in conformity with its laws and regulations. The Treaty contains no additional requirements for an entity to qualify as an 'investor' of Lithuania."

[Para. 28]

I.1.16 TREATY INTERPRETATION
See also I.17.011; II.4.9212; II.4.92232

c. Methods of Defining Corporate Nationality

[30] "Article 1(2)(c) of the Ukraine-Lithuania BIT, which defines 'investor' with respect to entities not established in Ukraine or Lithuania, provides relevant context for the interpretation of Article 1(2)(a) and (b). Article 1(2)(c) extends the scope of the Treaty to entities incorporated in third countries using other criteria to determine nationality—namely, the nationality of the individuals who control the enterprise and the *siège social* of the entity controlling the enterprise. The Respondent argues that the existence of these alternative methods of defining corporate nationality to *extend* the benefits of the BIT in Article 1(2)(c) should also allow these methods to be used to *deny* the benefits of the BIT under Article 1(2)(b). If the Contracting Parties had intended these alternative methods to apply to entities legally established in Ukraine or Lithuania, however, the parties would have included them in Article 1(2)(a) or (b) respectively as they did in Article 1(2)(c). However, the purpose of Article 1(2)(c) is only to extend the definition of 'investor' to entities established under the law of a third State provided certain conditions are met. Under the well established presumption *expressio unius est exclusio alterius*, the state of incorporation, not the nationality of the controlling shareholders or *siège social*, thus defines 'investors' of Lithuania under Article 1(2)(b) of the BIT."

[Para. 30]

7 [14] Emphasis added.

8 [15] The New Shorter Oxford English Dictionary 830 (Thumb Index Edition 1993).

9 *Id.* at 852.

I.1.16 TREATY INTERPRETATION
See also I.17.011; II.4.9212

d. Object and Purpose of the Treaty

[31] "The object and purpose of the Treaty likewise confirm that the control-test should not be used to restrict the scope of 'investors' in Article 1(2)(b). The preamble expresses the Contracting Parties' intent to 'intensify economic cooperation to the mutual benefit of both States' and 'create and maintain favourable conditions for investment of investors of one State in the territory of the other State.' The Tribunal in *SGS v. Philippines* interpreted nearly identical preambular language in the Philippines-Switzerland BIT as indicative of the treaty's broad scope of investment protection.[10] We concur in that interpretation and find that the object and purpose of the Ukraine-Lithuania BIT is to provide broad protection of investors and their investments." | **[32]** "The object and purpose of the Treaty are also reflected in the Treaty text. Article 1, which sets forth the scope of the BIT, defines 'investor' as '*any* entity' established in Lithuania or Ukraine as well as '*any* entity' established in third countries that is controlled by nationals of or by entities having their seat in Lithuania or Ukraine. Thus, the Respondent's request to *restrict* the scope of covered investors through a control-test would be inconsistent with the object and purpose of the Treaty, which is to provide broad protection of investors and their investments."

[Paras. 31, 32]

II.4.92 JURISDICTION
See also II.4.9223; II.4.92232

e. Denying Benefits

[35] "[. . .] [A] number of investment treaties of other States enable the parties to deny the benefits of the treaty to entities of the other party that are controlled by nationals of the denying party and do not have substantial business activity in the other party. [. . .]" | **[36]** "These investment agreements confirm that state parties are capable of excluding from the scope of the agreement entities of the other party that are controlled by nationals of third countries or by nationals of the host country. The Ukraine-Lithuania BIT, by contrast, includes no such 'denial of benefits' provision with respect to entities controlled by third-country nationals or by nationals of the de-

10 [20] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, Decision on Jurisdiction, Case No. ARB/02/6 (Jan. 29, 2004), at para. 116 ("The BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended 'to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other.' It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments.") ("*SGS v. Philippines*").

nying party. We regard the absence of such a provision as a deliberate choice of the Contracting Parties. In our view, it is not for tribunals to impose limits on the scope of BITs not found in the text, much less limits nowhere evident from the negotiating history. An international tribunal of defined jurisdiction should not reach out to exercise a jurisdiction beyond the borders of the definition. But equally an international tribunal should exercise, and indeed is bound to exercise, the measure of jurisdiction with which it is endowed.[11]"

[Paras. 35, 36]

I.1.16 TREATY INTERPRETATION
See also I.17.011; II.4.9212

f. Conclusion of the Tribunal

[37] "We note that the Claimant has provided the Tribunal with significant information regarding its activities in Lithuania, including financial statements, employment information, and a catalogue of materials produced during the period of 1991 to 1994. [. . .]" | **[38]** "[. . .] [U]nder the terms of the Ukraine-Lithuania BIT, interpreted according to their ordinary meaning, in their context, and in light of the object and purpose of the Treaty, the only relevant consideration is whether the Claimant is established under the laws of Lithuania. We find that it is. Thus, the Claimant is an investor of Lithuania under Article 1(2)(b) of the BIT."

[Paras. 37, 38]

II.4.9223 NATIONAL OF ANOTHER CONTRACTING STATE
See also II.4.92232; II.4.9224

2. Determination of Corporate Nationality

[42] "In our view, the definition of corporate nationality in the Ukraine-Lithuania BIT, on its face and as applied to the present case, is consistent with the Convention and supports our analysis under it. Although Article 25(2)(b) of the Convention does not set forth a required method for determining corporate nationality, the generally accepted (albeit implicit) rule is that the nationality of a corporation is determined on the basis of its

11 [24] See, e.g., *Compañia de Aguas del Aconquija S.A. and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic*, Decision on Annulment, Case No. ARB/97/3 (July 3, 2002). "In the Committee's view, the Tribunal, faced with such a claim and having validly held that it had jurisdiction, was obliged to consider and to decide it." *Id.* at para. 112. "[T]he Committee concludes that the Tribunal exceeded its powers in the sense of Article 52(1)(b), in that the Tribunal, having jurisdiction over the Tucumán claims, failed to decide those claims." *Id.* at para. 115.

siège social or place of incorporation.[12] Indeed, 'ICSID tribunals have uniformly adopted the test of incorporation or seat rather than control when determining the nationality of a juridical person.'[13] Moreover, '[t]he overwhelming weight of the authority . . . points towards the traditional criteria of incorporation or seat for the determination of corporate nationality under Art. 25(2)(b).'[14] As Professor Schreuer notes, '[a] systematic interpretation of Article 25(2)(b) would militate against the use of the control test for a corporation's nationality.'[15]"

[Para. 42]

II.4.92 JURISDICTION
See also I.17.011; II.4.9223; II.4.92232; II.4.9224

3. Purpose of Art. 25(2)(b) ICSID Convention

[45] "[. . .] The second clause of Article 25(2)(b) limits the use of the control-test to the circumstances it describes, i.e., when Contracting Parties agree to treat a national of the host State as a national of another Contracting Party because of foreign control. [. . .]" | **[46]** "The use of a control-test to define the nationality of a corporation to restrict the jurisdiction of the Centre would be inconsistent with the object and purpose of Article 25(2)(b). Indeed, as explained by Mr. Broches, the purpose of the control-test in the second portion of Article 25(2)(b) is to *expand* the jurisdiction of the Centre:

> [t]here was a compelling reason for this last provision. It is quite usual for host States to require that foreign investors carry on their business within their territories through a company organized under the laws of the host country. If we admit, as the Convention does implicitly, that this makes the company technically a national of the host country, it becomes readily apparent that there is need for an exception to the general principle that that the Centre will not have jurisdiction over disputes between a Contracting State and its own nationals. *If no exception were made for foreign-owned but locally incorporated companies, a large and important sector of foreign investment would be outside the scope of the Convention.*[16]" |

[47] "ICSID tribunals likewise have interpreted the second clause of Article 25(2)(b) to expand, not restrict, jurisdiction. [. . .]" | **[50]** "ICSID jurispru-

12 [27] Schreuer, at 278-79; *see also* G.R. Delaume, "ICSID Arbitration and the Courts," 77 AMER. J. INT'L LAW 784, 793-94 (1983); M. Hirsch, THE ARBITRATION MECHANISM OF THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES 85 (1993).

13 [28] Schreuer, at 279-80 (citing *Kaiser Bauxite Company v. Jamaica*, Decision on Jurisdiction, Case No. ARB/74/3 (July 6, 1975), 1 ICSID Reports 296, 303 (1993); *SOABI v. Senegal*, Decision on Jurisdiction, Case No. ARB/82/1 (Aug. 1, 1984), 2 ICSID Reports 175, 180-81; *Amco*, at 396); *see also Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, Decision on Jurisdiction, Case No. ARB/00/5 (Sept. 27, 2001), 16 ICSID Review-FILJ 469 (2001), at para. 108 ("*Autopista*").

14 [29] Schreuer, at 281.

15 [30] *Id.* at 278.

16 [36] Broches, at 358-59 (emphasis added).

dence also confirms that the second clause of Article 25(2)(b)should not be used to determine the nationality of juridical entities in the absence of an agreement between the parties. [. . .] In the present case, there was no agreement between the Contracting Parties to treat the Claimant as anything other than a national of its state of incorporation, i.e., Lithuania." | **[51]** "The second clause of Article 25(2)(b) does not mandatorily constrict ICSID jurisdiction for disputes arising in the inverse context from the one envisaged by this provision: a dispute between a Contracting Party and an entity of another Contracting Party that is controlled by nationals of the respondent Contracting Party." | **[52]** "In summary, the Claimant is an 'investor' of Lithuania under Article 1(2)(b) of the BIT because it is an 'entity established in the territory of the Republic of Lithuania in conformity with its laws and regulations.' This method of defining corporate nationality is consistent with modern BIT practice and satisfies the objective requirements of Article 25 of the Convention. We find no basis in the BIT or the Convention to set aside the Contracting Parties' agreed definition of corporate nationality with respect to investors of either party in favor of a test based on the nationality of the controlling shareholders. While some tribunals have taken a distinctive approach,[17] we do not believe that arbitrators should read in to BITs limitations not found in the text nor evident from negotiating history sources."

[Paras. 45, 46, 47, 50, 51, 52]

II.4.9224 FOREIGN CONTROL
See also II.4.9223; II.4.92232

4. Doctrine of "Veil Piercing"

[54] "The seminal case, in this regard, is *Barcelona Traction*.[18] In that case, the International Court of Justice ('ICJ') stated, 'the process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in

17 [42] *See, e.g., SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan,* Decision on Jurisdiction, Case No. ARB/01/13 (Aug. 6, 2003), 42 I.L.M. 1290 (2003). In this case, a Swiss company asserted claims against the Government of Pakistan for breach of contract and for breach of the BIT between the Swiss Confederation and Pakistan. Article 9 of that BIT provides for ICSID arbitration of "disputes with respect to investments. . . ." *Id.* at para. 149. The provision does not in any manner restrict the scope of such disputes. Although the Tribunal recognized that BIT claims and contract claims "can both be described as 'disputes with respect to investment,'" it nonetheless decided—without support from the text or evidence of the parties' intent—to exclude contract claims from the scope of "disputes" that could be submitted to ICSID arbitration. *Id*. at paras. 161-62.

18 [44] For the sake of clarity, the Tribunal notes that *Barcelona Traction*, which held that incorporation is the only criterion for nationality in cases of diplomatic protection, is inapplicable with respect to agreements between the parties to treat companies of the host State as a national of the other Party under the second clause of Article 25(2)(b). *See* Broches, at 360-361.

international law.'[19] In particular, the Court noted, '[t]he wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to *prevent the misuse of the privileges of legal personality*, as in certain cases of *fraud or malfeasance*, to *protect third persons* such as a creditor or purchaser, or to *prevent the evasion of legal requirements or of obligations*.'[20]" | **[55]** "The Respondent has not made a prima facie case, much less demonstrated, that the Claimant has engaged in any of the types of conduct described in *Barcelona Traction* that might support a piercing of the Claimant's corporate veil. [. . .]" | **[56]** "The ICJ did not attempt to define in *Barcelona Traction* the precise scope of conduct that might prompt a tribunal to pierce the corporate veil. We are satisfied, however, that none of the Claimant's conduct with respect to its status as an entity of Lithuania constitutes an abuse of legal personality. [. . .]"

[Paras. 54, 55, 56]

I.3.0 NATIONALITY
See also I.2.041; I.3.1; I.17.011

5. Customary International Law

[70] "As with the Convention, the definition of corporate nationality in the Ukraine-Lithuania BIT is also consistent with the predominant approach in international law. As the International Court of Justice has explained, '[t]he traditional rule attributes the right of diplomatic protection of a corporate entity to the States under the laws of which it is incorporated and in whose territory it has its registered office. The two criteria have been confirmed by long practice and by numerous international instruments.'[21] According to *Oppenheim's International Law*, '[i]t is usual to attribute a corporation to the state under the laws of which it has been incorporated and to which it owes its legal existence; to this initial condition is often added the need for the corporation's head office, registered office, or its *siège social* to be in the same state.'[22] Thus, the Ukraine-Lithuania BIT uses the same well established method for determining corporate nationality as does customary international law."

[Para. 70]

19 [45] *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3 (Feb. 5), at para. 58 ("*Barcelona Traction*").

20 [46] Id. at para. 56 (emphasis added).

21 [64] *Barcelona Traction*, at para. 70.

22 [65] 1 Oppenheim's International Law 859-60 (Sir Robert Jennings and Sir Arthur Watts eds., 9th ed. 1996) (footnotes omitted).

B. Qualification as Investment

II.4.9211 QUALIFICATION AS INVESTMENT

1. Investment under Art. 25 ICSID Convention

[73] "[. . .] [T]he parties have broad discretion to decide the 'kinds of investment they wish to bring to ICSID.'[23] Indeed, '[p]recisely because the Convention does not define 'investment', it does not purport to define the requirements that an investment should meet to qualify for ICSID jurisdiction.'[24] Parties have a 'large measure of discretion to determine for themselves whether their transaction constitutes an investment for the purposes of the Convention.'[25] Here, that discretion is exercised in the BIT."

[Para. 73]

II.4.9211 QUALIFICATION AS INVESTMENT
See also I.17.011

2. Definition of "Investment" in Art. 1(1) of the BIT

[74] "[. . .] Article 1(1) of the BIT defines 'investment' as 'every kind of asset invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter. . . .' In addition, Article 1(1) provides that '[a]ny alteration of the form in which assets are invested shall not affect their character as an investment. . . .' The Treaty contains no requirement that the capital used by the investor to make the investment originate in Lithuania, or, indeed, that such capital not have originated in Ukraine." | **[75]** "[. . .] To assess the Respondent's objection, we follow the standard rule of interpretation: we apply to the terms of the Treaty their ordinary meaning, in their context, in light of the object and purpose of the Treaty. [. . .] Thus, an investment under the BIT is read in ordinary meaning as 'every kind of asset' for which 'an investor of one Contracting Party' caused money or effort to be expended and from which a return or profit is expected in the territory of the other Contracting Party. In other words, the Claimant must show that it caused an investment to be made in the territory of the Respondent." | **[76]** "The Claimant has provided substantial evidence of its investment in Ukraine[.] [. . .]" | **[77]** "The Respondent requests the Tribunal to infer, without textual foundation, that the Ukraine-Lithuania BIT requires the Claimant to demonstrate further that the capital used to make an investment in

23 [66] Schreuer, at 124.

24 [67] *CMS*, at para. 51.

25 [68] *See Fedax N.V. v. Republic of Venezuela*, Decision on Jurisdiction, Case No. ARB/96/3 (July 11, 1997), 37 I.L.M. 1378 (1998), at para. 22 (quoting Carolyn B. Lamm and Abby Cohen Smutny, "The Implementation of ICSID Arbitration Agreements," 11 ICSID Review-FILJ 64, 80 (1996)) ("*Fedax*").

Ukraine originated from non-Ukrainian sources. In our view, however, neither the text of the definition of 'investment,' nor the context in which the term is defined, nor the object and purpose of the Treaty allow such an origin-of-capital requirement to be implied. [. . .] In addition, the context in which the term 'investment' is defined, namely, '*every* kind of asset invested by an investor,' does not support the restriction advocated by the Respondent.[26] Finally, the origin-of-capital requirement is inconsistent with the object and purpose of the Treaty, which, as discussed above, is to provide broad protection to investors and their investments in the territory of either party. Accordingly, the Tribunal finds no basis on which to impose the restriction proposed by the Respondent on the scope of covered investments." | **[78]** "We conclude that, under the terms of the BIT, both the enterprise Taki spravy and the rights in the property described in the above-referred 'Informational Notices,' are assets invested by the Claimant in the territory of Ukraine. The investment would not have occurred but for the decision by the Claimant to establish an enterprise in Ukraine and to dedicate to this enterprise financial resources under the Claimant's control. In doing so, the Claimant caused the expenditure of money and effort from which it expected a return or profit in Ukraine."

[Paras. 74, 75, 76, 77, 78]

I.1.16 TREATY INTERPRETATION
See also I.17.011; II.4.9223; II.4.92232

3. Consistency of Art. 1(1) of the BIT with the ICSID Convention

[79] "The Tribunal's finding under the BIT is also consistent with the ICSID Convention. The broad definition of 'investment' in the Lithuania-Ukraine BIT is typical of the definition used in most contemporary BITs.[27] [. . .]" | **[80]** "[. . .] The Claimant made an investment for the purposes of the Convention when it decided to deploy capital under its control in the territory of Ukraine instead of investing it elsewhere. The origin of the capital is not relevant to the existence of an investment." | **[82]** "In our view, the ICSID Convention contains no inchoate requirement that the investment at issue in a dispute have an international character in which the origin of the capital is decisive. Although the Convention contemplates disputes of an international character, we believe that such character is defined by the terms of the Convention, and in turn, the terms of the BIT. Were we to accept the origin of capital as transcending the textual definition of the nationality of the Claimant and the scope of covered investment in the Ukraine-Lithuania

26 [74] Emphasis added.

27 [75] *See Fedax,* at para. 34 (citing Antonio Parra, "The Scope of New Investment Laws and International Instruments," in Economic Development, Foreign Investment and the Law 27, 35-36 (Robert Pritchard ed. 1996)); *see also* Rudolph Dolzer and Margaret Stevens, Bilateral Investment Treaties, 26-31 (1995).

BIT, we would override the explicit choice of the Contracting Parties as to how to define these terms. Ukraine, Lithuania and other Contracting Parties chose their methods of defining corporate nationality and the scope of covered investment in BITs with confidence that ICSID arbitrators would give effect to those definitions. That confidence is premised on the ICSID Convention itself, which leaves to the reasonable discretion of the parties the task of defining key terms. We should be loathe to undermine it."

[Paras. 79, 80, 82]

C. Dispute Arising Directly Out of an Investment

II.4.9214 DISPUTE ARISING DIRECTLY OUT OF AN INVESTMENT

1. Connection Between Dispute and Investment

[87] "In order for this Tribunal to have jurisdiction over a dispute, there must be an adequate nexus between the dispute and the Claimant's investment in the territory of the Contracting Party." | **[88]** "Article 25(1) of the ICSID Convention extends jurisdiction to any dispute 'arising directly out of an investment.' In order for the directness requirement to be satisfied, the dispute and investment must be 'reasonably closely connected.'[28] As Professor Schreuer notes, '[d]isputes arising from ancillary or peripheral aspects of the investment operation are likely to give rise to the objection that they do not arise directly from the investment. . . .'[29]" | **[91]** "[. . .] For a dispute to arise directly out of an investment, the allegedly wrongful conduct of the government need not be directed against the physical property of the investor. The requirement of directness is met if the dispute arises from the investment itself or the operations of its investment, as in the present case. [. . .]"

[Paras. 87, 88, 91]

I.17.1 EXPROPRIATION

2. Taking of Property in International Law

[92] "[. . .] [T]he Respondent's obligations with respect to 'investment' relate not only to the physical property of Lithuanian investors but also to the business operations associated with that physical property. States' obligations with respect to 'property' and 'the use of property' are well established in international law. For example, the *Draft Convention on the International Responsibility of States for Injuries to Aliens*, defines a 'taking of

28 [90] Schreuer, at 114.

29 [91] *Id.*

property' to include 'not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy or dispose of the property within a reasonable period of time after the inception of such interference.'[30] Further, the Iran-U.S. Claims Tribunal found that '[a] deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits.'[31]"

[Para. 92]

II.4.9214 DISPUTE ARISING DIRECTLY OUT OF AN INVESTMENT

3. Conclusion of the Tribunal

[93] "In the present case, each of the allegedly wrongful government actions—investigations, document seizures, public accusations of illegal conduct, and judicial actions to invalidate contracts and seize assets—involved the operations of the Claimant's subsidiary enterprise in Ukraine. Accordingly, we are satisfied that the present dispute arises directly from the Claimant's investment."

[Para. 93]

III. OBJECTIONS TO ADMISSIBILITY

II.4.93 CONSENT TO ICSID ARBITRATION
See also II.1.212

A. Consent to Arbitration

[94] "Article 25(1) states, 'jurisdiction of the Centre shall extend to any legal dispute. . . which the parties to the dispute consent in writing to submit to the Centre.' The consent of the Ukraine is found in Article 8(2) of the Treaty, which provides that 'the investor shall be entitled to submit the case to [arbitration]. . .' It is well established that, 'formulations [in a BIT] to the effect that a dispute 'shall be submitted' to the Centre'. . . leave no doubt as to the binding character of these clauses.'[32] [. . .]" | **[97]** "[. . .] [T]he Convention does not stipulate the form that written consent must take,

30 [96] L. Sohn and R. Baxter, "Responsibility of States for Injuries to the Economic Interests of Aliens, 55 AM J. INT'L L. 545, 553 (1961) (Article 10.3 of *Draft Convention on the International Responsibility of States for Injuries to Aliens*).

31 [97] *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA*, Award No. 141-7-2, 6 Iran-U.S. C.T.R. 219, 225 (June 22, 1984).

32 [98] Schreuer, at 213.

much less to whom it must be addressed and sent. As Dr. Amerasinghe explains,

> [t]he Convention requires *only* that the consent be in writing. Thus, it is not necessary that the consent of both parties be included in a single instrument. The consents may, indeed, be expressed in instruments of completely diverse character, and *not necessarily addressed to the other party* or made with particular reference to any dispute of arrangement with it.[33]" |

[98] "In fact, the Claimant need not have expressed its consent in a document separate from the RFA itself. As Professor Schreuer notes, '[i]t is established practice that an investor may accept an offer of consent contained in a BIT by instituting ICSID proceedings.'[34] Thus, not only the Claimant's letter but also the RFA itself satisfy the requirement to 'consent in writing' to the jurisdiction of the Centre. As the Convention contemplates 'no requirement that the consent [. . .] either precede or follow the incidence of a particular dispute,' neither does it require consent to precede or follow negotiations concerning a dispute.[35]" | **[99]** "Further, the Claimant was not required to submit its consent prior to initiating ICSID proceedings. The Executive Directors' Report addresses the timing of parties' consent in paragraph 24: '[c]onsent of the parties must exist when the Centre is seized (Articles 28(3) and 36(3)) but the Convention does not otherwise specify the time at which consent should be given.'[36] When an investor accepts a State's general offer of consent in a BIT, as in the present case, the timing of such an acceptance is proper as long as it occurs not later than the time at which the Claimant submits its request for arbitration.[37] There is no requirement that the Claimant's consent precede the request. Similarly, neither the BIT nor the Convention requires the Claimant to wait until after the requisite six-month negotiating period has ended before expressing its consent to ICSID jurisdiction. Article 8 of the BIT merely requires that there be a negotiating period of six months after a dispute arises before a claim may be submitted to arbitration. We are confident that this requirement has been fulfilled." | **[100]** "For the foregoing reasons, the Claimant's written consent satisfies the requirements of the ICSID Convention."

[Paras. 94, 97, 98, 99, 100]

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33 [103] C.F. Amerasinghe, "The Jurisdiction of the International Centre for the Settlement of Investment Disputes," at 224 (emphases added).

34 [104] Schreuer, at 218. As stated by the Tribunal in *SGS v. Philippines*, "the Claimant relies upon the consent to ICSID arbitration given by the Philippines in the BIT, combined with its own written consent contained in the Request for Arbitration. It is well established that the combination of these forms of consent can constitute 'consent in writing' within the meaning of Article 25(1), provided that the dispute falls within the scope of the BIT." *SGS v. Philippines,* at para. 31.

35 [105] Amerasinghe, "The Jurisdiction of the International Centre for the Settlement of Investment Disputes", at 224.

36 [106] Executive Directors' Report, at para. 24.

37 [107] Schreuer, at 225.

I.2.01 ORGANS OF THE STATE

B. Parties to the Negotiation as Required by Art. 8 of the BIT

[101] "[. . .] The Respondent [. . .] argues that the governmental authorities in Kyiv were not duly authorized to negotiate on behalf of Ukraine. In addition, the Respondent argues that officials acting on behalf of Taki spravy, not Tokios Tokelës, engaged governmental officials in negotiation." | **[102]** "We are satisfied that the Claimant and the Respondent participated to the extent necessary in the negotiations concerning this dispute. The Claimant did bring this dispute to the attention of the central government authorities, including the President of Ukraine. [. . .] In addition, the Claimant has provided evidence of its negotiations with federal officials in the form of letters that the Claimant exchanged with the General Procurator of Ukraine and the Chairman of the State Tax Administration of Ukraine. [. . .] There is, in addition, evidence of extensive negotiations between the Claimant and municipal government authorities. [. . .] While the *actions* of municipal authorities are attributable to the central government, [. . .] we need not decide whether the *negotiations* by those authorities may count toward the six-month 'cooling off' period prescribed by the Treaty, as the direct negotiations with central government authorities satisfy the jurisdictional requirement. Moreover, whether the President authorized any of these negotiations is irrelevant, as '[a] state cannot plead the principles of municipal law, including its constitution, in answer to an international claim.'[38]" | **[103]** "With respect to the Claimant's participation in the negotiation, it is immaterial whether the Claimant's representatives negotiated as agents of the parent enterprise, Tokios Tokelës, or its wholly owned subsidiary, Taki spravy. In either case, the Claimant was a party to the negotiation." | **[104]** "Thus, the present dispute was the subject of negotiation between 'an investor of one Contracting Party and the other Contracting Party' in accordance with Article 8 of the BIT."

[Paras. 101, 102, 103, 104]

II.4.9213 LEGAL DISPUTE

C. Existence of a Dispute

[106] "In the *Mavrommatis* Case, the International Court defined dispute 'as a disagreement on a point of law or fact, a conflict of legal views or interests between two persons.'[39] Professor Schreuer described the requirements of a 'dispute' in the following passage:

> The dispute must relate to clearly identified issues between the parties and must not be merely academic. This is not to say that a specific action must

38 [114] Brownlie, [Ian Brownlie, PRINCIPLES OF INTERNATIONAL LAW 634 (5th ed. 1998)] at 451.

39 [116] *Mavrommatis Case* 1924 P.C.I.J. Ser. A, No. 2, at 11-12.

> have been taken by one side or that the dispute must have escalated to a certain level of confrontation, but merely that it must be of immediate interest to the parties. The dispute must go beyond general grievances and must be susceptible of being stated in terms of a concrete claim.[40]" |

[107] "We are convinced that the dispute was sufficiently defined for negotiations to occur at least six months prior to the date upon which the Centre registered the claim. The Claimant notified governmental authorities of the Respondent of specific grievances, including allegedly unwarranted investigations, unreasonable seizures of documents, unfounded judicial actions, and publicly stated accusations by governmental authorities of the Respondent that the Claimant had engaged in illegal conduct. Although we reserve judgment as to merits of the Claimant's allegations, we find at this point that the claims constitute a 'dispute' for the purpose of satisfying jurisdictional requirements."

[Paras. 106, 107]

II.4.97 DECISION ON JURISDICTION

IV. DECISION OF THE TRIBUNAL

[108] "For the foregoing reasons, and after taking notice of the President's Dissenting Opinion, the Tribunal decides by a majority of its members that the present dispute is within the jurisdiction of the Centre and the competence of the Tribunal."

[Para. 108]

40 [117] Schreuer, at 102.

LG&E Energy Corp. v. Argentine Republic, ARB/02/1, Decision on Jurisdiction, 30 April 2004*

Original: English

Present: de Maekelt, *President of the Tribunal*
Rezek, van den Berg, *Arbitrators*

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II.4.911 REQUEST FOR ARBITRATION

I. PROCEDURE

[1] "On December 28, 2001, the International Centre for Settlement of Investment Disputes ('ICSID' or 'Centre') received from LG&E Energy Corp.,

* Summaries prepared by Christina Knahr, Ph.D. Candidate, Research Assistant, Department for European, International and Comparative Law, University of Vienna, Austria. The full text of the Decision is available at <http://www.worldbank.org/icsid/cases/lge-decision-en.pdf>. Original footnote numbers are indicated in brackets: [ ].

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

LG&E Capital Corp., and LG&E International Inc., juridical persons constituted under the laws of the Commonwealth of Kentucky, United States of America ('Claimants' or 'LG&E'), a Request for Arbitration dated December 21, 2001, against the Argentine Republic ('Respondent')."

[Para. 1]

II. THE DISPUTE

[19] "In the present case, claims were submitted by LG&E, companies constituted in the United States of America that operate in that country and others, against the Argentine Republic to ICSID under the Bilateral Treaty. LG&E holds shares in three gas distribution licensees constituted in Argentina: Distribuidora de Gas del Centro ('Centro'), Distribuidora de Gas Cuyana S.A. ('Cuyana'), and Gas Natural BAN S.A. ('GasBan'), hereinafter collectively referred to as 'Licensees.'" | **[22]** "The dispute [. . .] is related to the privatization process by the Argentine Republic, started in 1989, of the national gas monopoly, Gas del Estado. Its equipment and facilities were transferred to newly created local companies (amongst whom Centro, Cuyana and GasBan) that were granted licenses for the transport and distribution of natural gas. The shares in the local companies were sold to private investors." | **[23]** "The Claimants allege that the Respondent has discontinued the guaranteed PPI (U.S. Producer Price Index) adjustments and other tariff increases since 1999. [. . .]"

[Paras. 19, 22, 23]

III. CONSIDERATIONS OF THE TRIBUNAL

A. Jurisdiction *Ratione Personae*

II.4.9212 QUALIFICATION AS INVESTOR

1. Status of the Claimant

[48] "[. . .] There is no doubt about the status of the Argentine Republic. The question arises, however, with the Claimants. They are companies with United States nationality that have made investments in Argentina through local (Argentine) companies, and whose participation in this process has been questioned by the Respondent, because the Argentine companies were directly responsible for operating the activity covered by the license agreements."

[Para. 48]

II.4.9211 QUALIFICATION AS INVESTMENT

2. The Claimant's Shares

[50] "[. . .] The present case [. . .] is concerned with shares held by the Claimants in local companies [. . .]. Those shares are the investment within the meaning of Article I(1)(a)(ii) of the Bilateral Treaty. The Respondent has not disputed that those shares are 'owned or controlled directly or indirectly' by the Claimants. In that connection, it is irrelevant whether the shares are majority or minority shares."

[Para. 50]

II.4.9223 NATIONAL OF ANOTHER CONTRACTING STATE
See also I.1.16; II.4.9224

3. Article VII(8) of the BIT

[54] "Article VII(8) of the Bilateral Treaty [. . .] is not applicable to this case. It refers to the situation in which a company, legally constituted under the applicable laws and regulation of a State Party, is deemed to be 'an investment of nationals or companies of the other [State] Party' and, as such, it may resort to international arbitration and 'shall be treated as a national or company of such other [State] Party in accordance with Article 25 (2) (b) of the ICSID Convention.' Rather, Article VII(8) reinforces the Tribunal's analysis in the sense that it refers to 'a national or company' without setting any limit, such as 'foreign control' as mentioned by Article 25(2)(b) of the ICSID Convention."

[Para. 54]

II.4.9211 QUALIFICATION AS INVESTMENT

4. Definition of Investment in Argentine Domestic Law

[55] "With respect to Argentine domestic law, the situation is similar to that established by Article I (1)(a)(ii) of the Bilateral Treaty. Article 2(1) of Act 21.382, adopted through Decree No. 1853/1993 (B.O. 08/09/1993) on the regulation of foreign investment, defines such investment as 'any contribution of capital belonging to foreign investors, applied to economic activities carried out in the country;' it also includes 'the acquisition of shares of capital in an existing local company by foreign investors.' In turn, a foreign investor means 'any natural or juridical person domiciled outside the national territory who owns an investment in foreign capital. . . .'"

[Para. 55]

II.4.9212 QUALIFICATION AS INVESTOR

5. Conclusion of the Tribunal Regarding the Status of the Claimant

[60] "The proper distinction between a national company having the license and the investors is reaffirmed in the decision on jurisdiction cited above in the *CMS Gas Transmission Company* case, according to which:

> 'Because, as noted above, the rights of the Claimant can be asserted independently from the rights of TGN and those relating to the License, and because the Claimant has a separate cause of action under the Treaty in connection with the protected investment, the Tribunal concludes that the present dispute arises directly from the investment made and that therefore there is no bar to the exercise of jurisdiction on this count' (§ 68)." |

[63] "In view of the foregoing, the Tribunal must [. . .] conclude that, for the purposes of the ICSID Convention and the Bilateral Treaty, the Claimants should be considered foreign investors, even though they did not directly operate the investment in the Argentine Republic but acted through companies constituted for that purpose in its territory."

[Paras. 60, 63]

B. Jurisdiction *Ratione Materiae*

II.4.9214 DISPUTE ARISING DIRECTLY OUT OF AN INVESTMENT
See also II.4.9211; II.4.9223

1. Definition of Investment in the ICSID Convention

[64] "Within the framework of ICSID jurisdiction, it is necessary to determine how the term 'dispute' is to be understood in the proper context. This term is defined in Article 25(1) of the ICSID Convention as being any legal dispute arising directly out of an investment between a Contracting State and a national of another Contracting State. This provision again stresses the foreign status of the natural or juridical person making the investment, an aspect which is even more important in the present case. It should be recalled that even though the obligations stipulated in the license agreements are fulfilled by an Argentine company, the investment is effectively made by a group of United States companies, a fact which qualifies this investment as being foreign."

[Para. 64]

II.4.9211 QUALIFICATION AS INVESTMENT
See also I.1.16; I.17.011

2. Definition of Investment under the BIT

[65] "Article VII of the Bilateral Treaty, for its part, lists the criteria for defining an 'investment dispute.' The most relevant of these is found in subparagraph (c), according to which: 'an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to . . . an alleged breach of any right conferred or created by this Treaty with respect to an investment.'" | **[66]** "[. . .] [I]t appears that Claimants' claims are based on alleged breaches of the Bilateral Treaty with respect to their investment. Consequently, the present case constitutes an investment dispute within the meaning of the ICSID Convention and the Bilateral Treaty."

[Paras. 65, 66]

II.4.92 JURISDICTION
See also II.4.9214

3. Power of ICSID Tribunal to Rule on Economic Policies

[67] "[. . .] [T]he Tribunal shares the analysis and conclusion of the Arbitral Tribunal in *CMS Gas Transmission Company v. The Argentine Republic*:[1]

> 'On the basis of the above considerations the Tribunal concludes on this point that it does not have jurisdiction over measures of general economic policy adopted by the Republic of Argentina and cannot pass judgment on whether they are right or wrong. The Tribunal also concludes, however, that it has jurisdiction to examine whether specific measures affecting the Claimant's investment or measures of general economic policy having a direct bearing on such investment have been adopted in violation of legally binding commitments made to the investor in treaties, legislation or contracts.'(§ 33)"

[Para. 67]

II.1.121 ADMISSIBILITY OF THE APPLICATION
See also II.4.92

4. Conclusions of the Tribunal

[68] "The Tribunal also concludes in the present case that the fact that the Claimants have demonstrated *prima facie* that they have been adversely affected by measures adopted by the Respondent is sufficient for the Tribu-

1 [6] *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Decision on Jurisdiction, July 17, 2003.

nal to consider that the dispute, as far as this matter is concerned, is admissible and that it has jurisdiction to examine it on the merits."

[Para. 68]

II.4.93 CONSENT TO ICSID ARBITRATION

C. Consent to ICSID Arbitration

[72] "The Bilateral Treaty contains a multiple clause under which resort can be made to ICSID arbitration or to the Additional Facility of ICSID; to an ad hoc arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties (Article VII(3))." | **[73]** "The system for establishing consent is clearly set forth in the Bilateral Treaty. The investor, on his part, has to make a choice under the multiple clause by giving consent in writing, subject to a number of conditions (Article VII(3)). The host State, on its part, has already given its consent. In that respect Article VII(4) provides: 'Each Party [i.e., the Argentine Republic and the United States of America] hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3.' The mutuality of consent is completed by the provision: 'Such consent, together with the written consent of the national or company when given under paragraph 3 shall satisfy the requirement for: (a) written consent of the parties to the dispute for the purposes of Chapter II [i.e., Articles 25-27] of the ICSID Convention . . .' (Article VII(4) in fine). Thus, in accordance with Article 25(1) in fine, 'When the parties have given their consent, no party may withdraw its consent unilaterally.' This system is, for example, confirmed by the Arbitral Tribunal in the *Azurix v. Argentina* case.[2]" | **[74]** "It may be added that the multiple clause has been interpreted on other occasions by ICSID tribunals. One of these is the decision in the *Lanco* case, in which it is stated:

> 'the Argentina-US Treaty establishes the possibility of the investor choosing between the local courts (recourse to the courts which in any event are available to natural and legal persons by virtue of the basic principle of the right to effective judicial protection) and other means of dispute settlement, such as arbitration, which requires the previous agreement of the parties. In addition, the Argentina-US Treaty, once certain requirements are met, allows the investor to submit the dispute to ICSID arbitration. The Argentina-US Treaty therefore gives the investor the power to choose among several methods of dispute settlement: consequently, once the investor has ex-

2 [8] *Azurix v. Argentina* (ICSID Case ARB/01/12), Decision on Jurisdiction of December 8, 2003, para. 73, para. 42.

pressed its consent in choosing ICSID arbitration, the only means of dispute settlement available is ICSID arbitration' (§ 31)." |

[75] "In the present case, the Claimants chose to submit their investment disputes to ICSID and are therefore not restricted by the fact that the Licensees have resorted to local tribunals."

[Paras. 72, 73, 74, 75]

II.4.96 FORK IN THE ROAD CLAUSE

D. Fork in the Road Clause

[76] "Since the investor has the power to choose one of the four forums established in Article VII(3) of the Bilateral Treaty, it is noteworthy in this case that Claimants did not submit the dispute to the Argentine courts or to any other dispute settlement mechanism mentioned in Article VII(2) or (3). Thus, no question regarding the 'fork in the road' provision arises in the present case."

[Para. 76]

II.4.97 DECISION ON JURISDICTION
See also II.1.213; II.1.9

IV. DECISION

[84] "For the reasons stated above, the Tribunal:

(a) HOLDS that the present dispute is within the jurisdiction of the Centre and the competence of the Tribunal;

(b) DISMISSES all of the Respondent's objections to the admissibility of the dispute and all of the Respondent's objections to the jurisdiction of ICSID and the competence of this Tribunal;

(c) ORDERS by virtue of Rule 41(4) of the Arbitration Rules the continuation of the procedure pursuant Section 15.2 of the Minutes of the First Session;

(d) RESERVES all questions concerning the costs and expenses of the Tribunal and of the parties for subsequent determination."

[Para. 84]

Waste Management, Inc. v. United Mexican States*, ARB(AF)/00/3, Award, 30 April 2004[*]

Original: English and Spanish

Present: Crawford, *President*
Civiletti, Magallón Gómez, *Arbitrators*

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II.4.911 REQUEST FOR ARBITRATION

I. THE DISPUTE

[1] "On 27 September 2000, the Acting Secretary-General of ICSID registered a notice for the institution of arbitration proceedings, lodged by Waste Management Inc. ('Claimant') under the ICSID Arbitration Additional

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* Summaries prepared by Christina Knahr, Ph.D. Candidate, Research Assistant, Department for European, International and Comparative Law, University of Vienna, Austria. The full text of the Award is reprinted in 43 INTERNATIONAL LEGAL MATERIALS 967 (2004) and available online at <http://ita.law.uvic.ca/documents/laudo_ingles.pdf>. Original footnote numbers are indicated in brackets: [ ].

** This is not a reproduction of the Table of Contents of the Award.

Facility Rules ('the Rules') against the United Mexican States ('Respondent'). The Claimant alleged that the Respondent is liable under Articles 1110 and 1105 of NAFTA for the actions of various state organs concerning the Claimant's investment in an enterprise to provide waste management services to the City of Acapulco in the State of Guerrero." | **[40]** "The present dispute arises from a concession for the provision of waste disposal services in the Mexican City of Acapulco in the State of Guerrero, one of the component states of Mexico. The agreed terms for this operation were laid down in a Concession Agreement (Título de Concesion), the parties to which were the City through its Council (Ayuntamiento) ('the City') and Acaverde. Acaverde was a Mexican company created in 1994. It is said at all relevant times to have been a wholly owned subsidiary of the Claimant, Waste Management Inc. ('Waste Management'), a Delaware corporation with substantial interests in municipal waste disposal services in the United States and elsewhere. [. . .]"

[Paras. 1, 40]

II.4.9215 CONTRACT CLAIMS-TREATY CLAIMS
See also I.17.2; I.17.4; II.4.92; II.4.94

II. APPLICABLE LAW

[73] "The Tribunal begins by observing that—unlike many bilateral and regional investment treaties—NAFTA Chapter 11 does not give jurisdiction in respect of breaches of investment contracts such as the Concession Agreement. Nor does it contain an 'umbrella clause' committing the host State to comply with its contractual commitments. This does not mean that the Tribunal lacks jurisdiction to take note of or interpret the contract. But such jurisdiction is incidental in character, and it is always necessary for a claimant to assert as its cause of action a claim founded in one of the substantive provisions of NAFTA referred to in Articles 1116 and 1117. Furthermore, while conduct (e.g. an expropriation) may at the same time involve a breach of NAFTA standards and a breach of contract, the two categories are distinct. Even as to Article 1105, while it will be relevant to show that particular conduct of the host State contradicted agreements or understandings reached at the time of the entry of the investment, it is still necessary to prove that this conduct was a breach of the substantive standards embodied in Article 1105. Showing that it was a breach of contract is not enough.[1]"

[Para. 73]

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1 [20] See further *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment, (2002) 6 ICSID Reports 340, 365-7 (paras. 95-101), cited with approval by the Tribunal in *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, (ICSID Case No. ARB/01/13), decision of 6 August 2003, (2003) 18 *ICSID Rev.-FILJ* 307, 352-6 (paras. 147-8). See also *Azinian, Davitian & Baca v. United Mexican States* (ICSID Case No. ARB(AF)/97/2), (1998) 5 ICSID Reports 269, 286 (paras. 81, 83).

II.4.9212 QUALIFICATION AS INVESTOR
See also I.1.16

III. QUALIFICATION AS INVESTOR

[80] "Chapter 11 of NAFTA spells out in detail and with evident care the conditions for commencing arbitrations under its provisions. In particular it distinguishes between claims brought by an investor of another Party in its own right and claims brought by an investor on behalf of a local enterprise. The relevant provisions cover the full range of possibilities, including direct and indirect control and ownership. They deal with possible 'protection shopping', i.e. with situations where the substantial control or ownership of an enterprise of a Party lies with an investor of a non-party and the enterprise 'has no substantial business activities in the territory of the Party under whose law it is constituted or organized'.[2] In other words NAFTA addresses situations where the investor is simply an intermediary for interests substantially foreign, and it allows NAFTA protections to be withdrawn in such cases (subject to prior notification and consultation). There is no hint of any concern that investments are held through companies or enterprises of non-NAFTA States, if the beneficial ownership at relevant times is with a NAFTA investor." | **[85]** "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. Similarly they could have restricted claims of loss or damage by reference to the nationality of the corporation which itself suffered direct injury. No such restrictions appear in the text. It is not disputed that at the time the actions said to amount to a breach of NAFTA occurred, Acaverde was an enterprise owned or controlled indirectly by the Claimant, an investor of the United States. The nationality of any intermediate holding companies is irrelevant to the present claim. Thus the first of the Respondent's arguments must be rejected."

[Paras. 80, 85]

2 [29] NAFTA, Article 1113(2).

IV. FAIR AND EQUITABLE TREATMENT

I.1.16 TREATY INTERPRETATION
See also I.1.24

A. Scope and Interpretation of Art. 1105 NAFTA

[98] "The search here is for the Article 1105 standard of review, and it is not necessary to consider the specific results reached in the cases discussed above. But as this survey shows, despite certain differences of emphasis a general standard for Article 1105 is emerging. Taken together, the *S.D. Myers, Mondev, ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. 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." | **[99]** "Evidently the standard is to some extent a flexible one which must be adapted to the circumstances of each case. [. . .]"

[Paras. 98, 99]

I.17.3 CONTRACT VIOLATION

B. Breach of Contractual Commitments by a Municipiality

[114] "The Tribunal does not suggest that financial stringency or public resistance are, as such, excuses for breaches of contractual commitments on the part of a municipality. But NAFTA Chapter 11 is not a forum for the resolution of contractual disputes, and as investment tribunals have repeatedly said, 'Investment Treaties are not insurance policies against bad business judgments'.[3] The question is whether, having regard to the conduct of the parties concerned and the general circumstances, losses were caused to Waste Management by the City in circumstances amounting to a breach of the minimum standard of treatment embodied in Article 1105 [. . .]."

[Para. 114]

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3 [66] *Maffezini v. Spain*, Award, 13 November 2000, 5 ICSID Reports 419, 432 (para. 64), cited in para. 29 of *CMS Gas Transmission Company v. Argentina*, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, 42 ILM 788 (2003). See also *Eudoro A. Olguín v. Republic of Paraguay*, ICSID Case No. ARB/98/5, Award, 26 July 2001, 6 ICSID Reports 164, paras. 72-75.

I.2.0411 EXHAUSTION OF LOCAL REMEDIES

C. Non-payment of Debts by a Municipiality

[115] "[. . .] For present purposes it is sufficient to say that even the persistent non-payment of debts by a municipality is not to be equated with a violation of Article 1105, provided that it does not amount to an outright and unjustified repudiation of the transaction and provided that some remedy is open to the creditor to address the problem. In the present case the failure to pay can be explained, albeit not excused, by the financial crisis which meant that at key points the City could hardly pay its own payroll. There is no evidence that it was motivated by sectoral or local prejudice." | **[116]** "The importance of a remedy, agreed on between the parties, for breaches of the Concession Agreement bears emphasis. [. . .] It is true that in a general sense the exhaustion of local remedies is a procedural prerequisite for the bringing of an international claim, one which is dispensed with by NAFTA Chapter 11. But the availability of local remedies to an investor faced with contractual breaches is nonetheless relevant to the question whether a standard such as Article 1105(1) have been complied with by the State. Were it not so, Chapter 11 would become a mechanism of equal resort for debt collection and analogous purposes in respect of all public (including municipal) contracts, which does not seem to be its purpose."

[Paras. 115, 116]

II.1.07 DUE PROCESS
See also I.2.05; I.11.0

D. Denial of Justice

[129] "Turning to the actual reasons given by the federal courts, the Tribunal would observe that it is not a further court of appeal, nor is Chapter 11 of NAFTA a novel form of *amparo* in respect of the decisions of the federal courts of NAFTA parties. Certain of the decisions appear to have been founded on rather technical grounds, but the notion that the third party beneficiary of a line of credit or guarantee should strictly prove its entitlement is not a parochial or unusual one. Nor was it unreasonable, given the limitations of the Line of Credit Agreement, for the court in the second proceedings to insist that Acaverde comply with the dispute settlement procedure contained in the Concession Agreement, notice of the dispute with the City having been given to Banobras." | **[130]** "In any event, and however these cases might have been decided in different legal systems, the Tribunal does not discern in the decisions of the federal courts any denial of justice as that concept has been explained by NAFTA tribunals, notably

in the *Azinian*[4], *Mondev*[5], *ADF*[6] and *Loewen*[7] cases. The Mexican court decisions were not, either *ex facie* or on closer examination, evidently arbitrary, unjust or idiosyncratic. There is no trace of discrimination on account of the foreign ownership of Acaverde, and no evident failure of due process. The decisions were reasoned and were promptly arrived at. Acaverde won on key procedural points, and the dismissal in the second proceedings, in particular, was without prejudice to Acaverde's rights in the appropriate forum." | **[131]** "The Claimant argues that litigation strategy adopted by the City itself amounted to a denial of justice and hence a breach of Article 1105. But the City was a litigant, and there is no evidence that it was acting in collusion either with CANACO or the federal courts. It is not unusual for litigants to be difficult and obstructive, and there is nothing here comparable to the abusive remarks of counsel in the Loewen case which were tolerated and even condoned by the trial judge, producing a denial of justice.[8] The point is that a litigant cannot commit a denial of justice unless its improper strategies are endorsed and acted on by the court, or unless the law gives it some extraordinary privilege which leads to a lack of due process. There is no evidence of either circumstance in the present case." | **[132]** "Of course, as the *Loewen* tribunal said, it is

> 'the responsibility of the State under international law and, consequently, of the courts of a State, to provide a fair trial of a case to which a foreign investor is a party. It is the responsibility of the courts of a State to ensure that litigation is free from discrimination against a foreign litigant and that

4 [84] In *Azinian* the tribunal also addressed whether the Claimants could have successfully pursued a denial of justice claim. It said: "A denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way. . . . There is a fourth type of denial of justice, namely the clear and malicious misapplication of the law [which] . . . overlaps with the notion of 'pretence of form' to mask a violation of international law." However, in the view of the tribunal, the findings of the Mexican courts could not "possibly be said" to be in any way a denial of justice, *Azinian, Davitian & Baca v. United Mexican States*, Award of 1 November 1999, 5 ICSID Reports 269, 290 (paras. 102-103).

5 [85] *Mondev International Limited v. United States of America*, Award of 11 October 2002, 6 ICSID Reports 192.

6 [86] The *ADF* Tribunal, rejecting the investor's submission that a federal administrative body had acted *ultra vires* in its interpretation of the measures in question, the Tribunal said, ". . .even had the investor made out a *prima facie* basis for its claim, the Tribunal has no authority to review the legal validity and standing of the US measures. . . under *US internal administrative law*. We do not sit as a court with appellate jurisdiction. . . . The Tribunal would emphasize, too, that even if the US measures were somehow shown or admitted to be *ultra vires* under the internal law of the United States, that by itself does not necessarily render the measures grossly unfair or inequitable under the customary international law standard of treatment embodied in Article 1105(1). . . . [S]omething more than simple illegality or lack of authority under the domestic law of a State is necessary to render and act or measure inconsistent with the customary international law requirements of Article 1105(1). . .", *ADF Group Inc. v. United States of America*, Award of 9 January 2003, (para. 190).Nor was the authority's refusal to follow prior rulings "grossly unfair or unreasonable" on the facts presented by the investor.

7 [87] *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, Award of 26 June 2003, (ICSID Case No. ARB(AF)/98/3). For the Tribunal's discussion of Article 1105 and the FTC interpretation see ibid., paras. 124-128.

8 [88] Ibid., paras. 119-123.

the foreign litigant should not become the victim of sectional or local prejudice.'[9]

But neither the decisions themselves nor other evidence before the Tribunal suggest that these proceedings involved discrimination, bias on grounds of sectional or local prejudice, or a clear failure of due process. The CANACO arbitration, which alone held the prospect of complete relief for Acaverde in respect of its claims against the City, was not pursued, and the Tribunal has already held that this fact did not of itself entail a breach of Article 1105. As to the Banobras litigation, Acaverde did exhaust its remedies, but it was not a denial of justice for the federal courts to insist on prior action against the City. This aspect of the claim under Article 1105(1) accordingly fails."

[Paras. 129, 130, 131, 132]

I.2.0411 EXHAUSTION OF LOCAL REMEDIES

E. Exhaustion of Local Remedies

[133] "[. . .] Chapter 11 of NAFTA does not require that a party should exhaust local remedies before bringing an international claim: rather it requires a waiver of remaining remedies. [. . .]" | **[134]** "[. . .] [I]n any event whatever civil wrongs may have been committed during the denouement of the project, they did not in the Tribunal's opinion either cause or trigger its failure, nor did they independently amount to a breach of the Article 1105 standard."

[Paras. 133, 134]

I.11.0 STATE RESPONSIBILITY

F. Allegation of Conspiracy

[136] "Looking at the matter more generally, the position in this terminal phase can be compared with that in the *ELSI* case, where improper conduct of the local Italian authorities seems to have precipitated the collapse of a failing enterprise, leading to a fire-sale of assets and consequent losses to the investor. A Chamber of the Court held that such conduct did not amount to a breach of the applicable FCN treaty;[10] whether it would have amounted to a breach of NAFTA the Tribunal does not need to inquire. For the key difference here is that there was no actual requisition or any equivalent act triggering the departure of Acaverde. The Claimant was not prevented (as the parent company in the *ELSI* case was arguably prevented)

9 [89] *Loewen*, para. 123.

10 [93] *Case Concerning Elettronica Sicula S.P.A. (ELSI) (United States of America v. Italy)*, 1989 ICJ Reports 15.

from seeking to conduct an orderly withdrawal from Acapulco. Attempts at a financial settlement or sale of the enterprise failed, but this was not a result of any internationally wrongful act of the Respondent State." | **[138]** "The Tribunal has no doubt that a deliberate conspiracy—that is to say, a conscious combination of various agencies of government without justification to defeat the purposes of an investment agreement—would constitute a breach of Article 1105(1). A basic obligation of the State under Article 1105(1) is to act in good faith and form, and not deliberately to set out to destroy or frustrate the investment by improper means." | **[139]** "But such an allegation needs to be proved, and the Claimant has not proved it. For example, the State Delegate of Banobras was said to be responsible for soliciting the City's letter of 11 September 1996 with a view to avoiding payment to Acaverde. He denied this in evidence before the Tribunal, [. . .] and the Tribunal accepts his denial. But in any event, as already noted, Banobras had no obligation to Acaverde to garnishee funds payable to the City in order to replenish the line of credit. There was a substantial reduction in federal funds being channelled through Guerrero, and in the absence of replenishment the line of credit was nearly exhausted. As the Tribunal has already found, the refusal of Banobras to go further, whether or not it was a breach of contract, was not in itself a breach of Article 1105(1), nor was it converted into such a breach by the federal court decisions. More generally, there are sufficient reasons to explain the collapse of the concession—attributable far more to the City than to Banobras—and there is no need to resort to conspiracy theories, unsupported by solid evidence. A marginal financial plan, predicated on a much more substantial federal guarantee than was eventually agreed, foundered on the rocks of a deteriorating financial climate and a combination of little and large local difficulties. That is not enough to cross the Article 1105(1) threshold."

[Paras. 136, 138, 139]

I.17.1 EXPROPRIATION
See also I.17.11; I.17.12; I.1.16

V. EXPROPRIATION

[143] "It may be noted that Article 1110(1) distinguishes between direct or indirect expropriation on the one hand and measures tantamount to an expropriation on the other. An indirect expropriation is still a taking of property. By contrast where a measure tantamount to an expropriation is alleged, there may have been no actual transfer, taking or loss of property by any person or entity, but rather an effect on property which makes formal distinctions of ownership irrelevant. [. . .]" | **[144]** "Evidently the phrase 'take a measure tantamount to nationalization or expropriation of such an investment' in Article 1110(1) was intended to add to the meaning of the prohibition, over and above the reference to indirect expropriation.

Indeed there is some indication that it was intended to have a broad meaning, otherwise it is difficult to see why Article 1110(8) was necessary. As a matter of international law a 'non-discriminatory measure of general application' in relation to a debt security or loan which imposed costs on the debtor causing it to default would not be considered expropriatory or even potentially so. It is true that paragraph (8) is stated to be 'for greater certainty', but if it was necessary even for certainty's sake to deal with such a case this suggests that the drafters entertained a broad view of what might be 'tantamount to an expropriation'."

[Paras. 143, 144]

I.17.11 DIRECT EXPROPRIATION

A. Measures Tantamount to Expropriation

[155] "In the present case, for reasons that will appear, the Tribunal does not need to reach final conclusions on the meaning of the phrase 'measures tantamount to. . . expropriation' in Article 1110. Each case has to be looked at it in light of the factual situation and the basis for the measures in question. There is no issue in the present case of 'regulatory taking'; rather the question is whether the combined conduct of Mexican public entities had an effect equivalent to the taking of the enterprise, in whole or substantial part. In considering this question it is necessary to distinguish between the measures affecting Acaverde as a whole and those concerning particular contractual rights under the Concession Agreement." | **[156]** "[. . .] [I]n the present case there was at no stage any expropriation of physical assets. The assets of Acaverde were sold off in an apparently orderly way [. . .]." | **[157]** "Nor was there any direct or indirect expropriation of the enterprise, Acaverde, as such. [. . .]" | **[158]** "Thus for present purposes the question is whether there was any conduct tantamount to an expropriation which might trigger NAFTA Article 1110. [. . .]" | **[159]** "[. . .] [T]he present Tribunal does not regard the conduct of Mexico in the present case as tantamount to expropriation of the enterprise as such, within the meaning attributed to that term in *Metalclad*. Acaverde at all times had the control and use of its property. It was able to service its customers and earn collection fees from them. It is true that the City failed to make available the promised land for the disposal site—but a failure by a State to provide its own land to an enterprise for some purpose is not converted into an expropriation of the enterprise just because the failure involves a breach of contract. It is also true that the City's breaches (not remedied by Guerrero and remedied only to a limited extent by Banobras) had the effect of depriving Acaverde of 'the reasonably-to-be-expected economic benefit' of the project so far as the monthly fees due from the City were concerned. But that will be true of

any serious breach of contract: the loss of benefits or expectations is not a sufficient criterion for an expropriation, even if it is a necessary one."

[Paras. 155, 156, 157, 158, 159]

I.17.3 CONTRACT VIOLATION

B. Non-payment of Debts or Breach of Contractual Obligations

[160] "In the Tribunal's view, an enterprise is not expropriated just because its debts are not paid or other contractual obligations towards it are breached. There was no outright repudiation of the transaction in the present case, and if the City entered into the Concession Agreement on the basis of an over-optimistic assessment of the possibilities, so did Acaverde. It is not the function of Article 1110 to compensate for failed business ventures, absent arbitrary intervention by the State amounting to a virtual taking or sterilising of the enterprise." | **[161]** "The nearest the Claimant came to showing an outright repudiation of the enterprise by Mexico was the Mayor's statement, shortly after the Concession Agreement came into force, to the effect that 'the obligation to contract Acaverde's services will be eliminated in order to remove what was previously interpreted as an imposition'. [. . .] This of course related only to one aspect of the concession arrangements, although an important aspect. But even if a unilateral and unjustified change in the exclusivity obligation could have amounted to an expropriation, no legislative change was in fact made. The Claimant argued that this statement 'effectively repealed the law' but the Tribunal does not agree. The Mayor was not purporting to exercise legislative authority or unilaterally to vary the contract. He was not intervening by taking some extra-legal action, as the Mayor of Palermo did when he intervened in the *ELSI* case. He was saying what ought to be done, in his view, to allay public concerns, concerns which did in fact exist at the time. Individual statements of this kind made by local political figures in the heat of public debate may or may not be wise or appropriate, but they are not tantamount to expropriation unless they are acted on in such a way as to negate the rights concerned without any remedy. In fact no action was taken of the kind threatened at the time or later. Even if it had been taken, the Claimant had remedies available to it, under the Concession Agreement and otherwise." | **[162]** "For these reasons the Tribunal does not accept that there was an expropriation of Acaverde in this case, or any measure tantamount to the expropriation of Acaverde as an enterprise."

[Paras. 160, 161, 162]

I.17.3 CONTRACT VIOLATION

C. Persistent and Serious Breach of a Contract by a State Organ

[165] "[. . .] [T]he present case does raise the question whether a persistent and serious breach of a contract by a State organ can constitute expropriation of the right in question, or at least conduct tantamount to expropriation of that right, for the purposes of Article 1110." | **[171]** "Subsequent authorities have sought to make a distinction between mere failure or refusal to comply with a contract, on the one hand, and conduct which crosses the threshold of taking or expropriation, on the other hand. The Tribunal is sympathetic to the view expressed in Azinian that such a distinction is not adequately made by the addition of adjectives ('egregious', 'gross', 'flagrant' or whatever). [. . .] But *some* distinction must be made: if certain cases of contractual non-performance may amount to expropriation, it must be possible to say, in principle, which ones, otherwise the distinction between contractual and treaty claims disappears." | **[172]** "On analysis it appears that the cases fall into a number of groups. First and perhaps best known are the cases where a whole enterprise is terminated or frustrated because its functioning is simply halted by decree or executive act, usually accompanied by other conduct.[11] This was so in many of the oil cases;[12] and in many cases before the Iran-United States Claims Tribunal.[13]" | **[173]** "Secondly, there are cases where there has been an acknowledged taking of property, and associated contractual rights are affected in consequence. In such cases the bundle of rights requiring to be compensated includes all the associated contractual and other incorporeal rights,[14] unless these are severable and retain their value in the hands of the claimant notwithstanding the seizure of the related property." | **[174]** "Thirdly, there is the much smaller group of cases where the only right affected is incorporeal; these come closest to the present claim of contractual nonperformance. *Cook* was such a case, and (if it is properly classified as an instance of expropriation, which is doubtful) so was *Singer Sewing Machine Co. v. The Republic of Turkey*. In such cases, simply to assert that 'property rights are created under and by virtue of a contract' is not sufficient.[15] The mere non-performance of a contractual obligation is not to be equated with a taking of property, nor (unless accompanied by other elements) is it tanta-

11 [140] Thus in the *Rudloff* case, the council unilaterally terminated the contract and destroyed the building the Claimant was constructing on the land in question: (1905) 9 RIAA 255, 259.

12 [141] E.g., *Libyan American Oil Company v. Government of the Libyan Arab Republic*, (1977) 62 ILR 141, 189-90. See also *Revere Copper & Brass, Inc. v. Overseas Private Investment Corporation* (1978) 56 ILR 258.

13 [142] See the cases reviewed by GH Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Oxford, Clarendon Press, 1996) ch. 5.

14 [143] See, e.g., *Starrett Housing Corporation v. Government of the Islamic Republic of Iran* (1987) 16 Iran-US CTR 112, 230-1 (paras. 361-2).

15 [144] See *Shufeldt Claim*, (1930) 2 RIAA 1083, 1097. This was a case of legislative invalidation of a concession agreement 6 years after its inception.

mount to expropriation. Any private party can fail to perform its contracts, whereas nationalization and expropriation are inherently governmental acts, as is envisaged by the use of the term 'measure' in Article 1110(1). It is true that, having regard to the inclusive definition of 'measure',[16] one could envisage conduct tantamount to an expropriation which consisted of acts and omissions not specifically or exclusively governmental. All the same, the normal response by an investor faced with a breach of contract by its governmental counter-party (the breach not taking the form of an exercise of governmental prerogative, such as a legislative decree) is to sue in the appropriate court to remedy the breach. It is only where such access is legally or practically foreclosed that the breach could amount to an definitive denial of the right (i.e., the effective taking of the chose in action) and the protection of Article 1110 be called into play." | **[175]** "The Tribunal concludes that it is one thing to expropriate a right under a contract and another to fail to comply with the contract. Non-compliance by a government with contractual obligations is not the same thing as, or equivalent or tantamount to, an expropriation. In the present case the Claimant did not lose its contractual rights, which it was free to pursue before the contractually chosen forum. The law of breach of contract is not secreted in the interstices of Article 1110 of NAFTA. Rather it is necessary to show an effective repudiation of the right, unredressed by any remedies available to the Claimant, which has the effect of preventing its exercise entirely or to a substantial extent." | **[176]** "In the present case, in the Tribunal's view, this has not been shown. The question here is not one of final refusal to pay (combined with effective obstruction and denial of legal remedies); it is one of neglect and failure at the contractual level in the context of a marginal enterprise. That does not pass the test for an expropriatory taking of contractual rights as it emerges from the decisions analysed above."

[Paras. 165, 171, 172, 173, 174, 175, 176]

I.17.1 EXPROPRIATION
See also I.17.24

D. Conclusions of the Tribunal

[177] "In the Tribunal's view, it is not the function of the international law of expropriation as reflected in Article 1110 to eliminate the normal commercial risks of a foreign investor,[17] or to place on Mexico the burden of compensating for the failure of a business plan which was, in the circumstances, founded on too narrow a client base and dependent for its success on unsustainable assumptions about customer uptake and contractual per-

16 [145] Article 201 defines "measure" as including "any law, regulation, procedure, requirement or practice".

17 [146] Cf. *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award of 16 December 2002, para. 111.

formance. A failing enterprise is not expropriated just because debts are not paid or other contractual obligations are not fulfilled. The position may be different if the available legal avenues for redress are blocked or are evidently futile in the face of governmental intransigence. But this was not the case here. The Claimant's decision not to proceed with the CANACO arbitration may have been understandable, but taking into account all the circumstances it did not implicate Mexico in a breach of Article 1110 any more than of Article 1105. [. . .]" | **[178]** "For all these reasons, in the Tribunal's view, there was nothing which could be properly described as an expropriation by Mexico of Waste Management's property, assets or investment, or a measure tantamount to such expropriation, within the meaning of NAFTA Article 1110. The Claimant's case on Article 1110, like that on Article 1105, must fail."

[Paras. 177, 178]

II.1.9 COSTS OF JUDICIAL AND ARBITRAL PROCEEDINGS

VI. COSTS OF ARBITRATION

[183] "There is no rule in international arbitration that costs follow the event. Equally, however, the Tribunal does not accept that there is any practice in investment arbitration (as there may be, at least *de facto*, in the International Court and in interstate arbitration) that each party should pay its own costs. In the end the question of costs is a matter within the discretion of the Tribunal, having regard both to the outcome of the proceedings and to other relevant factors." | **[184]** "In circumstances where the conduct of the City is by no means beyond criticism, the Tribunal concludes that a fair outcome would be an order that each party bear its own legal costs and expenses, and that the costs and expenses of the Tribunal be borne equally between them."

[Paras. 183, 184]

II.4.98 AWARD
See also I.17.1; I.17.24; II.1.121; II.1.9

VII. AWARD

"For the foregoing reasons, the Tribunal unanimously DECIDES:

(a) That the claim is admissible under Chapter 11 of NAFTA;

(b) That the conduct of the Respondent which is the subject of the claim did not involve any breach of Article 1105 or 1110 of NAFTA;

(c) That Waste Management's claim is accordingly dismissed in its entirety;

(d) That each Party shall bear its own costs and half of the costs and expenses of these proceedings. [. . .]"

MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ARB/01/7, Award, 25 May 2004*

Original: English and Spanish

Present: Rigo Sureda, *President*
Lalonde, Oreamuno Blanco, *Arbitrators*

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* Summaries prepared by Christina Knahr, Ph.D. Candidate, Research Assistant, Department for European, International and Comparative Law, University of Vienna, Austria. The full text of the Award is reprinted in 44 International Legal Materials 91 (2005) and available online at <http://ita.law.uvic.ca/documents/MTD-Award.pdf>. Original footnote numbers are indicated in brackets: [ ].

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II.4.911 REQUEST FOR ARBITRATION
See also I.17.011

I. REQUEST FOR ARBITRATION

[1] "By letter of June 26, 2001, MTD Equity Sdn ('MTD Equity'), a Malaysian company, and MTD Chile S.A ('MTD Chile'), a Chilean company, (collectively 'the Claimants'or 'MTD') filed a request for arbitration with the International Centre for Settlement of Investment Disputes ('ICSID' or 'the Centre') against the Republic of Chile ('the Respondent' or 'Chile'). The request, invoked the ICSID Arbitration provisions of the 1992 Agreement between the Government of Malaysia and the Government of the Republic of Chile for the Promotion and Protection of Investments ('the BIT')."

[Para. 1]

II. THE DISPUTE

[54] "The Foreign Investment Contract was signed on March 18, 1997 by the President of FIC on behalf of Chile and Mr. Labbé on behalf of MTD. The Foreign Investment Contract provides that MTD will develop 'a real estate project on 600 hectares of Fundo El Principal de Pirque. The aforementioned project consists of the construction of a self-sufficient satellite city, with houses, apartments, schools, hospitals, commerce, services, etc.' ('the Project'). [. . .]" | **[55]** "After signature of the Foreign Investment Contract, MTD injected US$ 8.4 million into EPSA as a capital contribution and with US$ 8.736 million MTD purchased 51% of the EPSA shares [. . .]." | **[80]** "On October 19, 1998, MTD's representatives and their advisors met with the MINVU Minister, Mr. Henríquez, and SEREMI González. Mr. Henríquez re-affirmed that the policy of the Government was to encourage development of Santiago towards the North and not the South where Pirque is located. Hence, he would not support the required zoning change, and the Project should be built elsewhere in Chile. [. . .]"

[Paras. 54, 55, 80]

III. PRELIMINARY CONSIDERATIONS

II.4.94 APPLICABLE LAW
See also II.4.941; II.4.942

A. Applicable Law

[86] "Article 42(1) of the Convention is the relevant provision for determining the law applicable to the merits of the dispute between the parties. This article requires the Tribunal to 'decide a dispute in accordance with such rules of law as may be agreed by the parties'. This being a dispute under the

BIT, the parties have agreed that the merits of the dispute be decided in accordance with international law. [. . .]" | **[87]** "[. . .] [F]or purposes of Article 42(1) of the Convention, the parties have agreed to this arbitration under the BIT. This instrument being a treaty, the agreement to arbitrate under the BIT requires the Tribunal to apply international law. [. . .]"

[Paras. 86, 87]

II.4.9223 NATIONAL OF ANOTHER CONTRACTING STATE
See also II.4.92232

B. Nationality of MTD Chile

[94] "MTD Chile is wholly owned by MTD Equity and is a corporation organized under the laws of Chile. Under Article 25(2)(b) of the ICSID Convention and Article 6(2) of the BIT, such a corporation is to be deemed as a Malaysian national for purposes of arbitration proceedings under the ICSID Convention."

[Para. 94]

I.2.03 TERRITORIAL SOVEREIGNTY

C. National Legislation

[98] "The Tribunal concurs with statements made by the Respondent to the effect that it has a right to decide its urban policies and legislation. Indeed, the States parties to the BIT have agreed that their commitment to encourage and create favorable conditions for investors and admit their investments is 'subject to [each party's] rights to exercise powers conferred by its laws, regulations and national policies.'[1] Furthermore, in the definition of investment, the term 'investment' is understood to refer to 'all investments approved by the appropriate Ministries or authorities of the Contracting Parties in accordance with its legislation and national policies.'[2]" | **[99]** "Thus, by entering into the BIT, the Contracting Parties did not limit the exercise of their authority under their national laws or policies except to the extent that this exercise would contravene obligations undertaken in the BIT itself. An arbitral tribunal in the specific case of ICSID would not consider the policies or legislation of a country and changes thereto unless a connection can be established with the investment concerned. This connection may be 'established if those general measures are adopted in violation of specific commitments given to the investor in treaties, legislation or contracts. What is brought under the jurisdiction of the Centre is not the

1 [57] Article 2(1).
2 [58] Article 1(b).

general measures in themselves but the extent to which they may violate those specific commitments.'[3]"

[Paras. 98, 99]

I.17.22 MFN-TREATMENT
See also I.17.011

D. MFN Clause in the BIT

[100] "The Claimants have based in part their claims on provisions of other bilateral investment treaties and have alleged that these provisions apply by operation of the MFN clause of the BIT. The Respondent has not argued against the application of these provisions but, in the case of Article 3(1) of the Denmark BIT and Article 3(3) and (4) of the bilateral investment treaty between Chile and Croatia ('the Croatia BIT'), the Respondent has qualified its arguments by stating that, even in the event that the clause concerned would apply, the facts of the case are such that it would not have been breached. Because of this qualification in the Counter-Memorial and the Rejoinder, the Tribunal considers it appropriate to examine the MFN clause in the BIT and satisfy itself that its terms permit the use of the provisions of the Denmark BIT and Croatia BIT as a legal basis for the claims submitted to its decision." | **[101]** "The first paragraph of the MFN clause of the BIT—(Article 3(1))—reads as follows:

> '1. Investments made by investors of either Contracting Party in the territory of the other Contracting Party shall receive treatment which is fair and equitable, and not less favourable than that accorded to investments made by investors of any third State.'" |

[102] "The other provisions of this Article extend the clause to compensation related to losses suffered because of wars or like events or limit its application by excluding benefits provided in regional cooperation and taxation related agreements." | **[104]** "The Tribunal considers the meaning of fair and equitable treatment below and refers to that discussion. The Tribunal has concluded that, under the BIT, the fair and equitable standard of treatment has to be interpreted in the manner most conducive to fulfill the objective of the BIT to protect investments and create conditions favorable to investments. The Tribunal considers that to include as part of the protections of the BIT those included in Article 3(1) of the Denmark BIT and Article 3(3) and (4) of the Croatia BIT is in consonance with this purpose. The Tribunal is further convinced of this conclusion by the fact that the exclusions in the MFN clause relate to tax treatment and regional cooperation, matters alien to the BIT but that, because of the general nature of

3 [59] *CMS Gas Transmission Company v. The Republic of Argentina.* Case No. ARB/01/8. Decision on Jurisdiction, para. 27.

the MFN clause, the Contracting Parties considered it prudent to exclude. *A contrario sensu*, other matters that can be construed to be part of the fair and equitable treatment of investors would be covered by the clause."

[Paras. 100, 101, 102, 104]

IV. CONSIDERATIONS ON THE MERITS

I.17.24 FAIR AND EQUITABLE TREATMENT
See also I.1.16; I.17.011

A. Fair and Equitable Treatment

[109] "[. . .] As defined by Judge Schwebel, 'fair and equitable treatment' is 'a broad and widely-accepted standard encompassing such fundamental standards as good faith, due process, nondiscrimination, and proportionality'. [. . .]" | **[110]** "The parties have commented on whether the fair and equitable standard is part of customary international law or additional to customary international law in reference to recent awards of arbitral tribunals established under NAFTA before and after the interpretation of Article 1105(1) by the NAFTA Free Trade Commission. The Free Trade Commission has interpreted 'fair and equitable treatment' as not requiring treatment in addition to or beyond that which is required by the international law minimum standard." | **[111]** "[. . .] The Tribunal further notes that there is no reference to customary international law in the BIT in relation to fair and equitable treatment." | **[112]** "This being a Tribunal established under the BIT, it is obliged to apply the provisions of the BIT and interpret them in accordance with the norms of interpretation established by the Vienna Convention on the Law of the Treaties, which is binding on the State parties to the BIT. Article 31(1) of the Vienna Convention requires that a treaty be 'interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'" | **[113]** "[. . .] As regards the object and purpose of the BIT, the Tribunal refers to its Preamble where the parties state their desire 'to create favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party', and the recognition of 'the need to protect investments by investors of both Contracting Parties and to stimulate the flow of investments and individual business initiative with a view to the economic prosperity of both Contracting Parties'. Hence, in terms of the BIT, fair and equitable treatment should be understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment. Its terms are framed as a pro-active statement—'to promote', 'to create', 'to stimulate'—rather than prescriptions for a passive behavior of the State or avoidance of prejudicial

conduct to the investors." | **[114]** "[. . .] The tribunal in *TECMED* described the concept of fair and equitable treatment as follows:

> '[. . .] to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the state that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the state to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.'[4]" |

[115] "This is the standard that the Tribunal will apply to the facts of this case. [. . .]"

[Paras. 109, 110, 111, 112, 113, 114, 115]

1. Meeting on November 6, 1996

[152] "Given the factual controversy surrounding this meeting, the Tribunal will analyze the situation with and without the meeting and to what extent the conduct of the parties is consequent with the statements allegedly made by Chilean officials and the Claimants' representatives." | **[159]** "The scope of the approval of the first two investments of the Claimants by the FIC is a key element in the consideration of whether the Respondent fulfilled its obligation to treat the Claimants fairly and equitably and the Tribunal will turn to this question now. [. . .]"

[Paras. 152, 159]

4 [65] *Técnicas Medioambientales TECMED S.A. v. The United Mexican States,* ICSID Case No. ARB(AF)00/2, award dated May 29, 2003, para. 154. See also *Waste Management, Inc.v.United Mexican Status*, ICSID Case No. ARB(AF)/00/3, para. 98.

I.11.013 IMPUTABILITY
See also I.11.0131

2. Approval of the FIC

[160] "The parties disagree on the meaning of the approval of the investment by the FIC under DL 600 and the significance of the absence of the Minister responsible for the sector of the proposed investment from the meeting where the investment was approved. [. . .]" | **[163]** "The Tribunal considers that the ministerial membership of the FIC is by itself proof of the importance that Chile attributes to its function, and it is consequent with the objective to coordinate foreign investment at the highest level of the Ministries concerned. It is also evident from the DL 600 that the FIC is required to carry out a minimum of diligence internally and externally. Approval of a Project in a location would give *prima facie* to an investor the expectation that the project is feasible in that location from a regulatory point of view. The practice whereby the non-permanent member of the FIC is not notified of the FIC meetings and no information is distributed to the Minister concerned prior to the meetings, when followed consistently, may impair seriously the coordination function of the FIC. This is not to say that approval of a project in a particular location entitles the investor to develop that site without further governmental approval. The Foreign Investment Contracts are clear in that respect and this matter is dealt with separately in this award. What the Tribunal emphasizes here is the inconsistency of action between two arms of the same Government *vis-à-vis* the same investor even when the legal framework of the country provides for a mechanism to coordinate. This is even more so, if, as affirmed by the Respondent, the presence of the MINVU Minister in the FIC meeting where the investment was approved would not have made a difference." | **[164]** "Chile has argued that each organ of the Government has certain responsibilities, that it is not its function to carry out due diligence regarding the legal and technical feasibility of a project for investors, and that this is the investors' responsibility. The Tribunal agrees that it is the responsibility of the investor to assure itself that it is properly advised, particularly when investing abroad in an unfamiliar environment. However, in the case before us, Chile is not a passive party and the coherent action of the various officials through which Chile acts is the responsibility of Chile, not of the investor. [. . .]" | **[165]** "[. . .] [I]n June 1998, [. . .] the SEREMI González informed the Claimants in writing about the policy against changing the zoning of El Principal and modifying the PMRS, and Minister Henríquez rejected the Project. Chile claims that it had no obligation to inform the Claimants and that the Claimants should have found out by themselves what the regulations and policies of the country were. The Tribunal agrees with this statement as a matter of principle, but Chile also has an obligation to act coherently and apply its policies consistently, independently of how

diligent an investor is. Under international law (the law that this Tribunal has to apply to a dispute under the BIT), the State of Chile needs to be considered by the Tribunal as a unit."

[Paras. 160, 163, 164, 165]

I.17.24 FAIR AND EQUITABLE TREATMENT
See also I.11.0

[166] "The Tribunal is satisfied, based on the evidence presented to it, that approval of an investment by the FIC for a project that is against the urban policy of the Government is a breach of the obligation to treat an investor fairly and equitably. In this respect, whether the meeting of November 6, 1996 took place or not does not affect the outcome of these considerations. In fact, if it did take place, it is even more inexplicable that the FIC would approve the investment and the first two Foreign Investment Contracts would be signed. Minister Hermosilla and the FIC were different channels of communication of the Respondent with outside parties, but, for purposes of the obligations of Chile under the BIT, they represented Chile as a unit [. . .]." | **[167]** "This conclusion of the Tribunal does not mean that Chile is responsible for the consequences of unwise business decisions or for the lack of diligence of the investor. Its responsibility is limited to the consequences of its own actions to the extent they breached the obligation to treat the Claimants fairly and equitably. [. . .]"

[Paras. 166, 167]

3. Claimant's Diligence

[168] "The lack of diligence of the Claimants alleged by the Respondent rests on the trust placed in Mr. Fontaine, the lack of adequate professional advice in the urban sector and the acceptance of an exorbitant land valuation at the time they made the investment." | **[176]** "It is clear from the record that no specialist in urban development was contacted by the Claimants until the deal had been closed. The firms contacted thereafter, to the extent that there is a contemporary written record, do not seem to have been as clear as they are now in their testimony about the difficulty of changing the zoning. The only thing that emerges with certainty is that the Claimants were in a hurry to start the Project." | **[177]** "The Claimants apparently did not appreciate the fact that Mr. Fontaine may have had a conflict of interest with the Claimants for purposes of developing El Principal. He played lightly to them the significance of the zoning changes and they seem to have accepted at first hand Mr. Fontaine's judgment. The price paid for the land was based on the Project going ahead and it was paid

up-front without any link to the progress of the Project." | **[178]** "The BITs are not an insurance against business risk[5] and the Tribunal considers that the Claimants should bear the consequences of their own actions as experienced businessmen. Their choice of partner, the acceptance of a land valuation based on future assumptions without protecting themselves contractually in case the assumptions would not materialize, including the issuance of the required development permits, are risks that the Claimants took irrespective of Chile's actions."

[Paras. 168, 176, 177, 178]

II.4.9215 CONTRACT CLAIMS-TREATY CLAIMS
See also I.17.011; I.17.24; I.17.3

B. Breach of Contract

[187] "The Tribunal considers the legal basis of the claim valid[ly] based on the wide scope of the MFN clause in the BIT, as already discussed. The Tribunal notes the statement of the Respondent that under international law the breach of a contractual obligation is not *ipso facto* a breach of a treaty. Under the BIT, by way of the MFN clause, this is what the parties had agreed. The Tribunal has to apply the BIT. The breach of the BIT is governed by international law. However, to establish the facts of the breach, it will be necessary to consider the contractual obligations undertaken by the Respondent and the Claimants and what their scope was under Chilean law." | **[188]** "The Tribunal has found that Chile treated unfairly and inequitably the Claimants by authorizing an investment that could not take place for reasons of its urban policy. The Claimants have based their arguments on the fact that 'the location of the Project was a fundamental assumption of the bargain between MTD and the State of Chile. MTD had a right to that location, and the State of Chile had a correlative obligation to take such steps as might be necessary to permit the use of that location for the development of the Project.' [. . .] The Tribunal accepts that the authorization to invest in Chile is not a blanket authorization but only the initiation of a process to obtain the necessary permits and approvals from the various agencies and departments of the Government. It also accepts that the Government has to proceed in accordance with its own laws and policies in awarding such permits and approvals. Clause Four of the Foreign Investment Contracts would be meaningless if it were otherwise. Therefore, the Tribunal finds that Chile did not breach the BIT on account of breach of the Foreign Investment Contracts." | **[189]** "As already discussed under fair and equitable treatment, what is unacceptable for the Tribunal is

5 [139] "the Tribunal must emphasize that Bilateral Investment Treaties are not insurance policies against bad business judgments." *Emilio Agustín Maffezini v. The Kingdom of Spain,* ICSID Case No. ARB/97/7 para. 69.

that an investment would be approved for a particular location specified in the application and the subsequent contract when the objective of the investment is against the policy of the Government. Even accepting the limited significance of the Foreign Investment Contracts for purposes of other permits and approvals that may required, they should be at least in themselves an indication that, from the Government's point of view, the Project is not against Government policy."

[Paras. 187, 188, 189]

I.17.26 UNREASONABLE AND DISCRIMINATORY MEASURES

C. Unreasonable and Discriminatory Measures

[196] "To a certain extent, this claim has been considered by the Tribunal as part of the fair and equitable treatment. The approval of an investment against the Government urban policy can be equally considered unreasonable. On the other hand, the changes of the PMRS related to Chacabuco or more recently Modification 48, as explained by the Respondent, do not dispense with specific changes of the PMRS when the land is zoned of '*silvoagropecuario* interest'. Therefore, there is no basis for considering the modifications made to PMRS as discriminatory. The Tribunal is also satisfied by the explanation regarding the rejection of the EIS by COREMA."

[Para. 196]

II.4.942 RULES OF INTERNATIONAL LAW
See also I.17.011; II.4.943

D. Failure to Grant Necessary Permits

[197] "This claim is based on the Croatia BIT by way of the MFN clause of the BIT. Article 3(2) of the Croatia BIT reads as follows: 'When a Contracting Party has admitted an investment in its territory, it shall grant the necessary permits in accordance with its laws and regulations.'" | **[204]** "The Tribunal considers the legal basis of the claim valid based on the wide scope of the MFN clause in the BIT, as already discussed. The Tribunal disagrees with the Respondent's statement that there is no merit to the contention of the Claimants that, if there is a breach of an international obligation, 'the matter is governed, first and foremost, by international law'. The breach of an international obligation will need, by definition, to be judged in terms of international law. To establish the facts of the breach, it may be necessary to take into account municipal law. In the instant case, the Tribunal will need to establish first whether the Respondent's failure to modify the PMRS to the benefit of the Claimants was in accordance with its own laws." | **[205]** "The Tribunal draws a distinction between permits to be granted in accordance with the laws and regulations of the country concerned and those actions that require a change of said laws and regulations.

To the extent that the application for a permit meets the requirements of the law, then, in accordance with the BIT and Article 3(2) of the Croatia BIT, the investor should be granted such permit. On the other hand, said provision does not entitle an investor to a change of the normative framework of the country where it invests. All that an investor may expect is that the law be applied." | **[206]** "As explained by the Respondent, the carrying out of the investment would have required a change in the norms that regulate the urban sector in Chile. The PMRS forms part of this normative framework, as repeatedly stated by the Respondent. Laws and regulations may be changed by a country but it is not an entitlement that can be based in Article 3(2) of the Croatia BIT. This clause is an assurance to the investor that the laws will be applied, and to the State a confirmation that its obligation under that article is confined to grant the permits in accordance with its own laws. The Tribunal concludes that the Respondent did not breach the BIT by not changing the PMRS as required for the Project to proceed."

[Paras. 197, 204, 205, 206]

I.17.1 EXPROPRIATION
See also I.17.24

E. Expropriation

[208] "The Claimants argue that their investment has been expropriated by the Respondent in breach of Article 4 of the BIT. The Claimants allege indirect expropriation resulting from actions and failure to act by the Respondent [. . .]." | **[214]** "As already stated, the Tribunal agrees with the argument of the Respondent that an investor does not have a right to a modification of the laws of the host country. As argued by the Respondent, 'every State has the power to amend any of its laws. The mere fact that Chile can change the PMRS does not mean, however, that Chile is *obligated* to do so.' [. . .] The issue in this case is not of expropriation but unfair treatment by the State when it approved an investment against the policy of the State itself. The investor did not have the right to the amendment of the PMRS. It is not a permit that has been denied, but a change in a regulation. It was the policy of the Respondent and its right not to change it. For the same reason, it was unfair to admit the investment in the country in the first place."

[Paras. 208, 214]

V. DAMAGES

[237] "The Tribunal will address the following issues regarding damages that emerge from the parties' allegations:

(i) Eligible expenses for purposes of calculating damages;

(ii) Damages attributable to business risk;

(iii) Date from which interest should accrue; and

(iv) Applicable rate of interest."

[Para. 237]

I.17.133 COMPENSATION
See also I.17.1331

A. Standard of Compensation

[238] "The Tribunal first notes that the BIT provides for the standard of compensation applicable to expropriation, 'prompt, adequate and effective' (Article 4(c)). It does not provide what this standard should be in the case of compensation for breaches of the BIT on other grounds. The Claimants have proposed the classic standard enounced by the Permanent Court of Justice in the Factory at Chorzów: compensation should 'wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that had not been committed.' [. . .] The Respondent has not objected to the application of this standard and no differentiation has been made about the standard of compensation in relation to the grounds on which it is justified. Therefore, the Tribunal will apply the standard of compensation proposed by the Claimants to the extent of the damages awarded."

[Para. 238]

B. Calculation of Damages

I.11.035 REPARATION/COMPENSATION/SATISFACTION
See also I.1.0

1. Expenditures

[240] "The Tribunal considers as eligible for purposes of the calculation of damages the following expenditures:

(i) Expenditures related to the initial investment in the amount of US$ 17,345,400.00.

(ii) The Tribunal has found that Chile's responsibility is related to the approval of the transfer of funds by the FIC in spite of the policy of the Government not to change the PMRS. Therefore, the Tribunal considers that expenditures for the Project prior to the execution of the first Foreign Exchange Contract on March 18, 1997 are not eligible for purpose of the calculation of damages even if they could be considered part of the investment. For the same reason, expenditures made after November 4, 1998—the date on which Minister Henríquez informed the

Claimants in writing that the PMRS would not be changed—are also to be excluded from said calculation. The total of expenditures during this period on account of salaries, travel, legal services and miscellaneous items, as detailed in Exhibit 93A submitted with the Reply, amount to US$ 235,605.37.

(iii) The Tribunal considers the financial costs related to the investment made to be part of a business decision on how to finance the investment. As stated by the tribunal in *Middle East Cement* and referred to by the parties in their allegations:

> 'They could be claimed, if it were shown that they were caused by conduct of the Respondent which was in breach of the BIT.'[6] Since the Tribunal has found that Chile breached its obligation to treat the Claimants' investment fairly and equitably and this treatment is related to the decision of the Claimants to invest in Chile, the Tribunal considers that the financial costs related to the investment in the amount of US$ 3,888,582.95 are part of the eligible expenditures for purposes of the calculation of damages." |

[241] "The aggregate of the above eligible expenditures amounts to US$ 21,469,588.32. However, the residual value of the investment and the damages that can be attributed to business risk need to be deducted from such amount. [. . .]"

[Paras. 240, 241]

2. Damages Attributable to Business Risk

[242] "The Tribunal decided earlier that the Claimants incurred costs that were related to their business judgment irrespective of the breach of fair and equitable treatment under the BIT. As already noted, the Claimants, at the time of their contract with Mr. Fontaine, had made decisions that increased their risks in the transaction and for which they bear responsibility, regardless of the treatment given by Chile to the Claimants. They accepted to pay a price for the land with the Project without appropriate legal protection. A wise investor would not have paid full price up-front for land valued on the assumption of the realization of the Project; he would at least have staged future payments to project progress, including the issuance of the required development permits." | **[243]** "The Tribunal considers therefore that the Claimants should bear part of the damages suffered and the Tribunal estimates that share to be 50% after deduction of the residual value of their investment calculated on the basis of the following considerations." | **[244]** "Mr. Fontaine has made an offer for MTD's EPSA shares of US$ 10,069,206. The Claimants are, by the terms of their shareholders' arrangements with Mr. Fontaine and as decided by an arbitral tribunal and

6 [225] *Middle East Cement*, para. 154.

confirmed by the Chilean courts, obliged to accept this offer or buy him out. For this reason, the Tribunal considers that the price offered by Mr. Fontaine for the shares of EPSA currently held by the Claimants constitutes the residual value of the investment. Because only part of the offer is in cash, the cash value of the remainder on a present value basis is US$ 9,726,943.48.[7]" | **[245]** "The Tribunal notes that the Claimants had not accepted Mr. Fontaine's offer because it is not a full cash offer and are concerned about the uncertain financial situation of Mr. Fontaine. This is of no relevance to this Tribunal, since the risk of having chosen Mr. Fontaine as a partner should be borne by the Claimants. Chile had no participation in his selection nor has it been claimed that the financial difficulties of Mr. Fontaine can be attributed to Chile. The Claimants themselves have manifested that they knew all along about his financial difficulties. This is a business risk that the investors shall bear." | **[246]** "To conclude, the Claimants should bear the risk inherent in Mr. Fontaine's offer and 50% of the damages after deducting the present value of such offer from the total amount calculated in Section 1 above."

[Paras. 242, 243, 244, 245, 246]

3. Date from Which Pre-award Interest Should Accrue

[247] "The Tribunal considers that interest on the amount of damages for which Chile is responsible should accrue from November 5, 1998, the day after Minister Henríquez notified the Claimants that it was against his Government's policy to modify the PMRS." | **[248]** "The Claimants in their Reply increased the amount of their claim with the interest accrued during the extension granted by the Tribunal to the Respondent to file the Counter-Memorial. Chile has argued that the additional interest should not be awarded since the suspension was for all the 'issues related to the procedure.' [. . .] The Tribunal has awarded interest from November 5, 1998 for the reasons stated above and considers that the extension of the term for the submission of the Counter-Memorial does not have a bearing on this matter."

[Paras. 247, 248]

4. Applicable Rate of Interest

[249] "The Claimants have requested that the Tribunal apply a compound annual interest rate of 8%. The Respondent has proposed the dollar-based annual rate of interest applicable in Chile or the average annual LIBOR.

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7 [226] For purposes of this calculation, the Tribunal has used the US dollar two-year swap rate of May 6, 2004 for a two-year swap effective May 21, 2004 published by *Bloomberg*. The two-year swap rate represents an interest rate at which semiannual cash flows may be discounted until the maturity of the swap. There are no LIBOR rates for period of more than one year.

The Respondent has objected to a compound interest rate as not being in accordance with international law." | **[250]** "This being an international tribunal assessing damages under a bilateral investment treaty in an internationally traded currency related to an international transaction, it would seem in keeping with the nature of the dispute that the applicable rate of interest be the annual LIBOR on November 5 of each year since November 5, 1998 until payment of the awarded amount of damages. Based on the rates published daily by Bloomberg, the annual LIBOR on November 5 of each year since November 5, 1998 are as follows: (i) 5.03813 % in 1998, (ii) 6.16 % in 1999, (iii) 6.71625 % in 2000, (iv) 2.24625 % in 2001, (v) 1.62 % in 2002, and (vi) 1.4925 % in 2003." | **[251]** "The Tribunal considers that compound interest is more in accordance with the reality of financial transactions and a closer approximation to the actual value lost by an investor. As expressed by the tribunal in *Santa Elena*: 'Where an owner of property has at some earlier time lost the value of his asset but has not received the monetary equivalent that then became due to him, the amount of compensation should reflect, at least in part, the additional sum that his money would have earned, had it, and the income generated by it, been reinvested each year at generally prevailing rates of interest.'[8]"

[Paras. 249, 250, 251]

II.1.9 COSTS OF JUDICIAL AND ARBITRAL PROCEEDINGS

VI. COSTS OF ARBITRATION

[252] "Taking into account that neither party has succeeded fully in its allegations, the Tribunal decides that each party shall bear its own expenses and fees related to this proceeding and 50 % of the costs of ICSID and the Tribunal."

[Para. 252]

II.4.98 AWARD

VII. AWARD

[253] "For the reasons above stated the Tribunal unanimously decides that:

1. The Respondent has breached its obligations under Article 3(1) of the BIT.

2. The Claimants failed to protect themselves from business risks inherent to their investment in Chile.

3. The Respondent shall pay the Claimants the amount of US$ 5,871,322.42.

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8 [228] *Compañía de Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica,* ICSID Case No. ARB/96/1, Final Award, 17 February 2000, para. 104.

4. The Respondent shall pay compound interest on such amount from November 5, 1998 and determined as set forth in paragraphs 249-251 above until such amount has been paid in full.

5. The parties shall bear all their respective expenses and fees related to this proceeding.

6. The parties shall share equally the fees and expenses incurred by ICSID and the Tribunal.

7. All other claims filed in this arbitration shall be considered dismissed."

[Para. 253]

PSEG Global Inc., The North American Coal Corporation, and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ARB/02/5, Decision on Jurisdiction, 4 June 2004

Original: English

Present: Orrego Vicuña, *President*
Fortier, Kaufmann-Kohler, *Arbitrators*

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* Summaries prepared by Christina Knahr, Ph.D. Candidate, Research Assistant, Department for European, International and Comparative Law, University of Vienna, Austria. The full text of the Decision is reprinted in 44 INTERNATIONAL LEGAL MATERIALS 465 (2005) and available online at <http://ita.law.uvic.ca/documents/psegdecision.pdf>. Original footnote numbers are indicated in brackets: [ ].

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

II.4.911 REQUEST FOR ARBITRATION
See also I.17.011

I. PROCEDURE

[1] "On March 22, 2002, the International Centre for Settlement of Investment Disputes ('ICSID' or 'the Centre') received a request for arbitration against the Republic of Turkey ('Turkey' or the 'Respondent') from PSEG Global Inc. (PSEG), a company incorporated under the laws of New Jersey in the United States of America (USA); the North American Coal Corporation ('North American Coal'), a company incorporated under the laws of the state of Delaware in the USA; and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi (the 'Project Company'), described in the request for arbitration as a special purpose limited liability company incorporated under the laws of Turkey and wholly owned through several subsidiaries by PSEG (together referred to as the 'Claimants')." | **[2]** "The request invoked the ICSID arbitration provisions in the Treaty between the United States of America and the Government of the Republic of Turkey Concerning the Reciprocal Encouragement and Protection of Investments (the 'Treaty') [. . .]."

[Paras. 1, 2]

II. THE DISPUTE

A. Subject-matter of the Dispute

[19] "[. . .] In April 1994, PSEG requested the Ministry of Energy to undertake the negotiation of a contract with a view to developing a lignite-fired electric power plant in the Turkish Province of Konya. The development of an adjacent lignite mine that would supply the plant's fuel was also envisaged in the proposal. [. . .] the Ministry in November 1995 approved the Feasibility Study of the project prepared by PSEG." | **[21]** "In March 1996, the Turkish Constitutional Court ruled that BOT power projects could not be subject to private law and had to follow the traditional model of concession contracts subject to the approval of the Turkish Council of State (the 'Danistay'). Upon approval of the project by the State Planning Organization, the parties in August 1996 initialed an Implementation Contract [. . .] based on the same factors as the Feasibility Study. This contract was then submitted to the Danistay for review and approval in the form of a Concession Contract. [. . .]"

[Paras. 19, 21]

B. Provision on Dispute Settlement

[28] "In so far as the settlement of disputes was concerned, the Implementation Contract had provided for ICSID arbitration. The relevant clause was [. . .] deleted from the Concession Contract in the review process before the Danistay and as a result the Contract did not contain any specific provision on dispute settlement."

[Para. 28]

C. Concession Contract

[32] "[. . .] [T]he Danistay approved the Implementation Contract in the form of a Concession Contract on March 30, 1998. The economics of the project as envisaged in the Feasibility Study were not changed as no agreed amendment had been submitted. It follows that a plant capacity of 425 MW gross/375 MW net, on a 38-year term, an annual average availability factor of 85.08% and an average price of US$0.0498 cents/Kwh, were approved."

[Para. 32]

III. OBJECTIONS TO JURISDICTION

A. Objection Concerning the Existence of an Investment

II.4.9211 QUALIFICATION AS INVESTMENT
See also II.1.211

1. Existence of a Concession Contract

[66] "The Respondent argues first that the Treaty protection extends only to the investments defined therein and as neither the proposed project nor the Concession Contract are an investment the Tribunal lacks jurisdiction. Article I (1) (c) of the BIT defines 'investment' as follows:

> 'Investment' means every kind of investment in the territory of one Party owned or controlled, directly or indirectly, by nationals or companies of the other Party, including assets, equity, debt, claims and service and investment contracts; and includes
>
> (i) tangible and intangible property, including rights, such as mortgages, liens and pledges;
>
> (ii) a company or shares of stock or other interests in a company or interests in the assets thereof;
>
> (iii) a claim to money or a claim to performance having economic value and associated with an investment;
>
> (iv) intellectual and industrial property rights, including rights with respect to copyrights, patents, trademark, trade names, industrial designs, trade secrets and know-how, and goodwill;
>
> (v) any right conferred by law or contract, and any licenses and permits pursuant to law; and
>
> (vi) reinvestment of returns, and of principal and interest payments arising under loan agreements.'" |

[71] "[. . .] [T]he Contract, the Respondent asserts, is not a valid and binding agreement to which both parties have expressed their consent to be bound. [. . .]" | **[80]** "The essential point that the Tribunal must establish [. . .] is a legal one. Does the Concession Contract exist? The answer to this question is not difficult as the parties do not dispute the fact that the Concession Contract does exist, was duly signed, submitted to the Danistay and approved by this body and later executed with all the legal formalities and requirements. It is not disputed either that both parties unequivocally believed that the Contract had become effective on the date of the signing by the Ministry. The Contract is couched in proper legal language."

[Paras. 66, 71, 80]

2. Validity of the Concession Contract

[83] "[. . .] [T]he Contract did not ignore the essential commercial terms of the transaction as the terms originally agreed to in the Feasibility Study were incorporated in the Contract. Technical formulas to define the tariff structure and the price were thus included in Annex 2 of the Contract. To this extent there is not a blank or a vacuum in the Contract. Theoretically, on the basis of the Contract as signed and executed, the Claimants could still undertake the project on the commercial terms therein specified, which the Respondent has admitted was a possibility. The Claimants could also seek either to amend those terms, under both Articles 8 and 32 of the Contract or to ultimately abandon the project." | **[84]** "The parties to the Contract knew before its submission to the Danistay in draft form that costs would increase as a result of the Revised Mine Plan. This Revision entailed significant changes to the earlier economic estimates and to the work envisaged in the mine site. Letters pointing to the need for accommodation and tariff restructuring were abundant. This is precisely why the Implementation Contract included a rebalancing mechanism in Article 5.1, which later led to Article 8 of the Concession Contract. This is also why the Claimants repeatedly made reservations of their rights under the Implementation Contract and stated that amendments included in the draft submitted to the Danistay did not constitute a waiver of such rights." | **[85]** "The fact that economically the project might be difficult to execute or even become unfeasible does not render the Contract invalid. Neither does the fact that the project could become impossible to perform. As Professor Güran stated in his Legal Opinion, '. . .economic hardship does not constitute a valid excuse to escape a party's contractual obligations, whether under the doctrine of impossibility of performance or any other principle of Turkish law'. [. . .]" | **[86]** "Moreover, the repudiation that the Claimants have allegedly made of the original terms stems from its economic and financial feasibility. It does not alter the legal validity of the Contract, particularly since both parties foresaw that there would be a need for an economic adjustment as a result of the Revised Mine Plan and other issues intervening in the negotiation. The need for an economic adjustment informs Article 8 of the Contract. Article 8 of the Contract allows the Claimants to seek an economic rebalancing of the Contract terms in case of significant change in that balance." | **[87]** "An additional consideration arises because the Contract contains a mechanism for renegotiating the commercial terms and the tariff as a result of the Revised Mine Plan. Again, this does not affect the validity of the Contract; it only means that the terms therein defined can be reopened in the light of certain events." | **[88]** "This is not an unusual feature in contracts dealing with highly complex concessions of services of long duration or other types of long-term transactions. Faced with the possibility of renegotiation of certain contract terms, the parties' intent is dispositive of the question whether the Contract nevertheless came into existence. In the

present case, both the language of the Contract as well as the circumstances, as they are reviewed below, demonstrate an intent by the Parties to be bound in spite of the fact that certain terms still needed to be agreed upon at a later date."

[Paras. 83, 84, 85, 86, 87, 88]

3. Binding Force of the Concession Contract

[89] "The Tribunal also notes that several experts on Turkish administrative law have opined that the Concession Contract is binding on the Turkish State and meets all the conditions to become effective under Turkish administrative law."

[Para. 89]

4. Agreement by the Parties on Commercial Terms

[92] "The Respondent argues in particular that the Claimants in a letter of June 3, 1999, [. . .] characterized as a proposal what they now argue was an agreement referred to in an earlier letter of May 18, 1998, thus acknowledging that an agreement was never reached. While grammatically that may be so, the Tribunal cannot draw from this fact a legal conclusion since it is perfectly possible that the Claimants were referring to the proposal on the basis of which the alleged agreement of May 18, 1998 was reached. The ongoing submission of cash flow tables and tariff alternatives up to the year 2000 suggests, however, that no firm agreement was in place but that it was being explored and negotiated."

[Para. 92]

5. Intent of the Parties to be Bound by the Contract

[96] "There are [. . .] documents which the Tribunal believes are particularly important in establishing the intent of the parties to conclude and be bound by the Contract. The most fundamental of these is evidently the Contract itself. There are many provisions in the Contract which evidence the intent of the parties to be bound. The main one is Article 8 which specifically allows for a rebalancing of the Contract where a Revised Mine Plan introduces substantial changes in the economics of the Contract, such as in the present case. The wording of Article 8 is very clear. The pertinent terms of this Article, reproduced above, are clearly indicative of the central role played by the economic rebalancing which is envisaged." | **[97]** "While much has been discussed about whether the 60-day period the Ministry had to approve or disapprove the Article 8 amendments on reasonable grounds entails a mandatory action, or the opposite conclusion that if no action is taken it simply means the rejection of the amendments under

Turkish law, this does not alter the fact that the Claimants could avail themselves of this mechanism and indeed did so in order to seek to rebalance the Contract. The long negotiations between the parties with respect to a new tariff so indicates and the very terms of the draft Protocol discussed by the parties also show that commercial elements were being debated pursuant to the mechanism set out in Article 8 of the Contract." | **[98]** "In turn, this mechanism is related to Article 15 of the Contract which refers to a number of agreements or protocols to be concluded by the Company. The fact that this was seen as an obligation is clearly expressed by the use of the term 'shall'. This very obligation also assumes that the Respondent's institutions will concur in these agreements which will supplement the Contract."

[Paras. 96, 97, 98]

6. Effectiveness of the Contract

[99] "Article 35 of the Contract is also significant in this context. This Article provides that the Contract shall be effective on the date of execution upon review by the Danistay, all of which happened in fact. It provides next for the Company to complete other related steps concerning, in particular, financing, executing the Contracts envisaged in Article 15, obtaining required authorizations and permits and obtaining the final approval of projects by the Ministry. Paragraph 2 of Article 35 begins with the expression 'However'. This word does not condition the effectiveness of the Contract under paragraph 1 because termination only arises in case of 'default' of the Company. Otherwise the Contract remains in force and is effective." | **[100]** "The Danistay Decision of 11 March 1998 approving the Contract refers to the fulfillment of a number of additional transactions by the Company as 'an obligation arising from the contract', thus indicating that the obligations would be in effect as soon as the Contract was approved and executed. Clearly, these obligations were to be fulfilled once the Contract had become effective."

[Paras. 99, 100]

7. Amendment of the Contract

[102] "[. . .] [I]n weighing the totality of the evidence submitted by the parties, the Tribunal does find that amendments to the Contract terms were pursued. This finding further confirms the existence, validity and binding nature of the Contract."

[Para. 102]

8. Intent of the Parties

[103] "In reaching its conclusion on this matter the Tribunal is also persuaded by the argument that if the parties did not intend to bind themselves by means of a Contract, why would they then have signed, submitted for approval and executed a Contract? Letters of intention or other instruments would have sufficed to provide a general framework to continue negotiations until an agreement was reached or not without any legal consequence for either party, as the events in *Mihaly* show. The view of the Respondent that the Contract was signed as a mere courtesy or sign of good will is not tenable, nor is the view that this is nothing but a framework devoid of legal significance."

[Para. 103]

II.4.92 JURISDICTION
See also II.4.9211

9. Conclusion of the Tribunal

[104] "A contract is a contract. The Concession Contract exists, is valid and is legally binding. This conclusion is sufficient to establish that the Tribunal has jurisdiction on the basis of an investment having been made in the form of a Concession Contract. [. . .]"

[Para. 104]

B. Objection Concerning Direct Connection Between Dispute and Investment

II.4.9211 QUALIFICATION AS INVESTMENT
See also II.4.9214

1. Concession Contract Embodies Investment Agreement

[114] "The Tribunal has held above that the Concession Contract is valid and binding. By its very nature and specific terms the Contract embodies an investment agreement under which the investor is authorized to undertake the power generation activities therein specified. The Contract refers repeatedly to the investment, its amount, financing, period of implementation and a host of other investment connected questions. Article 4 of the Contract provides in particular for a detailed investment schedule." | **[115]** "The foreign investor is a party to the Contract in its own right. The investor was specifically encouraged to undertake the project and assurances were apparently given at the time of signing of the Contract that any pending problems would be accommodated. The investment operation as a whole was related to the activities to follow the delivery of the site as is evi-

dent from both Articles 4 and 35 of the Contract, which refer to such step among many others to be undertaken by the Company."

[Paras. 114, 115]

2. Authorization to Invest

[116] "The Tribunal also concludes that [. . .] the proper authorization has been granted by the foreign investment authority to the company, first in the form of a branch office and later as a limited liability company. The Turkish law governing foreign investments does not require a string of authorizations[1] nor does the Foreign Capital Framework Decree of 1995.[2] More specifically, the Communiqué explaining this last decree only requires one authorization issued in the form of a permit by the Foreign Investment General Directorate, Undersecretary of the Treasury.[3]" | **[117]** "The terms of the authorizations given in this case are also self-contained, in that a permit is granted for the Company to 'conduct its activities by having equal rights and responsibilities with local institutions acting in the same field. . .'[4]. The field of activity permitted is broad as it allows the Company to '. . .plan, construct and operate energy power plants, to exploit mining reservoirs, to trade electric energy and conduct all types of electricity, mining and other activities in accordance with the current related legislation'." | **[118]** "[. . .] [I]n so far as the authorization to invest is concerned only one decision by the pertinent government service suffices. This authorization has been duly given by the Foreign Investment General Directorate, as noted." | **[121]** "The dispute that has been described above, in the view of both parties, involves questions of interpretation or application of both the investment agreement and the investment authorization. This is also the case in respect of the Respondent's argument that there is no investment, agreement or authorization as these very claims involve the interpretation of the Contract and the authorization. The dispute therefore arises unequivocally directly out of the investment subject, of course, to the same proviso made above that the issue of what constitutes precisely an investment as opposed to mere preparatory activities pertains to the merits."

[Paras. 116, 117, 118, 121]

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1 [29] Law Concerning the Encouragement of Foreign Capital, No. 6224 Jan 18, 1954.

2 [30] Decree No. 95/6990, June 7, 1995.

3 [31] Communiqué No. 95/2, August 24, 1995.

4 [32] Permission Certificate No. 6014, 5 July 1999, replacing certificate No. 4492 of 5 May 1997.

II.4.9214 DISPUTE ARISING DIRECTLY OUT OF AN INVESTMENT
See also II.4.92

3. Conclusion of the Tribunal

[124] "The Tribunal accordingly finds that it has jurisdiction under this heading as the dispute concerned arises directly out of an investment in terms of the interpretation and application of the Contract and the investment authorization, as well as in terms of Treaty rights connected to this investment that could have been compromised."

[Para. 124]

C. Objection Concerning Notification under Art. 25 (4) ICSID Convention

II.4.91 PROCEDURAL ISSUES

1. Legal Effect of Art. 25 (4) ICSID Convention

[125] "Article 25 (4) of the Convention allows any Contracting State to '. . .notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. . .'. On the basis of this provision, the Republic of Turkey notified the Secretary-General of ICSID on February 23, 1989 that 'only the disputes arising directly out of investment activities which have obtained necessary permission, in conformity with the relevant legislation of the Republic of Turkey on foreign capital, and that have effectively started shall be subject to the jurisdiction of the Centre'." | **[126]** "The Respondent argues in this connection that the notification made qualifies the consent to arbitration contained in the Treaty, admittedly not as a reservation to the Convention but with the effect of informing the limits and scope of its subsequent consent to arbitration under the Treaty. As in the Respondent's view the project never 'effectively started', the consent to arbitration is absent. Effective start is generally identified by the Respondent with the beginning of construction of either the mine or the power plant. As discussed above, the Respondent has also argued that the Claimants lacked the necessary investment permits." | **[136]** "[. . .] Article 25 (4) in itself does not assign any particular legal effect to notifications as it refers to the disputes that the Contracting State 'would or would not consider submitting to the jurisdiction of the Centre'. This is quite natural as the whole issue of consent was left to instruments other than the Convention, for example investment agreements and bilateral investment treaties. This is also the reason why that very Article clearly separates notification from consent by providing that 'Such notification shall not constitute the consent required by paragraph (1)'." | **[138]** "[. . .] [It was] emphasized that notifications must necessarily have a purpose as otherwise they would be a meaningless exercise. There is no doubt that this is true. In fact, at the time the Convention was negotiated it was envisaged

that the Contracting States would normally express their consent in investment agreements concluded with the private investors, which were later supplemented by the massive network of bilateral investment treaties in force today. Notifications were a useful means to inform beforehand the kind of disputes to which consent for arbitration might or might not be expected by the prospective investor or its State of nationality. To this extent the notification has a specific purpose." | **[139]** "In this connection the Tribunal does not share the Respondent's interpretation of the *CSOB* and *Fedax* cases. Although the language in *CSOB* appears to support the interpretation that notifications can limit the scope of the Centre's jurisdiction, that Tribunal concluded that by not making such a declaration the Contracting Party has 'submitted itself broadly to the full scope of the subject matter jurisdiction governed by the Convention'. [. . .] Yet it remains that the 'subject matter' jurisdiction is determined by the consent of the Contracting State expressed in a separate instrument and by the definition of investment included in that expression of consent. True, it is governed by the Convention but it is not defined by it. It follows that notifications under Article 25 (4) do not have a life of their own and are wholly dependent on the consent mechanism." | **[140]** "Similarly, *Fedax* was also explicit in referring to notifications as putting 'investors on notice', but it does not follow that the Tribunal accepted a qualification of consent by means of a notification under Article 25 (4). Evidently, in case of doubt, the notification will help the interpretation of the parties' consent but it does not have an autonomous legal operation." | **[141]** "[. . .] Both parties have agreed that notifications are not reservations. This is also the view of the Tribunal. An autonomous legal effect of notifications has been ruled out for the reasons explained above."

[Paras. 125, 126, 136, 138, 139, 140, 141]

I.1.21 UNILATERAL ACTS OF STATES

2. Qualification of Notifications as Unilateral Acts

[142] "The view that unilateral acts of States have legal effects under international law is accurate as evidenced by the decisions of the Permanent Court of International Justice in the *Eastern Greenland* case[5] and of the International Court of Justice in the *Nuclear Tests* case.[6] There is no doubt that notifications qualify as unilateral acts under international law,[7] although in the present case it is not an autonomous act as it depends on the Convention. However, in the cases mentioned above the essence of the legal effects

5 [39] Permanent Court of International Justice, *Eastern Greenland* case, 1933, PCIJ, Ser. A/B, No. 53, at 52.

6 [40] International Court of Justice, *Nuclear Tests* case, ICJ Reports 1974, at 253.

7 [41] Patrick Daillier et Alain Pellet: Droit International Public, 2002, 359-366.

admitted has been that the unilateral acts in question create obligations for the State concerned on which other States can rely."

[Para. 142]

3. Difference Between Notification and Consent

[143] "In the instant case, the notification does not create an obligation for the Contracting State, but rather it is associated with the claim to a right. In fact, States making notifications will always wish to remain free to either follow or not follow the terms of the notification when expressing their consent. No State would believe that by making a notification it has become bound by its terms as in that case there would be no difference between notification and consent, thus contradicting specific provisions of the Convention. In this context, the Contracting State is in fact claiming a right to later exclude certain disputes from consent, if it so wishes, and it is always free not to adhere to the terms of its notification."

[Para. 143]

4. Declarations

[144] "It has become increasingly common for treaties to exclude reservations and allow for declarations instead. These declarations do not alter the legal rights and obligations under the treaty nor do they amend any of its provisions. They are simply an instrument that allows States to express questions of policy to which they are not bound and that do not create rights for the other parties. It is a matter of information, normally resorted to for domestic needs. This is also the legal nature of the declarations made by States in the form of notifications under Article 25 (4) of the Convention. Interestingly Mr. Broches, quoted above, referred to these notifications as 'declarations'."

[Para. 144]

5. Legal Effects of Notification and Consent

[145] "[. . .] [T]o be effective the contents of a notification will always have to be embodied in the consent that the Contracting Party will later give in its agreements or treaties. If, as in this case, consent was given in the Treaty before the notification, that treaty could have been supplemented by means of a Protocol to include the limitations of the notification into the State's consent. Otherwise the consent given in the Treaty stands unqualified by the notification." | **[146]** "Although [. . .] few notifications have been made, it must be noted, for example, that the terms of the notification made by the People's Republic of China are reproduced in various bilateral in-

vestment treaties entered into with other countries.[8] It follows that the legal effects of those terms arise from the treaties and not from the notification as such."

[Paras. 145, 146]

D. Objection Concerning Previously Agreed Dispute Settlement Procedures

II.4.91 PROCEDURAL ISSUES
See also II.4.93

1. Dispute Settlement Provisions in Article VI (2) and VI(3) of the Treaty

[149] "In this connection, the Respondent relies on Article VI (2) and its relationship with Article VI (3) (a) of the Treaty. The first clause provides that if the dispute cannot be solved by consultations and negotiations, 'the dispute shall be submitted for settlement in accordance with any previously agreed, applicable dispute settlement procedures'. The second clause provides that after one year a party may resort to ICSID arbitration if 'the dispute has not, for any reason, been submitted by the national or company for resolution in accordance with any applicable dispute settlement procedure previously agreed to by the parties to the dispute'." | **[159]** "[. . .] [T]he Tribunal concludes that there is no incompatibility between the provisions of Article VI (2) and Article VI (3) (a) and that they respond to a step by step search for a dispute resolution mechanism. First, consultations and negotiations are envisaged as an initial step. If this fails, third party nonbinding procedures can be attempted if agreed between the parties. If these procedures fail, then the dispute shall be submitted to the previously agreed mechanism." | **[160]** "If no submission had been made pursuant to the previously agreed mechanism, then, after one year, the investor can apply to ICSID. This sequence of dispute settlement procedures is quite typical of dispute settlement arrangements under international law, beginning with political alternatives, followed by third party non-binding intervention and ultimately by binding procedures, which can include a method agreed to or lead to binding international arbitration." | **[161]** "The fact that Article VI (2) provides that the dispute 'shall' be submitted to the previously agreed mechanism does not entail an obligation on the part of the investor. The investor may well choose to live with the dispute and never attempt a settlement. This is always a choice of the claimant party. If the investor chooses

8 [42] See, for example, the Agreement between the Government of Australia and the Government of the People's Republic of China, 11 July 1988, Article XII, 2, b; Agreement between the Government of Lithuania and the Government of the People's Republic of China, 8 November 1993, Article 8, 2, b; Agreement between the People's Republic of China and the Government of the Republic of Korea, 30 September 1992, Article 9.10. The text of the notification of the People's Republic of China is found in www.Worldbank.org/icsid/pubs/icsid-8-d.htm.

to resort to the previously agreed mechanism, the dispute must then be submitted to that procedure. It is obligatory and the other party has no further option. It is in this context that the 'shall' becomes mandatory for the other party." | **[162]** "This is the reason why Article VI (3) (a) expressly provides that the ICSID alternative will not be available if the 'national or company' has submitted the dispute to the previously agreed procedure, thereby clearly indicating that the choice belongs to the investor. Any other interpretation would mean that the principal feature of the Treaty, which is to make ICSID arbitration available to the investor, would be nullified and impaired by Article VI (2)." | **[164]** "The Tribunal is not convinced either that in the light of the facts of the case there was a procedure previously agreed to. [. . .] The decision of the Danistay to delete the ICSID clause contained in the draft Contract certainly does not have the effect of precluding ICSID jurisdiction provided by consent in treaties. Otherwise treaties would be subject to unilateral derogation by one party. The Respondent has argued in this connection that the Danistay has exclusive jurisdiction over contract disputes as a consequence of the Constitutional Court ruling of 1996 not allowing private law contracts for BOT power projects and requiring instead concession contracts approved by the Danistay. This view, however, cannot be imposed upon the investor who seeks to rely on an arbitration established by treaty."

[Paras. 149, 159, 160, 161, 162, 164]

2. Lack of Agreement of the Parties on Dispute Settlement Mechanism

[165] "The Claimants' argument to the effect that the Danistay's deletion of the ICSID arbitration clause did not really mean that the clause was rejected is not tenable. [. . .]" | **[166]** "The submission of the Respondent that such deletion was accepted by the Claimants on signing the Contract and that, in any event, the Danistay also has jurisdiction to hear treaty based claims does not convince the Tribunal. On the contrary, this discussion evidences that there was no agreement on an exclusive dispute settlement mechanism."

[Paras. 165, 166]

I.17.05 NATIONAL LAW
See also I.1.4

3. Turkish Legislation

[167] "But even assuming for the sake of argument that the Danistay jurisdiction could be exclusive under Turkish legislation, there are two additional considerations to be had. The first is that the Turkish legislature came later to the conclusion that concession agreements could be submitted to international arbitration and that investors could request their conversion

to private law contracts, as noted above. This new approach entailed recognition that international arbitration was not to be regarded as incompatible with Turkish legislation. Claimants believe this to be the case since the very outset." | **[168]** "The second consideration is the place of treaties under Article 90 of the Turkish Constitution. The last paragraph of this Article provides that 'International agreements duly put into effect carry the force of law. . .'. In the Turkish Constitutional system this means that at the very least treaties rank equally with the law. A number of opinions are of the view that treaties even prevail over the law. In this context, whatever jurisdiction the Danistay might have had or still has in respect of administrative acts and concession contracts yields to treaty provisions which, in the instant case is the investment protection Treaty and associated arbitration."

[Paras. 167, 168]

II.4.9215 CONTRACT CLAIMS-TREATY CLAIMS
See also II.4.95

4. Decisions of International Arbitral Tribunals on Difference Between Contract Claims and Treaty Claims

[169] "The discussion about a forum selection clause is also associated to the question of contract-based and treaty-based rights that have haunted many ICSID tribunals, which if applicable to the present case would mean that some disputes are capable of being submitted to Danistay or Turkish jurisdiction and some other kind of disputes could be submitted to international arbitration." | **[170]** "The difference between contract-based claims and treaty-based claims has been discussed by various international arbitral tribunals as evidenced by the decisions in *Lauder*,[9] *Genin*,[10] *Aguas del Aconquija*,[11] *CMS*[12] and *Azurix*[13] and by those of the Annulment Committees in *Vivendi*[14] and *Wena*[15]. The Tribunal held in *CMS*, referring to this series of decisions, that 'as contractual claims are different from treaty claims, even if there had been or there currently was a recourse to the local courts for

9 [47] Ronald S. Lauder v. Czech Republic, UNCITRAL Final Award (Sept. 3, 2001).

10 [48] Alex Genin and others v. Republic of Estonia (ICSID Case No. ARB/99/2), Award of the Tribunal (June 25, 2001); Decision on Claimants' Request for Supplementary Decisions and Rectification (April 4, 2002), *available at*: http://www.worldbank.org/icsid/cases/conclude.htm.

11 [49] *Aguas* cit. [Compañia de Aguas del Aconquija S.A. v. Argentine Republic (ICSID Case No. ARB/97/3), Award of November 21, 2000, 16 ICSID Rev.—FILJ 641 (2001)]

12 [50] *CMS* cit. [CMS Gas Transmission Company v. Argentine Republic (ICSID Case No. ARB/01/8), Decision on Jurisdiction of July 17, 2003, 42 ILM 788 (2003).]

13 [51] Azurix Corp. v. Argentine Republic (ICSID Case No. ARB/01/12), Decision on Jurisdiction of December 8, 2003, International Law in Brief *available at*: http://www.asil.org/ilib/azurix.pdf.

14 [52] Vivendi annulment cit. [Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic (Case No. ARB/97/3), Decision on Application for Annulment of July 3, 2002, 41 ILM 1135 (2002).]

15 [53] Wena Hotels Ltd. v. Egypt (ICSID Case No. ARB/98/4), Decision on Application for Annulment rendered on February 5, 2002, 41 ILM 933 (2002).

breach of contract, this would not have prevented submission of the treaty claim to arbitration'.[16]" | **[171]** "Where to draw the line, however, is not easy in practice as has been evidenced by the discussion of these various cases. The *Vivendi* Annulment Committee explained that '[i]n a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract'.[17] However, to the extent that the basis for the claim is a treaty violation, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state 'cannot operate as a bar to the application of the treaty standard'.[18] To the extent that there are valid concurrent alternatives, the choice will then depend on the nature of the dispute submitted." | **[173]** "In the instant case [. . .] it is not evident that there was such an alternative or an agreed forum selection clause. The existence of a previously agreed procedure is questionable and disputed. In any event, the dispute that has arisen in this case rather qualifies as a treaty based dispute as it is related both to the issue of interpretation and implementation of the Contract as an investment agreement and to the allegation that the Government, through various measures, impeded and ultimately destroyed the investment. The nature of the dispute is therefore not that of a typical contractual dispute." | **[174]** "The Tribunal accordingly affirms its jurisdiction and the objection based on the lack of resort to a previously agreed dispute settlement mechanism is dismissed."

[Paras. 169, 170, 171, 173, 174]

E. Objection Concerning Standing of NACC

II.4.9212 QUALIFICATION AS INVESTOR

1. The Respondent's Objections

[175] "The Respondent also objects to the jurisdiction of the Tribunal in respect of the North American Coal Corporation (NACC) and the Project Company on the ground that these entities lack standing. It is argued that NACC has no investment in Turkey nor any rights under the Danistay approved Contract, which was not even signed by NACC. Moreover, the Respondent believes that NACC owns no equity in the Project Company and owns none of the assets that have been claimed as investments. The only link it has to the case is a Memorandum of Understanding signed on August 1, 1998 between NACC and PSEG, conferring the option to acquire ownership interest in the Project Company by means of a Shareholders Agreement to be negotiated later." | **[183]** "It must first be noted that the es-

16 [54] *CMS* cit., par. 80; *Azurix* cit., par. 89.

17 [55] *Vivendi Annulment* cit., par. 98.

18 [56] *Vivendi Annulment* cit., par. 101.

tablishment of a branch office of a foreign investor in Turkey is done in accordance with Turkish legislation. The foreign company of which the branch office was an integral part was owned and controlled by PSEG. This fact alone would provide a clear link between this branch and the investment. However, other facts also strengthen this link. The branch was known to the Turkish Government as the conduit for the proposed investment and its establishment for this purpose was discussed at various times. More importantly, the fact that the first Permission Certificate was issued to this branch is in itself evidence that it was regarded by the Turkish Government as the entity authorized to operate and do business in that country in the specific context of the mining and power project envisaged. The Tribunal notes that the legal status of the Project Company is persuasively explained in the Opinions of Professors Reisman and Dolzer." | **[184]** "It was later that the question of a new corporate structure arose in the light of tax policies and other interests. This discussion resulted in long negotiations, including the impact of the change on the tariff, and ultimately led to the incorporation of Konya Ilgin Ltd. There can be no doubt that whatever rights or interests the branch office had were transferred to the new company as its successor in law and business. The objectives of the Project Company as stated in the act of incorporation are unequivocally linked to the investment. [. . .]" | **[185]** "Because of this continuity, the fact that the Company as such only came into existence later is immaterial. Any right or dispute concerning the branch office was also the concern of the successor as both entities were the legal vehicles of the investment made. Even if the Tribunal were to accept a line separating events in time in connection with the date of incorporation, there are still events after that date which involve a dispute between the parties." | **[186]** "On many occasions the critical date for the purpose of jurisdiction is whether the dispute arose before or after the entry into force of the relevant treaty. This is the situation specifically considered in *Mondev*, where events or conduct prior to that date were considered only for the purpose of establishing breaches subsequent to the entry into force of the treaty. Similarly, in *Maffezini* the Tribunal held that events before the critical date might be factors leading to the legal dispute after that date. The critical date in this case is not the incorporation date of the Project Company but again that of the entry into force of the Treaty. Every dispute affecting the investment arose in this case after the Treaty had entered into force."

[Paras. 175, 183, 184, 185, 186]

II.4.9211 QUALIFICATION AS INVESTMENT

2. Scope of Investment Definitions

[189] "Whether the Memorandum is valid and in force is immaterial for the purpose of the Tribunal's decision. The Tribunal considers that the Respon-

dent's argument that the definition of investment does not include an option is persuasive as a general approach. Broad as many definitions of investment are in treaties of this kind, there is a limit to what they can reasonably encompass as an investment. Options such as this particular one can not, in the view of the Tribunal, be interpreted as an 'investment'. The Tribunal acknowledges that different circumstances from those which obtain in the present case may lead to a different conclusion."

[Para. 189]

II.4.9212 QUALIFICATION AS INVESTOR

3. Status of NACC

[191] "In the opinion of the Tribunal NACC was at best only a technical operator for the investor in respect of the mining operations of the project and, later, an equity holder with a standing no different from any other equity holder. In fact at some point another entity had the same status as NACC since a similar Memorandum was signed between PSEG and Guris, a Turkish corporation. Given the corporate structure of the project, only PSEG as the investor and the Project Company as the conduit for this investment can be considered legally linked to the Turkish Government for the purpose of the Contract and the operation of the Treaty, including the consent given to arbitration. Other equity holders do not have an interest separate from these entities and consequently cannot claim on their own." | **[192]** "[. . .] Any interest, which the investor may eventually have, may accrue, in part, to NACC, if the latter still has an ongoing equity participation in the investor company. But this is a matter which concerns only intra-corporate arrangements that are separate and distinct from any Treaty connection between NACC and the Respondent. As such, while it may possibly result in a claim by NACC against PSEG, it does not give rise to a Treaty claim by NACC against the Respondent."

[Paras. 191, 192]

II.4.97 DECISION ON JURISDICTION

IV. DECISION

"For the above reasons, the Tribunal decides that:

1. The dispute submitted by PSEG and Konya Ilgin Ltd. is within the jurisdiction of the Centre and the competence of the Tribunal.

2. The dispute submitted by NACC is not within the jurisdiction of the Centre and the competence of the Tribunal.

3. The costs of the jurisdictional phase of the arbitration are reserved."

Hussein Nuaman Soufraki v. United Arab Emirates*, ARB/02/7, Award, 7 July 2004[*]

Original: English

Present: Fortier, *President*
Schwebel, El Kholy, *Arbitrators*

Table of Contents[**]

I. THE DISPUTE

A. Concession Agreement

[1] "[. . .] The agreement at the heart of these proceedings is a Concession Agreement between the Dubai Department of Ports and Customs and Claimant dated 21 October 2000 (the 'Concession Agreement')." | **[2]** "The Concession Agreement awarded Claimant a concession for a period of 30 years for the purpose of developing, managing and operating the Port of Al

* Summaries prepared by Christina Knahr, Ph.D. Candidate, Research Assistant, Department for European, International and Comparative Law, University of Vienna, Austria. The full text of the Award is available at <http://ita.law.uvic.ca/documents/Soufraki_000.pdf>. Original footnote numbers are indicated in brackets: [ ].

** This is not a reproduction of the Table of Contents of the Award.

Hamriya and its surrounding area after which it was to revert to the Dubai Department of Ports and Customs."

[Paras. 1, 2]

II.4.9223 NATIONAL OF ANOTHER CONTRACTING STATE
See also I.3.0; I.17.011; II.4.92231

B. Nationality of the Claimant

[3] "The Concession Agreement was entered into by Mr. Soufraki in his personal capacity and, in that capacity, he is described in the Concession Agreement as a Canadian national." | **[4]** "In its Request for Arbitration, Claimant describes himself as an Italian national and invokes the Bilateral Investment Treaty between Italy and the United Arab Emirates ('UAE') dated 22 January 1995 (the 'BIT'). [. . .]"

[Paras. 3, 4]

II. CONSIDERATIONS OF THE TRIBUNAL

II.4.9223 NATIONAL OF ANOTHER CONTRACTING STATE
See also I.3.0; II.4.92231; II.4.93

A. Nationality Requirement under Art. 25 (2) (a) ICSID Convention

[21] "[. . .] The Tribunal must determine whether Claimant is a national of Italy according to Article 25(2)(a) of the Convention and whether Claimant belongs to the class of investors to whom Respondent has offered consent to ICSID arbitration pursuant to the BIT."

[Para. 21]

I.17.05 NATIONAL LAW

B. Relevant Provisions of Italian Law

[24] "In order to determine whether Claimant is a national of Italy, on the facts of the present case three provisions of Italian law are relevant:

(1) Article 8, paragraph 1 of the Italian Law No. 555 of 1912 which reads as follows:

Loses the [Italian] citizenship: (1) whoever spontaneously acquires a foreign citizenship and establishes his residence abroad.

(2) Article 17(1) of the Italian Law No. 91 of 1992 which reads as follows:

17.-1 Who has lost the [Italian] citizenship according to articles 8 and 10, Law 13th June, 1912, n. 555, or because he/she has not adhered to the option provided for by article 5, Law 21st April, 1983, n. 123, may reacquire the citizenship if

he/she submits a relevant declaration within two years from the entry into force of this law.

(3) Article 13(1)(d) of the Italian Law No. 91 of 1992 which provides:

(1) whoever has lost his [Italian] citizenship reacquires it: . . . (d) one year after the date at which he established his residence in the territory of the Republic [of Italy], save in case of explicit renunciation within the same time-limit[.] [. . .]"

[Para. 24]

I.3.0 NATIONALITY

C. Loss of Nationality of the Claimant

[49] "[. . .] Mr. Soufraki claims Italian nationality by right of jus soli and jus sanguinis." | **[51]** "[. . .] [T]he Tribunal accepts and respects the sincerity of Mr. Soufraki's conviction that he was and remains a national of Italy." | **[52]** "However, the terms of Article 8, paragraph 1 of the Italian Law No. 555 of 1912 are clear and leave no room for interpretation. As a consequence of his acquisition of Canadian nationality and residence in Canada, Mr. Soufraki, in 1991, lost his Italian nationality by operation of Italian law. It appears from the evidence that Mr. Soufraki was unaware of the loss of his Italian nationality at the time and became aware of it only in the course of, and as a result of expert evidence submitted in, these proceedings."

[Paras. 49, 51, 52]

D. Relevant Date for Determination of Nationality

[53] "The first contentious question to be decided is whether, as Claimant maintains, the Certificates of Nationality issued by Italian authorities characterizing Mr. Soufraki as an Italian national, and his Italian passports, identity cards and the letter of the Italian Ministry of Foreign Affairs so stating, constitute conclusive proof that Mr. Soufraki reacquired his Italian nationality after 1992 and that he was an Italian national on the date on which the parties to this dispute consented to submit it to arbitration as well as on the date on which the request to ICSID was registered by it."

[Para. 53]

E. Nationality under Domestic Legislation

[55] "It is accepted in international law that nationality is within the domestic jurisdiction of the State, which settles, by its own legislation, the rules relating to the acquisition (and loss) of its nationality. Article 1(3) of the BIT reflects this rule. But it is no less accepted that when, in international arbitral or judicial proceedings, the nationality of a person is challenged, the international tribunal is competent to pass upon that challenge. It will accord

great weight to the nationality law of the State in question and to the interpretation and application of that law by its authorities. But it will in the end decide for itself whether, on the facts and law before it, the person whose nationality is at issue was or was not a national of the State in question and when, and what follows from that finding. Where, as in the instant case, the jurisdiction of an international tribunal turns on an issue of nationality, the international tribunal is empowered, indeed bound, to decide that issue."

[Para. 55]

II.1.41 BURDEN OF PROOF
See also I.3.0

F. Proof of Claimant's Nationality

[58] "The question rather comes to this. Mr. Soufraki asserts as a fact that he was resident in Italy for business purposes for more than one year in 1993-94. In accordance with accepted international (and general national) practice, a party bears the burden of proof in establishing the facts that he asserts. Claimant accordingly bears the burden of proving to the satisfaction of the Tribunal that he was resident in Italy for more than one year in 1993-94 and accordingly that he was an Italian national on the relevant dates and that, as a result, he belongs to the class of investors in respect of whom the Respondent has consented to ICSID jurisdiction."

[Para. 58]

II.1.4 EVIDENCE

G. Application of Rules of Evidence

[59] "The Tribunal agrees with Claimant that, as an international Tribunal, it is not bound by rules of evidence in Italian civil procedure.[1]" | **[60]** "The 'substantial' evidence rule, while it may well be required in an Italian court[2], has no application in the present proceedings." | **[62]** "In the present instance, it is thus for this Tribunal to consider and analyse the totality of the evidence and determine whether it leads to the conclusion that Claimant has discharged his burden of proof."

[Paras. 59, 60, 62]

1 [4] Claimant's Post-Hearing Brief dated 30 June 2003 at para. 60.

2 [5] Prof. Sacerdoti's Second Supplemental Legal Opinion dated 2 June 2003, Exhibit R-17.

H. Certificates of Nationality

[63] "The Tribunal will [. . .] accept Claimant's Certificates of Nationality as '*prima facie*' evidence. We agree with Professor Schreuer that:

> . . . A certificate of nationality will be treated as part of the 'documents or other evidence' to be examined by the tribunal in accordance with Art. 43 [of the Convention]. Such a certificate will be given its appropriate weight but does not preclude a decision at variance with its contents.[3]" |

[68] "The Tribunal accordingly holds that the Claimant cannot rely on any of the pleaded Certificates of Nationality to establish conclusively that he was a national of Italy on the dates of the Request for Arbitration and its registration. Nor can it treat the letter from the Ministry of Foreign Affairs as conclusively establishing Mr. Soufraki's Italian nationality and his entitlement to invoke Italy's BIT with the UAE, essentially for the same reason, namely, that it is not shown that the Ministry knew when it wrote its letter that Mr. Soufraki had lost his Italian nationality and that hence the question was whether he had reacquired it."

[Paras. 63, 68]

I. Residence

[64] "[. . .] [I]f Claimant reacquired his Italian citizenship after 1992, it is as a result of having established his residence in Italy for one year after that date." | **[70]** "The concept of 'residence' as used in Article 13(1)(d) of Italian Law No. 91 is factual. It is different from the concept of 'legal residence'.[4]" | **[71]** "Consequently, actual residence for one year is a sufficient requisite for the reacquisition of Italian citizenship." | **[72]** "Residence does not imply continuous presence and does not disallow travel. However, the Tribunal agrees with Respondent that proof of some continuity of residence during that year is required." | **[77]** "The Tribunal observes that [. . .] Claimant's Reply made no mention of Mr. Soufraki's residing in Italy in the 1993-94 period." | **[78]** "The Tribunal does not find that the affidavit of Messrs. Casini and Nicotra constitutes disinterested and convincing evidence. It should be noted that Mr. Casini is an auditor whom Mr. Soufraki has engaged over the years, and that Mr. Nicotra is a receptionist at Mr. Soufraki's hotel in Viareggio." | **[79]** "As to the lease, the Tribunal notes that it was to be used by Mr. Soufraki 'as his own personal office' and that it was never registered although its terms required that, 'in case of use' (in caso d'uso), it needed to be registered." | **[80]** "In the opinion of the Tribunal, neither the affidavit of Messrs. Casini and Nicotra, nor the unregistered lease of the Viareggio flat, sufficiently sustain the central submission of the Claimant

3 [6] Christoph[er] SCHREUER, The ICSID Convention: A Commentary, p. 268, para. 433.

4 [8] Legal opinion of Avv Castellani and Curto dated 23 June 2003, Exhibit C-114, paras. 16-25.

that he resided in Italy for more than one year as from March 1993." | **[81]** "Having considered and weighed the totality of the evidence adduced by Mr. Soufraki, the Tribunal, unanimously, comes to the conclusion that Claimant has failed to discharge his burden of proof. He has not demonstrated to the satisfaction of the Tribunal that he established and maintained his residence in Italy during the period from March 1993 until April 1994." | **[82]** "In the circumstances, Claimant cannot rely today on Article 13(1)(d) of Italian law No. 91 of 1992."

[Paras. 64, 70, 71, 72, 77, 78, 79, 80, 81, 82]

II.4.922 JURISDICTION *RATIONE PERSONAE*

[84] "Since, as found by the Tribunal, Claimant was not an Italian national under the laws of Italy at the two relevant times, namely on 16 May 2002 (the date of the parties' consent to ICSID arbitration) and on 18 June 2002 (the date the Claimant's Request for Arbitration was registered with ICSID), this Tribunal does not have jurisdiction to hear this dispute."

[Para. 84]

II.4.98 AWARD
See also II.1.9; II.4.97

III. AWARD

[86] "For the reasons set out in the foregoing paragraphs, the Tribunal unanimously decides:

a. That the present dispute falls outside its jurisdiction under Article 25(1) and (2)(a) of the ICSID Convention and Article 1(3) of the BIT;

b. That the costs of the proceeding, including the fees and expenses of the Tribunal and the ICSID Secretariat, be borne two-thirds by Claimant and one-third by Respondent;

c. That each party shall bear its own legal costs and expenses in the proceeding."

[Para. 86]

Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ARB/01/3, Decision on Jurisdiction, Ancillary Claim, 2 August 2004

Original: English

Present: Orrego Vicuña, *President*
Gros Espiell, Tschanz, *Arbitrators*

Table of Contents**

II.4.911 REQUEST FOR ARBITRATION
See also I.17.011

I. PROCEDURE

[1] "On March 25, 2003, Enron Corporation and Ponderosa Assets, L.P. ('Claimants') submitted before the International Centre for Settlement of Investment Disputes ('ICSID' or 'Centre') a request for arbitration against the Argentine Republic ('Argentine Republic' or 'Argentina') for alleged violations of the provisions of the 1991 Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investments ('Treaty'). The request concerns the adoption by the Government of Argentina of certain measures that allegedly affect the Claimants' investment in a gas transportation company."

[Para. 1]

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* Summaries prepared by Christina Knahr, Ph.D. Candidate, Research Assistant, Department for European, International and Comparative Law, University of Vienna, Austria. The full text of the Decision is available at <http://www.worldbank.org/icsid/cases/enron-decision-en.pdf>. Original footnote numbers are indicated in brackets: [ ].

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

II.4.99 ANCILLARY CLAIM

II. THE DISPUTE

[8] "[. . .] [T]his is the second dispute between Enron Corporation and Ponderosa Assets L. P and the Argentine Republic brought before this Tribunal. The first dispute concerned the assessment of Stamp Taxes by the Argentine Provinces and the jurisdiction of the Tribunal was affirmed by its decision of January 14, 2004 (*Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*) ('Stamp Tax Decision'). This dispute is an ancillary claim arising from the refusal of the Argentine Government to allow tariff adjustments in accordance with the United States Producer Price Index ('PPI') and the enactment of Law No. 25.561 which nullified PPI adjustments and the calculation of tariffs in dollars of the United States of America. In the Claimants' argument, these various measures violate the commitment made to the investor under the Treaty."

[Para. 8]

III. CONSIDERATIONS OF THE TRIBUNAL REGARDING JURISDICTION

II.4.9212 QUALIFICATION AS INVESTOR

A. Protection of Foreign Investors

[27] "[. . .] [T]he Tribunal is persuaded that again in this case the Claimants have *ius standi* to claim in their own right as they are protected investors under the Treaty.[1] The Claimants' right to bring an action on their own has been firmly established in the Treaty and there are no reasons to hold otherwise in connection with this dispute. Neither is this situation contrary to international law or to ICSID practice and decisions." | **[28]** "Foreign investors [. . .] were specifically invited to participate in the privatization process, various companies were set up in Argentina to this effect and investments were channelled into TGS through this network of corporate arrangements. It is simply not tenable to try now to dissociate TGS from those other companies and the investors [. . .]. This is one of the essential features of the Treaty and the protection it extends to foreign investors."

[Paras. 27, 28]

1 [10] *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Decision on Jurisdiction of December 8, 2003, pars. 62-63.

II.4.9211 QUALIFICATION AS INVESTMENT

B. Indirect Investment

[29] "The Treaty language and intent is specific in extending this protection to minority or indirect shareholders. The Tribunal must also emphasize that the definition of investment under Article I(1)(a) of the Treaty has been expressly related to the direct or indirect ownership or control by the foreign national:

> (a) 'investment' means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes without limitation:
>
> (. . .)
>
> (ii) a company or shares of stock or other interests in a company or interests in the assets thereof; [. . .]" |

[31] "Faced with this very explicit provision, the Tribunal can only conclude that indirect investments are specifically protected under the Treaty."

[Paras. 29, 31]

I.1.16 TREATY INTERPRETATION

C. Rules of the Vienna Convention on the Law of Treaties

[32] "The Tribunal's interpretation is, in addition, fully consistent with the rules on the interpretation of treaties laid down in the 1969 Vienna Convention on the Law of Treaties. Article 31.1 of this Convention provides that 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. Also Article 32 indicates the recourse to supplementary means of interpretation, including the 'preparatory work of the treaty and the circumstances of its conclusion. . .'. That the Treaty was made with the specific purpose of guaranteeing the rights of the foreign investors and encouraging their participation in the privatization process, is beyond doubt. In view of the explicit text of the Treaty and its object and purpose, it is not even necessary to resort to supplementary means of interpretation, such as the preparatory work, a step that would be required only in case of insufficient elements of interpretation in connection with the rule laid down in Article 31 of the Convention."

[Para. 32]

II.4.9211 QUALIFICATION AS INVESTMENT
See also I.2.041; I.17.011

D. Rights of Investors

[37] "The Tribunal must note [. . .] that the greatest innovation of ICSID and other systems directed at the protection of foreign investments is precisely that the rights of the investors are not any longer subject to the political and other considerations by their governments, as was the case under the old system of diplomatic protection, often resulting in an interference with those rights. Investors may today claim independently from the view of their governments." | **[39]** "The definition of investment adopted in bilateral investment treaties is a clear example of protection of minority shareholders [. . .]."

[Paras. 37, 39]

II.4.9224 FOREIGN CONTROL
See also II.4.9223

E. Treatment of Locally Incorporated Companies as Nationals of Another Contracting State

[41] "[. . .] [T]he tribunal dealt with the interpretation of Article 25(2)(b) of the Convention in connection with the meaning of 'foreign control'. This Article provides for juridical persons which have the nationality of the Contracting State party to the dispute to be able to qualify for ICSID jurisdiction when '. . .because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention'. The decision [on the *Stamp Tax Claim*] held that because there was no such agreement, the Claimant was precluded from acceding to ICSID jurisdiction." | **[42]** "The Argentine Republic believes that this is also the case here, as there has been no agreement to treat any of the Argentine companies involved as nationals of another Contracting State because of foreign control." | **[43]** "The Tribunal is not persuaded by these arguments for two reasons. The first one is that *Vacuum Salt* had been at all material times a corporation organized under the 1963 Companies Code of Ghana. There was no foreign investment contract nor any connection to a foreign investment law. There was only a minority Greek shareholder in that company." | **[44]** "The situation here is entirely different. There are specific foreign investors, who were invited by the Argentine Government to participate in the privatization process and required to organize locally incorporated companies to channel their investments. At all times this was a foreign investment operation." | **[45]** "But there is a second and still more powerful reason that convinces the Tribunal about the fact that *Vacuum Salt* was an entirely different case not comparable in any way to this one. There was no bilateral investment treaty and hence there was no specific defini-

tion of investment available." | **[46]** "The provision of Article 25(2)(b) allows for locally incorporated companies to claim in ICSID arbitration to the extent that there is an agreement to this effect. Such an agreement would be normally the outcome of the Treaty. This is what the tribunal explained in *CMS* when holding that:

> 'The reference that Article 25(2)(b) makes to foreign control in terms of treating a company of the nationality of the Contracting State party as a national of another Contracting State is precisely meant to facilitate agreement between the parties, so as not to have the corporate personality interfering with the protection of the real interests associated with the investment. The same result can be achieved by means of the provisions of the BIT, where the consent may include non-controlling or minority shareholders'.[2]"

[Paras. 41, 42, 43, 44, 45, 46]

II.4.9215 CONTRACT CLAIMS-TREATY CLAIMS

F. Decisions of ICSID Tribunals

[48] "Many tribunals have had to deal with the difference between contract-based claims and treaty-based claims, as evidenced by *Lauder*,[3] *Genin*,[4] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic ('Aguas del Aconquija')*,[5] *CMS*[6] and *Azurix*[7] as well as the Annulment Committees *in Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic (Annulment Proceeding) ('Vivendi')*[8] and *Wena Hotels Limited v. Arab Republic of Egypt ('Wena')*.[9] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan ('SGS v. Pakistan')*[10] and *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines ('SGS v. Philippines')*[11] are two other recent instances of this discussion." | **[49]** "The distinction between these different types of claims has relied in part on the test of the triple identity. To the extent that a dispute might involve the same parties, object

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2 [17] *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Decision on Jurisdiction of July 17, 2003, par. 51.

3 [18] *Ronald S. Lauder v. Czech Republic,* Uncitral Final Award, September 3, 2001.

4 [19] *Alex Genin and others v. Republic of Estonia* (ICSID Case No. ARB/99/2), Award of June 25, 2001.

5 [20] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3), Award of November 21, 2000.

6 [21] *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Decision on Jurisdiction of July 17, 2003.

7 [22] *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Decision on Jurisdiction of December 8, 2003.

8 [23] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment Proceeding of July 3, 2002.

9 [24] *Wena Hotels Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Decision on Annulment Proceeding of February 5, 2002.

10 [25] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Decision on Jurisdiction of August 6, 2003.

11 [26] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (ICSID Case No. ARB/02/6), Decision on Jurisdiction of January 29, 2004.

and cause of action it might be considered as a dispute where it is virtually impossible to separate the contract issues from the treaty issues and drawing from that distinction any jurisdictional conclusions." | **[50]** "However, as the Annulment Committee held in *Vivendi*, 'A treaty cause of action[12] is not the same as a contractual cause of action; it requires a clear showing of conduct which is in the circumstances contrary to the relevant treaty standard'.[13] The tribunal also held in *CMS* [. . .] that 'as contractual claims are different from treaty claims, even if there had been or there currently was a recourse to the local courts for breach of contract, this would not have prevented submission of the treaty claims to arbitration'.[14]" | **[51]** "In this case [. . .] the essence of the claims, like in the Stamp Tax Claim, relates to alleged violations of the Treaty rights. Having the Tribunal concluded that there are no reasons to change the conclusions on jurisdiction reached in the Stamp Tax Claim Decision, the distinction between contract-based claims and treaty-based claims looses to a great extent its significance in the present phase of the case."

[Paras. 48, 49, 50, 51]

II.4.97 DECISION ON JURISDICTION

IV. DECISION

[52] "For the reasons stated above the Tribunal decides that the present dispute is within the jurisdiction of the Centre and the competence of the Tribunal. The Order necessary for the continuation of the procedure pursuant to Arbitration Rule 41(4) has accordingly been made."

[Para. 52]

12 [27] *Ronald S. Lauder v. Czech Republic,* Uncitral Final Award, September 3, 2001, paras. 161, 163.

13 [28] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment Proceeding of July 3, 2002, para. 113.

14 [29] *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Decision on Jurisdiction of July 17, 2003, para. 80. See also *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Decision on Jurisdiction of December 8, 2003, para. 89.

Siemens A.G. v. Argentine Republic, ARB/02/8, Decision on Jurisdiction, 3 August 2004*

Original: English and Spanish

Present: Rigo Sureda, *President*
Brower, Bello Janeiro, *Arbitrators*

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* Summaries prepared by Christina Knahr, Ph.D. Candidate, Research Assistant, Department for European, International and Comparative Law, University of Vienna, Austria. The full text of the Decision is reprinted in 44 INTERNATIONAL LEGAL MATERIALS 138 (2005) and available online at <http://www.worldbank.org/icsid/cases/siemens-decision-en.pdf>. Original footnote numbers are indicated in brackets: [ ].

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

II.4.911 REQUEST FOR ARBITRATION
See also I.17.011

I. THE DISPUTE

[1] "On May 23, 2002, the International Centre for Settlement of Investment Disputes (hereinafter 'ICSID' or 'the Centre') received from Siemens A.G. (hereinafter 'Siemens' or 'the Claimant') a request for arbitration against the Argentine Republic (hereinafter 'the Respondent' or 'Argentina'). [. . .]" | **[23]** "In August 1996, the Respondent invited bids for a contract to establish a system of migration control and personal identification ('the System'). The bidding terms required that a local company be established by bidders in order to participate in the bidding process. The Claimant established, through its wholly-owned affiliate Siemens Nixdorf Informationssysteme AG ('SNI'), a local corporation, Siemens IT Services S.A. ('SITS')." | **[25]** "SITS' bid won the contract, which was signed on October 6, 1998 and approved by Decree No. 1342/98 ('the Contract'). [. . .] Siemens proceeded to make the required investments through capital contributions to SITS and funds provided to SITS to enable it to carry out its obligations under the Contract." | **[26]** "On December 10, 1999, a new Government came to power in Argentina and in February 2000 it suspended the contract allegedly because of technical problems. [. . .] On May 18, 2001, the Respondent terminated the Contract by Decree No. 669, issued under Emergency Law 25.344. [. . .]" | **[27]** "On July 23, 2001, Siemens had notified the Respondent of a breach of the Treaty between the Federal Republic of Germany and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investments, signed on April 9, 1991 ('the Treaty'), triggering a six-month negotiation period under the Treaty. [. . .]"

[Paras. 1, 23, 25, 26, 27]

II.4.94 APPLICABLE LAW
See also II.4.92

II. APPLICABLE LAW

[31] "Argentina in its allegations has not distinguished between the law applicable to the merits of the dispute and the law applicable to determine the Tribunal's jurisdiction. This being an ICSID Tribunal, its jurisdiction is governed by Article 25 of the ICSID Convention and the terms of the instrument expressing the parties' consent to ICSID arbitration, namely, Article 10 of the Treaty. Therefore, the Tribunal needs to assess whether the Request for Arbitration meets the requirements of Article 25 of the ICSID Convention and of Article 10 of the Treaty."

[Para. 31]

III. OBJECTIONS TO JURISDICTION

A. Breach of Treaty Requirements by Siemens

I.2.0411 EXHAUSTION OF LOCAL REMEDIES
See also I.1.16; II.4.92; I.17.22; II.1.211

1. Treaty Interpretation

[32] "The Claimant has invoked the most-favored-nation ('MFN') clause of the Treaty to avoid, as is permitted under the Treaty between Argentina and Chile concerning the Reciprocal Encouragement and Protection of Investments of October 2, 1991 ('the Chile BIT'), a prior submission of the dispute to the local courts. [. . .]" | **[33]** "Argentina considers that the scope of the MFN clause can be determined only through interpretation of the specific treaty in which it appears[.] [. . .]" | **[35]** "Argentina argues that the MFN clause in the Treaty precludes an investor from invoking the Chile BIT. [. . .]" | **[36]** "It is the contention of Argentina that the text of Article 3(1) of the Treaty refers only to investments and the treatment of investments. It does not cover treatment to be accorded to holders of investments. [. . .]" | **[81]** "The Tribunal considers that the Treaty has to be interpreted neither liberally nor restrictively, as neither of these adverbs is part of Article 31(1) of the Vienna Convention. The Tribunal shall be guided by the purpose of the Treaty as expressed in its title and preamble. It is a treaty 'to protect' and 'to promote' investments. The preamble provides that the parties have agreed to the provisions of the Treaty for the purpose of creating favorable conditions for the investments of nationals or companies of one of the two States in the territory of the other State. [. . .] The intention of the parties is clear. It is to create favorable conditions for investments and to stimulate private initiative."

[Paras. 32, 33, 35, 36, 81]

2. MFN Clause

I.17.22 MFN-TREATMENT
See also I.1.16; I.17.011

a. Article 3 of the BIT

[82] "There are three clauses in the Treaty that refer to MFN treatment: Article 3(1), Article 3(2) and Article 4(4). The Tribunal will consider first the MFN clauses in Article 3, which for ease of reference are reproduced here:

> Article 3(1): None of the Contracting Parties shall accord in its territory to the investments of nationals or companies of the other Contracting Party or to investments in which they hold shares, a less favorable treatment than

> the treatment granted to the investments of its own nationals or companies or to the investments of nationals or companies of third States.
>
> Article 3(2): None of the Contracting Parties shall accord in its territory to nationals or companies of the other Contracting Party a less favorable treatment of activities related to investments than granted to its own nationals and companies or to the nationals and companies of third States. [. . .]" |

[83] "The exceptions in Article 3 to no less favorable treatment refer to privileges agreed in the context of customs or economic unions and of free trade areas (Article 3(3)), and to advantages granted in taxation-related agreements (Article 3(4)). The Protocol complements these exceptions by excluding measures dictated by internal or external security or public order concerns, and the fiscal advantages, exemptions or reductions granted to each Contracting Party's nationals or companies (Ad Article 3 (a) and (b)). In addition, the Protocol states that 'activities' refers 'specially but not exclusively to the administration, use and benefit of an investment', and that measures that affect the purchase of raw materials and other inputs and means of production in or outside each Contracting Party will be, 'specially but not exclusively', considered measures of less than favorable treatment (Ad Article 3 (a))." | **[85]** "The first two clauses of Article 3 refer simply to a 'not less favorable treatment'—'trato no menos favorable' in the Spanish version. 'Treatment' in its ordinary meaning refers to behavior in respect of an entity or a person. The term 'treatment' is neither qualified nor described except by the expression 'not less favorable'. The term 'activities' is equally general. The need for exceptions confirms the generality of the meaning of treatment or activities rather than setting limits beyond what is said in the exceptions. In clarifying in the Protocol the term 'activities' used in Article 3(2), the drafters were careful to qualify twice that the clarification is special but not exclusive. This is a clear indication that the clarifications do not limit the meaning of the term 'activities'. They simply emphasize matters of particular concern to the parties. When the parties meant to provide an outright limitation by way of an exception they have done so in paragraphs (3) and (4) of Article 3 and in the Protocol in relation to security measures or taxation privileges of nationals or national companies. If it were the intention to limit the content of Article 3 beyond the limits of those exceptions, then the terms 'treatment' or 'activities' would have been qualified. The fact that this is not the case is an indication of their intended wide scope. Treatment in Article 3 refers to treatment under the Treaty in general and not only under that article." | **[86]** "For these reasons, the Tribunal finds that a plain and contextual reading of Article 3(1) and (2) does not limit the treatment to transactions of a commercial and economic nature in relation to exploitation and management of investments as alleged by Argentina. This understanding of Article 3(1) and (2) is reinforced by the consideration that the term 'companies', as defined in the Treaty, includes

'companies or associations [. . .] independently from whether or not the purpose of their activity is the pursuit of profit'. [. . .] The competitiveness argument advanced by Argentina would effectively exclude non-profit organizations from protection under the Treaty."

[Paras. 82, 83, 85, 86]

I.17.22 MFN-TREATMENT
See also I.17.132; I.17.25

b. Article 4 of the BIT

[88] "Article 4 provides that:

> '(1) The investments of nationals or companies of each Contracting Party shall enjoy full protection and legal security in the territory of the other Contracting Party.
>
> (2) [This paragraph deals with expropriation and compensation and is not necessary to reproduce for the present discussion]
>
> (3) The nationals or companies of one of the Contracting Parties that suffer losses in their investments because of war or other armed conflict, revolution, national state of emergency or insurrection in the territory of the other Contracting Party, shall not be treated by such party less favorably than its own nationals or companies as to restitution, compensation, indemnities or other. These payments will be freely transferable.
>
> (4) The nationals or companies of each Contracting Party shall enjoy in the territory of the other Contracting Party the treatment of the most favored nation in all matters covered in this Article.' [. . .]" |

[89] "For purposes of considering the Respondent's interpretation, the Tribunal needs to consider in detail the provisions of Article 4 in comparison with Article 3. The Tribunal notes first that Article 4(4) is restricted to 'matters covered in this Article'. No such limitation exists in Article 3. The Article 4 MFN clause further refers to nationals or national companies, a subjective element which is lacking in Article 3(1). Whether this is significant the Tribunal will discuss later in considering the differentiation between investments and investors argued by Argentina. There is no reference to national treatment except in Article 4(3) in relation to losses caused by war or disturbances. Only Article 3 refers to investments jointly owned by the foreign investor with nationals or national companies of the Contracting Party where the investment has been made."

[Paras. 88, 89]

I.1.16 TREATY INTERPRETATION
See also I.17.011; I.17.22

c. Conclusion of the Tribunal Regarding Art. 3 and Art. 4 of the BIT

[90] "The Tribunal concludes from this textual comparison that references to MFN treatment or to national treatment in Article 4 do not detract from the generality of Article 3 nor make Article 4 superfluous. To the extent that there is an overlap, it needs to be understood as covering areas of special interest to the parties. Compensation on account of expropriation or of civil war or other violent disturbances is a key issue in the treatment of foreign investment and foreign nationals and a specific reference to it would seem congruent with its importance. The Tribunal considers that the parties to a treaty are not precluded from placing emphasis on certain matters *ex abundante cautela*. The repeated provision in a particular context stresses the concern of the parties in respect of that particular matter rather than limiting the scope of clauses of general character."

[Para. 90]

I.17.2 TREATMENT OBLIGATIONS
See also I.1.16; I.17.011

d. Protection of Investors or Investments under Art. 3 of the BIT

[92] "The Tribunal notes that Article 3 refers to treatment of investments in paragraph (1), while the exceptions refer to investors. On the other hand, there is a double reference to investments and investors in Article 4, paragraphs 1 and 4, respectively. It could be argued based on this use of the terms 'investments' and 'investors' that the exceptions in Article 3 do not apply to investments and that unless in each case both terms are used, as it is the case in Article 4, then the provision concerned applies only to one or the other as the case may be. The Tribunal has difficulty with such argument. The Treaty is a treaty to promote and protect investments, investors do not figure in the title. Fair and equitable treatment would be reserved to investments, and denial of justice to an investor would be excluded. While these considerations may follow a strict logical reasoning based on the terms of the Treaty, their result does not seem to accord with its purpose. More consistent with it is to consider that, in Article 3, treatment of the investments includes treatment of the investors and hence the need to provide for exceptions that refer to them. In the same vein, the reference to investors and investments in Article 4 is a matter of emphasis, not of exclusion. In other instances, the subjective element is just a matter of plain common sense, e.g., in clauses dealing with the transfer of payments, dispute settlement, and activities in relation to investments: these actions need to be taken by a person, physical or legal. The Tribunal finds that, for pur-

poses of applying the MFN clause, there is no special significance to the differential use of the terms investor or investments in the Treaty."

[Para. 92]

I.17.21 NATIONAL TREATMENT
See also I.17.22

e. National Treatment

[93] "The reference to national treatment in Article 3(1) and (2) is provided as one alternative, the other being treatment not less favorable than the treatment granted to nationals or to nationals or companies of a third State. The obligation is dual. The State has undertaken not to give treatment less favorable in either situation. It may happen that advantages granted to nationals of a third State result in more favorable treatment than that enjoyed by the nationals of the grantor State. In that situation, reference to national treatment does not limit the advantages that investors may have by operation of the MFN clause. The obligations of the State under Article 3 (1) and (2) refer to a minimum level of treatment, not a ceiling. If advantages granted to nationals of a third State would not be granted under the MFN clause simply because they exceed national treatment, then the State would breach the obligation to grant not less favorable treatment under that clause. The simple ordinary meaning of this clause is that investors should not be discriminated against for being foreigners and at the same time should be given the best treatment afforded any other foreign investor. This treatment is irrespective of whether the investment has been made solely by foreign investors or jointly or in association with local investors."

[Para. 93]

I.2.0411 EXHAUSTION OF LOCAL REMEDIES
See also I.17.011; II.4.93

f. Exhaustion of Local Remedies

[104] "The Respondent has argued that Article 10(2) is a 'moderate' version of the exhaustion of local remedies rule and that that rule may not be tacitly waived. It is an essential element of its consent to arbitration and is related to sensitive economic and foreign policy issues. The Tribunal concurs with the Respondent in that the Contracting Parties had intended through 10(2) to give the local tribunals an opportunity to decide a dispute first before it would be submitted to international arbitration. However, this does not mean that this provision requires the exhaustion of local remedies as this

rule has been understood under international law.[1] Article 10(2) does not require a prior final decision of the courts of the Respondent. It does not even require a prior decision of a court at any level. It simply requires the passing of time or the persistence of the dispute after a decision by a court. Then, even if this decision is one subject to appeal, the requirement of Article 10(2) would have been fulfilled. For these reasons, the Tribunal considers that Article 10(2) is not comparable to the local remedies rule and the issue of a tacit waiver of a rule of international law does not arise." | **[105]** "As to the claim that Article 10(2) reflects the policy of Argentina, the Respondent has not presented any evidence beyond its affirmations to this effect in the written pleadings. The Tribunal would consider an indication of the existence of a policy of the Respondent if a certain requirement has been consistently included in similar treaties executed by the Respondent. The Chile BIT was signed on August 2, 1991, only a few months before the Treaty. The Spain BIT was entered into on October 3, 1991. The US-Argentina BIT, which does not require institution of judicial proceedings prior to arbitration, was executed on November 14, 1991. This lack of consistency among the BITs entered into by the Respondent during the same year as the Treaty was signed does not support the argument that the institution of proceedings before the local courts is a 'sensitive' issue of economic or foreign policy or that it is an essential part of the consent of the Respondent to arbitration. The Respondent has sought for its own nationals as investors in Chile or the United States similar treatment to that sought by the Claimant in these proceedings."

[Paras. 104, 105]

I.17.22 MFN-TREATMENT

g. Application of the MFN Clause

[109] "[. . .] [T]he Tribunal considers that, as a general matter, claiming a benefit by the operation of an MFN clause does not carry with it the acceptance of all the terms of the treaty which provides for such benefit whether or not they are considered beneficial to the party making the claim; neither does it entail that the claiming party has access to all benefits under such treaty. This will depend on the terms of the MFN clause and other terms of the treaties involved. The Tribunal concurs with *Maffezini* that the beneficiary of the MFN clause may not override public policy considerations judged by the parties to a treaty essential to their agreement.[2] [. . .] the

1 [88] Ibid. [*Emilio Agustin Maffezini v. The Kingdom of Spain* (ICSID Case No. ARB/97/7), Decision on Objections to Jurisdiction of January 25, 2000] para. 28.

2 [90] Decision on Jurisdiction, paras. 62-63.

Tribunal considers that the public policy considerations adduced by the Respondent are not applicable.[3]"

[Para. 109]

I.17.22 MFN-TREATMENT
See also I.2.05

B. Submission of the Dispute to Local Jurisdiction

[118] "The allegations of the parties raise two issues: (i) whether by claiming a benefit through the MFN clause all provisions of the treaty providing for that benefit then apply; and (ii) whether there is a difference between the terms 'local jurisdiction' and 'ordinary jurisdiction' used in the Chile BIT and the Treaty, respectively, for purposes of applying the fork-in-the-road clause under the Chile BIT or the requirement to submit a dispute first to the local courts under the Treaty." | **[120]** "[. . .] The Tribunal recognizes that there may be merit in the proposition that, since a treaty has been negotiated as a package, for other parties to benefit from it, they also should be subject to its disadvantages. The disadvantages may have been a trade-off for the claimed advantages. However, this is not the meaning of an MFN clause. As its own name indicates, it relates only to more favorable treatment. There is also no correlation between the generality of the application of a particular clause and the generality of benefits and disadvantages that the treaty concerned may include. Even if the MFN clause is of a general nature, its application will be related only to the benefits that the treaty of reference may grant and to the extent that benefits are perceived to be such. As already noted, there may be public policy considerations that limit the benefits that may be claimed by the operation of an MFN clause, but those pleaded by the Respondent have not been considered by the Tribunal to be applicable in this case." | **[121]** "[. . .] [T]he Tribunal concludes that the Claimant may limit the application of the Chile BIT to direct access to international arbitration. Therefore, there is no further need to consider the allegations of the parties on the fork-in-the-road provision of the Chile BIT or the nature of the jurisdictions referred to in the Treaty and the Chile BIT."

[Paras. 118, 120, 121]

3 [91] Supra, para. 105.

C. *Ius Standi* of Siemens

II.4.9211 QUALIFICATION AS INVESTMENT

1. Definition of Investment

[137] "The Tribunal has conducted a detailed analysis of the references in the Treaty to 'investment' and 'investor'. 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 specific categories of investment included in the definition are included as examples rather than with the purpose of excluding those not listed. 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".[4] The plain meaning of this provision is that shares held by a German shareholder are protected under the Treaty. The Treaty does not require that there be no interposed companies between the investment and the ultimate owner of the company. Therefore, a literal reading of the Treaty does not support the allegation that the definition of investment excludes indirect investments."

[Para. 137]

I.17.133 COMPENSATION

2. Direct and Indirect Claims

[138] "The arguments related to Ad Article 4 of the Protocol refer to indirect claims by a shareholder based on damage to the company in which it holds shares. [. . .] It reads as follows: 'The right to be compensated also exists when measures defined in Article 4 are adopted in respect of a company where the investment has been made and as a result of such measures the investment is severely prejudiced.' The term 'measures' in Article 4 of the Treaty is used only in the context of expropriation or measures tantamount to expropriation. This Article and the addition in the Protocol read together indicate that the right to be compensated is based on damage suffered by the investment directly, or indirectly through 'measures' taken against the company. It is not sufficient for the company in which the investment has been made to suffer damage. This damage has to have a detrimental effect on the investment. This effect is the cause of the State's responsibility under the Treaty." | **[139]** "[. . .] The Tribunal considers that this clause focuses on damage to the investment directly, or indirectly through measures

4 [124] Article 1(1) b).

taken against the company in which the investment has been made, rather than on who may base a claim on it. The provision speaks of a right to compensation, without specifying who may claim such a right, whether directly or indirectly. The use of 'also' should be read in the same light. It is established in the Treaty that the right to be compensated exists in case of expropriation and measures having the equivalent effect, and 'also' in the case of measures directed against the company in which the investment has been made. Therefore, in the opinion of the Tribunal, the arguments related to indirect claims based on these provisions are misplaced." | **[140]** "It follows from this conclusion that there is no merit in the allegation that the provision for indirect claims in Article 4 and the corresponding provision of the Protocol are an indication that such claims are not permitted under other provisions of the Treaty. [. . .]" | **[142]** "As regards ICSID case law dealing with the issue of the right of shareholders to bring a claim before an arbitral tribunal, the decisions of arbitral tribunals have been consistent in deciding in favor of such right of shareholders. [. . .]"

[Paras. 138, 139, 140, 142]

II.4.9214 DISPUTE ARISING DIRECTLY OUT OF AN INVESTMENT

D. Dispute Arising Directly Out of an Investment

[150] "As described by Siemens, its investment consists of: 'shares, rights of participation in companies and other types of participation', 'claims to money that has been used to create economic value or claims to any performance under a contract having an economic value', 'intellectual property rights', and 'business concessions conferred by public law.' There is no doubt that the dispute with Argentina under the Treaty is a dispute which arises directly from the investment as defined by Siemens. The quality of a direct dispute is not affected by Siemens not being the direct shareholder of the local company. This is a separate question. For purposes of Article 25(1), a dispute may arise directly out of an investment made directly or indirectly by an investor. Whether in that situation the investor qualifies as such will depend on the definition of investor in the treaty or the terms of the investment contract. The direct requirement under the ICSID Convention is related to the investment dispute, not to whether the investor is direct or indirect."

[Para. 150]

II.4.9213 LEGAL DISPUTE

E. Existence of a Dispute

[159] "For a dispute to exist, according to the ICJ, there must be 'a disagreement on a point of law or fact, a conflict of legal views or interests between

the parties.'[5] [. . .]" | **[160]** "The Tribunal considers that this issue is of a historical nature. The administrative appeals were rejected shortly after the notification of the dispute by Decree 1205/01, which confirmed Decree 669/01 on September 24, 2001. As Siemens has framed its claim, the claim goes beyond expropriation measures and it is a claim under the Treaty by a party different from the party that instituted the proceedings in Argentina. There are certainly conflicting interests between the parties, and opposed legal views on the significance of certain facts and on whether the dispute is a dispute of a contractual nature or a dispute under the Treaty. The Tribunal is satisfied that a real dispute exists." | **[161]** "Concerning the critical date to determine whether a dispute exists, the Tribunal considers that for purposes of the Treaty the dispute must exist at the time of the notice of arbitration. It has to exist also at the time the dispute is filed with the ICSID Secretariat and at the time of registration. The Tribunal has examined the correspondence between the Claimant and the Respondent between July 12, 2001, date of the communication of the Claimant to the Respondent to start amicable consultations for purposes of Article 10(1) of the Treaty, and March 18, 2002, date of the notice of the Claimant to the Respondent concerning its consent to arbitration. It is evident from this correspondence that a dispute existed at the time and that the parties even considered to submit it jointly to arbitration. [. . .]"

[Paras. 159, 160, 161]

II.4.9215 CONTRACT CLAIMS-TREATY CLAIMS
See also II.4.92; II.4.93

F. Specific Jurisdictional Clause in the Contract

[180] "[. . .] The Tribunal concurs with decisions of previous ICSID arbitral tribunals [. . .] and in particular recalls the statement made by the *Ad hoc* Annulment Committee in *Vivendi* to the effect that 'A treaty cause of action is not the same as a contractual cause of action; it requires a clear showing of conduct which is in the circumstances contrary to the treaty standard. The availability of local courts ready and able to resolve specific issues [. . .] is not dispositive, and it does not preclude an international tribunal from considering the merits of the dispute.' [. . .] Arbitral tribunals have found that a dispute arising out of a contract may give rise to a claim under a bilateral investment treaty. The dispute as formulated by the Claimant is a dispute under the Treaty. At this stage of the proceedings, the Tribunal [. . .] simply has to be satisfied that, if the Claimant's allegations would be proven correct, then the Tribunal has jurisdiction to consider them." | **[181]** "As regards Article 26 of the Convention, the first sentence reads as follows: 'Consent of the parties to arbitration under this Convention shall, unless

5 [144] *Case concerning East Timor*, 1995 ICJ Reports, p. 89.

otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.' This provision presumes exclusivity of the remedies under the Convention unless the parties had agreed otherwise. Article 26 does not provide that what may be agreed otherwise excludes the remedies under Convention. In that case, the remedies under the Convention are not exclusive but neither are those otherwise agreed. This understanding of Article 26 is confirmed by the decision on jurisdiction in *Southern Pacific Properties (Middle East) Limited (SPP) v. The Arab Republic of Egypt*: 'Article 26 says that consent to ICSID jurisdiction, unless otherwise stated, shall be deemed to exclude other remedies. Thus failure to waive other remedies does not impair consent to ICSID jurisdiction.'[6]"

[Paras. 180, 181]

II.4.97 DECISION ON JURISDICTION
See also II.1.9

IV. DECISION OF THE TRIBUNAL

[184] "The Tribunal has considered the parties' arguments in their written and oral pleadings and for the reasons above stated the Tribunal finds that:

1. The Tribunal has jurisdiction of Siemens' claims as set forth in its Request for Arbitration and its Memorial on the Merits.

2. Siemens has *ius standi* to present the claims referred in 1. above.

The Tribunal has, accordingly, made the necessary Order under Arbitration Rule 41(4) for the continuation of the procedure." |

[185] "Each party has requested that the costs of the jurisdictional phase of the proceedings, including its own costs, be borne by the other. The Tribunal further decides to consider this matter as part of the merits. [. . .]"

[Paras. 184, 185]

6 [171] 3 *ICSID Reports*, p. 112.

Joy Mining Machinery Limited v. The Arab Republic of Egypt, ARB/03/11, Decision on Jurisdiction, 6 August 2004*

Original: English

Present: Orrego Vicuña, *President*
Craig, Weeramantry, *Arbitrators*

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* Summaries prepared by Christina Knahr, Ph.D. Candidate, Research Assistant, Department for European, International and Comparative Law, University of Vienna, Austria. The full text of the Decision is reprinted in 44 INTERNATIONAL LEGAL MATERIALS 73 (2005) and available online at <http://www.worldbank.org/icsid/cases/joy-mining-award.pdf>. Original footnote numbers are indicated in brackets: [ ].

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

II.4.911 REQUEST FOR ARBITRATION
See also I.17.011

I. PROCEDURE

[1] "The International Centre for Settlement of Investment Disputes ('ICSID' or 'the Centre') received a request for arbitration, under cover of a letter dated February 26, 2003, against the Arab Republic of Egypt ('Egypt' or the 'Respondent') from Joy Mining Machinery Limited ('Joy Mining' or the 'Claimant'), a company incorporated under the laws of England and Wales. The request invoked the ICSID arbitration provisions in the United Kingdom-Arab Republic of Egypt Agreement for the Promotion and Protection of Investments which entered into force on February 24, 1976 (the 'Treaty' or 'BIT')."

[Para. 1]

II. THE DISPUTE

A. Subject-matter of the Dispute

[15] "The dispute in this case arises out of a 'Contract for the Provision of Longwall Mining Systems and Supporting Equipment for the Abu Tartur Phosphate Mining Project' (the 'Contract'), executed on April 26, 1998 between Joy Mining Machinery Limited and the General Organization for Industrial and Mining Projects of the Arab Republic of Egypt ('IMC'). Following various disagreements between the parties, the Contract was amended by an agreement of November 8, 2000 ('Amendment Agreement')." | **[16]** "[. . .] The Contract envisaged two stages. The first concerned the partial replacement of equipment already existing at the Project site supplied by other companies ('Replacement Longwall'), while the second stage comprised a new Longwall System ('First New Longwall')." | **[17]** "The total Contract price amounted to UK £ 13,325,293. Letters of guarantee for Contract Performance, Advance Payment and Remaining Payment or Balance were supplied by the Company for each of the Contract's stages, amounting to a total of UK £ 12,950,737. This amount was later reduced by the Amendment Agreement to UK £ 9,605,228. These guarantees have been renewed at various points in time and are currently in place at the Bank of Alexandria. The Contract and later the Amendment Agreement provided for a timetable and conditions for the release of these guarantees connected to the performance of the equipment and to the achievement of certain levels of production." | **[18]** "Installation of the equipment on site began in February 1999 and since the outset each party has claimed that performance problems which surfaced are to be blamed on the other. [. . .]" | **[19]** "Disagreement persisted between the parties as to technical aspects related to the commissioning and performance tests of the equipment. However,

the Company was paid the full purchase price of the equipment in accordance with the Contract. The guarantees have not been released by IMC and, as mentioned, have been renewed by the Company several times in order to prevent their drawdown. [. . .]"

[Paras. 15, 16, 17, 18, 19]

B. Arguments of the Claimant

II.4.9211 QUALIFICATION AS INVESTMENT
See also I.17.1; I.17.24; I.17.25

[22] "[. . .] The Company claims that the Contract is an investment under this Treaty and that the decisions by IMC and Egypt not to release these guarantees are in violation of the Treaty. In particular, it is claimed that nationalization or measures having an effect equivalent to expropriation have been undertaken in respect of the bank guarantees, that the free transfer of funds has been prevented, that discrimination has taken place and that, generally, fair and equitable treatment and full protection and security have not been accorded."

[Para. 22]

I.17.3 CONTRACT VIOLATION
See also I.17.05

[23] "In addition, the Company argues that the dispute concerns also the breach of the Contract and Egyptian law, particularly the Egyptian Civil Code, because Joy Mining has not been allowed to carry out the commissioning and performance testing of the equipment, the guarantees have not been released and compensation has not been paid."

[Para. 23]

III. OBJECTIONS TO JURISDICTION

II.1.211 OBJECTIONS TO JURISDICTION

A. Preliminary Considerations of the Tribunal

[29] "[. . .] It is often argued [. . .] that the Tribunal needs only to be satisfied that if the facts or the contentions alleged by the Claimant are ultimately proven true, they would be capable of constituting a violation of the Treaty. This is in fact the *prima facie* test [. . .] that, for the limited purpose of determining jurisdiction, the Claimants' factual contentions are prima facie deemed to be correct. In the Respondent's submission, however, this is not an absolute rule that prevents the Tribunal from further examining the Claimant's assertions." | **[30]** "The Tribunal notes that the prima facie test

has also been applied in a number of ICSID cases, including *Maffezini*,[1] *CMS*,[2] *Azurix*,[3] *SGS v. Pakistan*[4] *and Salini v. Morocco*.[5] As a *prima facie* approach to jurisdictional decisions this is no doubt a useful rule. However, it is a rule that must always yield to the specific circumstances of each case. If [. . .] the parties have such divergent views about the meaning of the dispute in the light of the Contract and the Treaty, it would not be appropriate for the Tribunal to rely only on the assumption that the contentions presented by the Claimant are correct. The Tribunal necessarily has to examine the contentions in a broader perspective, including the views expressed by the Respondent, so as to reach a jurisdictional determination. This is the procedure the Tribunal will adopt."

[Paras. 29, 30]

B. Objection Concerning the Existence of an Investment

II.4.9211 QUALIFICATION AS INVESTMENT
See also I.1.16

1. Do Bank Guarantees Qualify as an Investment?

[42] "The question that the Tribunal must answer is accordingly whether or not bank guarantees are to be considered an investment. [. . .]" | **[43]** "The Tribunal will examine first the meaning and extent of the Company's claim in the light of the Treaty. [. . .] Article 1 of the Treaty provides for a variety of activities to be considered as investments, including pledges, claims to money, all kinds of assets and other matters." | **[44]** "The first contention of the Company in this respect is that the bank guarantees constitute an asset which thus qualifies under the definition of investment of the Treaty. [. . .] The Tribunal is not persuaded by the Company's argument that this is an investment, as a bank guarantee is simply a contingent liability. [. . .]" | **[45]** "To conclude that a contingent liability is an asset under Article 1(a) of the Treaty and hence a protected investment, would really go far beyond the concept of investment [. . .]." | **[46]** "The Company has also asserted that its claim falls within Article I (a) (iii) of the Treaty which includes within the scope of investment 'claims to money or to any performance under con-

1 [3] *Emilio Agustín Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7), Decision on Objections to Jurisdiction of January 25, 2000, 16 *ICSID Rev.—FILJ* 212 (2001).

2 [4]*CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Decision on Jurisdiction of July 17, 2003, 42 *ILM* 788 (2003).

3 [5] *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Decision on Jurisdiction of December 8, 2003, *International Law in Brief* (Dec. 2003), *available at* http://www.asil.org/ilib/azurix.pdf.

4 [6] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Decision on Objections to Jurisdiction of August 6, 2003, 18 *ICSID Rev.—FILJ* 301 (2003).

5 [7] *Salini Construttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* (ICSID Case No. ARB/00/4), Decision on Jurisdiction of July 23, 2001, 129 *Journal du droit international* 196 (2002) [French original]; English translation in 42 *ILM* 609 (2003).

tract having a financial value', and that it also should be considered a 'pledge' under Article I (a) (i) of the Treaty." | **[47]** "The Tribunal is not persuaded by this argument either. Even if a claim to return of performance and related guarantees has a financial value it cannot amount to recharacterizing as an investment dispute a dispute which in essence concerns a contingent liability. [. . .]"

[Paras. 42, 43, 44, 45, 46, 47]

I.1.16 TREATY INTERPRETATION

2. Considerations Regarding Article 25 of the ICSID Convention

[49] "The fact that the Convention has not defined the term investment does not mean, however, that anything consented to by the parties might qualify as an investment under the Convention. The Convention itself, in resorting to the concept of investment in connection with jurisdiction, establishes a framework to this effect: jurisdiction cannot be based on something different or entirely unrelated. [. . .] there is a limit to the freedom with which the parties may define an investment if they wish to engage the jurisdiction of ICSID tribunals." | **[50]** "The parties to a dispute cannot by contract or treaty define as investment, for the purpose of ICSID jurisdiction, something which does not satisfy the objective requirements of Article 25 of the Convention. Otherwise Article 25 and its reliance on the concept of investment, even if not specifically defined, would be turned into a meaningless provision."

[Paras. 49, 50]

II.4.9211 QUALIFICATION AS INVESTMENT

3. ICSID Cases Dealing with Question of Definition of Investment

[51] "A number of ICSID cases have dealt with the question of the definition of investment, confirming generally that a host of activities can be included within this concept. Thus, *Alcoa Minerals v. Jamaica* held that contribution of capital was one type of investment;[6] *Amco Asia* first annulment proceeding established that an international tort and an investment dispute were not mutually exclusive categories;[7] *Fedax* recognized that promissory notes issued in certain circumstances qualified as an investment; *CSOB* admitted that a loan was in the circumstances of the case an invest-

6 [14] *Alcoa Minerals of Jamaica, Inc. v. Jamaica* (ICSID Case No. ARB/74/2), Decision on Jurisdiction and Competence of July 6, 1975, 4 *Yearbook Commercial Arbitration* 206 (1979) (excerpts); and see also the comment by Carolyn B. Lamm, *Jurisdiction of the International Centre for Settlement of Investment Disputes*, 6 ICSID Rev. —FILJ 462 at 475.

7 [15] *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), *Ad hoc* Committee Decision of May 16, 1986, 1 *ICSID Reports* 503 (1993); and see also the comment by Carolyn B. Lamm, 6 *ICSID Rev. —FILJ* 462 at 475.

ment; *Atlantic Triton* accepted as an investment the conversion of equipment of fishing vessels; *Salini v. Morocco* did so in connection with the construction of a highway; and *SGS v. Pakistan* included within the concept of investment pre-shipment inspection activities and other services, as also did *SGS v. Philippines*.[8]" | **[53]** "Summarizing the elements that an activity must have in order to qualify as an investment, both the ICSID decisions mentioned above and the commentators thereon have indicated that the project in question should have a certain duration, a regularity of profit and return, an element of risk, a substantial commitment and that it should constitute a significant contribution to the host State's development.[9] To what extent these criteria are met is of course specific to each particular case as they will normally depend on the circumstances of each case."

[Paras. 51, 53]

II.4.9211 QUALIFICATION AS INVESTMENT

4. Examination of the Contract as a Whole

[54] "The requirement mentioned above, that a given element of a complex operation should not be examined in isolation because what matters is to assess the operation globally or as a whole, is a perfectly reasonable one in the view of the Tribunal. Accordingly, it has undertaken an examination of the Contract as a whole in order to determine whether it could qualify as an investment under Article 25 of the Convention, although as explained the Tribunal is only called to determine the status and implications of the bank guarantees." | **[55]** "[. . .] [A]dmittedly the Contract involves a number of additional activities mentioned above, such as engineering and design, production and stocking of spare parts and maintenance tools and incidental services such as supervision of installation, inspection, testing and commissioning, training and technical assistance. This is certainly a special feature of contracts relating to the supply of complex equipment. But it does not transform the Contract into an investment [. . .]." | **[56]** "The terms of the Contract are entirely normal commercial terms, including those governing the bank guarantees. No reference to investment is anywhere made and no steps were taken to qualify it as an investment under the Egyptian mechanisms for the authorization of foreign investments nor were any steps taken to take advantage of any of the many incentives offered by that country to foreign investors. [. . .]" | **[57]** "The duration of the commitment is not particularly significant [. . .]. Neither is therefore the regularity of profit and return. Risk there might be indeed, but it is not different from that involved in any commercial contract [. . .]. The amount of the price and

8 [16] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (ICSID Case No. ARB/02/6), Decision of the Tribunal on Objections to Jurisdiction of January 29, 2004, *available at* http://www.worldbank.org/icsid/cases/SGSvPhil-final.pdf.

9 [18] Christoph H. Schreuer, *The ICSID Convention: A Commentary* (2001), at 140.

of the bank guarantees is relatively substantial [. . .] but it is only a small fraction of the Project. [. . .]" | **[58]** "The Tribunal is also mindful that if a distinction is not drawn between ordinary sales contracts, even if complex, and an investment, the result would be that any sales or procurement contract involving a State agency would qualify as an investment. International contracts are today a central feature of international trade and have stimulated far reaching developments in the governing law [. . .]. Yet, those contracts are not investment contracts, except in exceptional circumstances, and are to be kept separate and distinct for the sake of a stable legal order. [. . .]"

[Paras. 54, 55, 56, 57, 58]

II.4.921 JURISDICTION *RATIONE MATERIAE*
See also II.1.213

5. Conclusion of the Tribunal Regarding This Jurisdictional Objection

[63] "For the reasons discussed above, the Tribunal concludes that it lacks jurisdiction to consider this dispute because the claim falls outside both the Treaty and the Convention. This conclusion would render it unnecessary to discuss the other jurisdictional objections and issues raised by the Respondent. However, the Tribunal will consider these other issues in order to make certain clarifications concerning the nature of the Contract and the role of the forum selection clause contained therein."

[Para. 63]

C. Objection Concerning Contract and Treaty-based Claims

II.4.9215 CONTRACT CLAIMS—TREATY CLAIMS

1. Distinction Between Commercial Aspects of a Dispute and Treaty Issues

[72] "The Tribunal is mindful that any answer to this question must be case specific as every contract and many treaties are different. However, a basic general distinction can be made between commercial aspects of a dispute and other aspects involving the existence of some form of State interference with the operation of the contract involved." | **[75]** "[. . .] To the extent that a dispute might involve the same parties, object and cause of action[10] it might be considered to be a dispute where it is virtually impossible to separate the contract issues from the treaty issues and to draw any jurisdictional conclusions from a distinction between them. A purely contractual claim, however, will normally find difficulty in passing the jurisdictional test of

10 [32] *Lauder v. Czech Republic*, UNCITRAL Final Award of September 3, 2001, paras. 161, 163.

treaty-based tribunals, which will of course require allegation of a specific violation of treaty rights as the foundation of their jurisdiction. [. . .]"

[Paras. 72, 75]

I.17.1 EXPROPRIATION
See also I.17.24; I.17.25

2. Non-release of the Bank Guarantee

[78] "[. . .] [A] bank guarantee is clearly a commercial element of the Contract. The Claimant's arguments to the effect that the non-release of the guarantee constitutes a violation of the Treaty are difficult to accept. In fact, the argument is not sustainable that a nationalization has taken place or that measures equivalent to an expropriation have been adopted by the Egyptian Government. Not only is there no taking of property involved in this matter, either directly or indirectly, but the guarantee is to be released as soon as the disputed performance under the Contract is settled. It is hardly possible to expropriate a contingent liability. Although normally a specific finding to this effect would pertain to the merits, in this case not even the prima facie test would be met. The same holds true in respect of the argument concerning the free transfer of funds and fair and equitable treatment and full protection and security."

[Para. 78]

II.4.9211 QUALIFICATION AS INVESTMENT

3. Disputes About Bank Guarantees Are Contractual Disputes

[79] "Disputes about the release of bank guarantees are a common occurrence in many jurisdictions and the fact that a State agency might be a party to the Contract involving a commercial transaction of this kind does not change its nature. It is still a commercial and contractual dispute to be settled as agreed to in the Contract, including the resort to arbitration if and when available. [. . .] It is not transformed into an investment or an investment dispute."

[Para. 79]

I.17.4 UMBRELLA CLAUSE

4. Transformation of Contract Disputes into Investment Disputes

[81] "In this context, it could not be held that an umbrella clause inserted in the Treaty [. . .] could have the effect of transforming all contract disputes into investment disputes under the Treaty, unless of course there would be a clear violation of the Treaty rights and obligations or a violation of contract rights of such a magnitude as to trigger the Treaty protection, which is

not the case. The connection between the Contract and the Treaty is the missing link that prevents any such effect. [. . .]"

[Para. 81]

II.4.921 JURISDICTION *RATIONE MATERIAE*
See also II.1.213

5. Conclusion of the Tribunal Regarding This Jurisdictional Objection

[82] "The Tribunal concludes therefore that, even if for the sake of argument there was an investment in this case, the absence of a Treaty-based claim, and the evidence that, on the contrary, all claims are contractual, justifies the finding that the Tribunal lacks jurisdiction. Neither has it been credibly alleged that there was Egyptian State interference with the Company's contract rights."

[Para. 82]

D. Objection Concerning the Forum Selection Clause under the Contract

II.4.95 FORUM SELECTION CLAUSE

1. Forum Selection Clause in the Contract

[89] "Having concluded that there is no investment in this case and that, moreover, all the claims involved are in any event contract-based claims, it is necessary also to conclude that in the absence of any ICSID jurisdiction only the forum selection clause stands. There is no question here of either exclusive ICSID jurisdiction or of concurrent jurisdiction; even less so is there room here to adopt the solution of *SGS v. Philippines*, directing the parties to local courts first and suspending ICSID jurisdiction until that first step is completed." | **[90]** "The situation in this case is precisely that which the *Vivendi Annulment Committee* envisaged when holding that

> 'In a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract'.[11]" |

[91] "The rationale for this conclusion on contract-based claims and the validity of forum selection clauses is entirely logical, as is the conclusion in the converse situation, that is, as in *Vivendi,* that the claim is treaty-based:

> '. . .where 'the fundamental basis of the claim' is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claim-

11 [40] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on application for annulment, July 3, 2002, 41 *ILM* 1135 (2002), para. 98.

ant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard'.[12]" |

[92] "[. . .] The forum selection clause in the Contract does not refer the dispute solely to domestic courts [. . .] but provides in addition for a separate mechanism of international arbitration. [. . .]"

[Paras. 89, 90, 91, 92]

II.4.95 FORUM SELECTION CLAUSE
See also I.2.05; II.1.213; II.4.986

2. Conclusion of the Tribunal Regarding This Jurisdictional Objection

[97] "The Tribunal accordingly notes that IMC is under an obligation to observe the Contract forum selection clause in so far as resort to UNCITRAL proceedings has been agreed to and to abide by the decisions on the merits by the Tribunal thus seized of the matter. The Tribunal also notes that the approval of the Contract by the Minister for Industry is the expression of the consent given by the Egyptian State to UNCITRAL arbitration [. . .]." | **[98]** "[. . .] [T]he Tribunal also takes note that the Egyptian State is under an international legal obligation to facilitate the enforcement of any award issued in this case to the extent that the intervention of the State is required." | **[99]** "The option of resorting to Egyptian courts is also precluded by the Declaration made as the obligations both to resort to arbitration and abide by its results have been solemnly recorded."

[Paras. 97, 98, 99]

II.4.97 DECISION ON JURISDICTION
See also I.2.05; II.1.9; II.4.95; II.4.986

IV. DECISION

"In the light of the above considerations, the Tribunal decides:

a. The Centre lacks jurisdiction and the Tribunal lacks competence to consider the claims made by the Company.

b. The Tribunal notes that IMC is under the obligation to observe the Contract forum selection clause in so far as arbitration in the Cairo Regional Arbitration Centre governed by the UNCITRAL Arbitration Rules might be initiated by the Company, and to abide by any award issued in respect of this dispute.

c. The Tribunal further takes note that the approval of the Contract by the Minister of Industry constitutes the consent given by the Egyptian

12 [41] *Id.* para. 101.

State for IMC to submit disputes under the Contract to UNCITRAL Arbitration and that such consent to IMC's agreement to arbitrate has been expressly confirmed by Declaration made in this arbitration by counsel on behalf of the Egyptian State.

d. The Tribunal also takes note that the Egyptian State is under an international legal obligation to facilitate the enforcement of any award issued in this case to the extent that the intervention of the State is required.

e. The Tribunal further notes that the option of submitting the Contract disputes to the Egyptian courts as provided for in the Contract forum selection clause is effectively precluded by the above mentioned Declaration if the Company initiates arbitration proceedings.

f. Each Party shall pay one half of the arbitration costs.

g. Each Party shall bear its own legal costs."

Salini Costruttori S.p.A. and Italstrade S.p.A. v. the Hashemite Kingdom of Jordan, ARB/02/13, Decision on Jurisdiction, 29 November 2004*

Original: English

Present: Guillaume, *President*
Cremades, Sinclair, *Arbitrators*

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* Summaries prepared by Christina Knahr, Ph.D. Candidate, Research Assistant, Department for European, International and Comparative Law, University of Vienna, Austria. The full text of the Decision is reprinted in 44 International Legal Materials 573 (2005) and available online at <http://www.worldbank.org/icsid/cases/salini-decision.pdf>. Original footnote numbers are indicated in brackets: [ ].

I. THE DISPUTE

[1] "On 12 August 2002, the International Center for Settlement of Investment Disputes ('ICSID' or 'the Center') received from Salini Costruttori S.P.A. and Italstrade S.P.A., both companies incorporated under the laws of Italy (the 'Claimants') a request for arbitration, dated 8 August 2002, against the Hashemite Kingdom of Jordan ('Jordan' or the 'Respondent'). [. . .]" | **[14]** "[. . .] Salini Costruttori S.p.A (Italy) and Italstrade S.p.A. (Italy) state that in 1992, the Government of Jordan issued an international invitation to submit tenders for the award of a public works contract called 'Construction of the Karameh Dam Project'. The companies submitted their best offer in May 1993, and were awarded the Contract which was signed on 4 November 1993 between the Joint Venture, made up of the two companies, (as Contractor) and the Ministry of Water and Irrigation-Jordan Valley Authority (as Employer). The work was completed in October 1997, as certified by the Engineer appointed by the Respondent." | **[15]** "On 22 April 1999, the Claimants submitted to the Engineer and to the Respondent a draft final statement setting out the total outstanding amount claimed to be due to them, equivalent to approximately US$ 28 million, net of interest and financing charges. On 25 May 1999, the Engineer informed the Contractor that, according to its evaluations, it was only entitled to 33,759.54 Jordanian Dinars (US$49,140)."

[Paras. 1, 14, 15]

II. JURISDICTIONAL ISSUES

II.4.92 JURISDICTION

A. Jurisdiction under Art. 25 ICSID Convention

[62] "The jurisdiction of the Tribunal to consider the present case must be established under the Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States (the ICSID Convention). Article 25 (1) of the Convention sets out the criteria to be met in order for ICSID to have jurisdiction over a specific dispute. [. . .]"

[Para. 62]

II.4.9222 CONSTITUENT SUBDIVISION OR AGENCY OF A CONTRACTING STATE

B. Constituent Subdivision or Agency of a Contracting State

[63] "[. . .] [I]n the case of a dispute between an investor and a constituent subdivision or agency of a Contracting State [. . .] the Tribunal notes that ICSID jurisdiction may extend to such disputes by agreement of the Par-

ties. However, in cases involving a constituent subdivision or agency of a Contracting State, ICSID jurisdiction is made subject to two further conditions: firstly, the constituent subdivision or agency must have been designated to the Center by the State to that effect; secondly, under Article 25(3), 'Consent by a Constituent Subdivision or Agency of a Contracting State shall require the approval of that State unless that State notifies the Center that no such approval is required.'" | **[64]** "[. . .] [I]n the present case, the Claimants' submissions are directed only against Jordan as Contracting State to the Washington Convention and, consequently, the provisions of Article 25 concerning ICSID jurisdiction over constituent subdivisions or agency are not applicable. [. . .]"

[Paras. 63, 64]

II.4.93 CONSENT TO ICSID ARBITRATION
See also I.17.011

C. Consent to ICSID Arbitration

[65] "[. . .] [I]n order to establish ICSID jurisdiction, the Claimants do not invoke a provision of the contract they have concluded for the construction of the Karameh Dam. They rely exclusively upon the Agreement between the Government of the Italian Republic and the Government of the Hashemite Kingdom of Jordan on the Promotion and Protection of Investments of 21 July 1999 (the BIT), combined with their own consent contained in the Request for Arbitration. Following a well established practice, the Tribunal considers that the combination of these two forms of consent can constitute 'consent in writing' within the meaning of Article 25(1), provided that the dispute falls within the scope of the BIT."

[Para. 65]

III. INTERPRETATION OF THE ITALY-JORDAN BIT

I.1.16 TREATY INTERPRETATION
See also I.17.011

A. Article 9 (2) of the BIT

[70] "The Tribunal notes that under Article 9(2) of the BIT, '[i]n case the investor and an entity of the Contracting Parties have stipulated an investment Agreement, the procedure foreseen in such investment agreement shall apply'." | **[76]** "The Tribunal cannot agree with the Claimants' argument according to which Article 9(2), would apply only to procedures for the amicable settlement of disputes. This paragraph is incorporated into an article relating to 'settlement of disputes between investors and contracting Parties' in general. It covers 'the procedure foreseen in the Investment

Agreement stipulated between an investor and an entity of a Contracting State'. This type of procedure generally comprises several steps, closely interconnected, the last one being recourse to courts or to arbitration and, indeed, clause 67 organises such steps: referral of the dispute to the Engineer; decision taken by the Engineer; note to commence litigation or arbitration; attempt to settle the dispute amicably within a certain time limit; and, eventually, initiation of the litigation or arbitration. Article 9(2), which is worded in general terms, covers all these procedures." | **[77]** "In this respect, the arguments drawn by the Claimants from the context cannot prevail over the text itself. It is true, as stressed by the Claimants, that the exception provided for in Article 9(2) has been incorporated between Article 9(1) on amicable settlement, and Article 9(3) on settlement by courts or arbitration. However, it is difficult to draw any consequences from this placement: one could indeed, as the Claimants do, argue that Article 9(2) has the same scope as Article 9(1) which it follows. One could also argue that it has the same scope as Article 9(3) which it precedes. One may finally consider that it concerns both amicable settlement and settlement by courts or arbitration." | **[78]** "Moreover, the fact that Article 9(3) covers 'the event that such dispute cannot be settled amicably' does not imply that the word 'dispute' in that text is a dispute under Article 9(2), all the more so that the word 'dispute' is not used in that provision." | **[79]** "In fact, Articles 9(1) and (3) correspond to standard clauses of settlement of disputes and Article 9(2) has been incorporated into the text to make a general exception to those standard provisions. The common intention of the Parties is reflected in this clear text that the Tribunal has to apply."

[Paras. 70, 76, 77, 78, 79]

B. "Entity of the Contracting Party"

[81] "The Jordan Valley Authority (JVA) was established under Jordan law no 19 of 1998 entitled 'Jordan Valley Development Law'. Under Article 3 of that law, the JVA 'shall undertake inter alia the development of the water resources of the valley and utilizing them'. It will also carry out 'all the works related to the development, utilization, protection and conservation of these resources', including 'the planning, design, construction, operation and maintenance of irrigation projects and related structures and works of all types and purposes, including dams'." | **[82]** "Under Article 13 of the law, 'the Authority shall be considered an autonomous corporate body'. 'It may conclude contracts'. In conformity with Article 17(b), 'all Authority funds shall be deposited in a special account or accounts at the Central Bank'. The Authority has 'its own cadre of Employees'. The classified Employees are subject to the Civil Service Law. The others are under a specific status." | **[83]** "Under Article 8, the Authority is composed of the Minister of Water and Irrigation, the Board of Directors, the Secretary

General and the Staff. The Board of Directors is chaired by the Minister. The Secretary General of the JVA is Vice-Chairman. The Board comprises representatives of various Ministries and one Member 'with expertise and specialization' appointed by the Cabinet." | **[84]** "In conclusion, it appears that, although the Government exercises a strict control over the JVA, this Authority is an autonomous corporate body, distinct legally and financially from the State of Jordan. It must thus be considered as an 'entity' of the Kingdom of Jordan within the meaning of Article 9(2)."

[Paras. 81, 82, 83, 84]

C. Parties to the Contract

[86] "In this respect, the Tribunal will first observe that the agreement was made on 4 November 1993 'between the Ministry of Water and Irrigation—Jordan Valley Authority of PO Box 2769, Amman, Jordan (hereinafter called the Employer) of the one part and MS/Joint Venture Salini Costruttori SPA Italstrade SPA Rome Italy (hereinafter called 'the Contractor') of the other part'. The contract is signed 'Employer—Minister of Water and Irrigation—Bassam E, KAKISH'. 'In the presence of Dr. eng. Abdul Aziz al-Weshah—Secretary General' with those two signatures. The stamp put on the Contract reads: 'The Hashemite Kingdom of Jordan—Ministry of Water and Irrigation—Jordan Valley Authority—Tenders and Procurement'." | **[91]** "[. . .] [I]t appears that the Contract was signed by the Minister and the Secretary-General of the JVA, both acting on behalf of the JVA. It was implemented as a JVA Contract." | **[92]** "The Tribunal concludes [. . .] that an [I]nvestment Contract was concluded between the Jordanian Valley Authority, an entity of the Jordanian State, with the Claimants. Therefore Article 9(2) does not deprive the Tribunal of the jurisdiction it may have under other provisions of the BIT to entertain such treaty claims. The procedure foreseen in the [I]nvestment Agreement accordingly applies."

[Paras. 86, 91, 92]

II.4.9215 CONTRACT CLAIMS—TREATY CLAIMS

D. Contract Claims—Treaty Claims

[96] "[. . .] [T]he Tribunal will note that the dispute settlement procedures provided for in the Contract could only cover claims based on breaches of the Contract. Those procedures cannot cover claims based on breaches of the BIT (including breaches of those provisions of the BIT guaranteeing fulfillment of contracts signed with foreign investors). Therefore Article 9(2)

does not deprive the Tribunal of such jurisdiction, as it may have, to entertain treaty claims of this nature under other provisions of the BIT."

[Para. 96]

I.1.16 TREATY INTERPRETATION
See also I.17.011

E. Article 9(1) and 9(3) of the BIT

[97] "Under Article 9(1) of the BIT quoted above, disputes which 'may arise between one of the contracting Parties and the investors of the other contracting Party on investments including disputes relating to the amount of compensation, shall be settled amicably'. Under Article 9(3), 'in the event such dispute cannot be settled amicably within six months from the date of the written application by settlement, the investor in question may submit the dispute for settlement' either to the contracting Party's Court having territorial jurisdiction' or to ICSID (this last option having been chosen in the present case)." | **[100]** "The Tribunal recalls that there is no question as to the application of the dispute settlement mechanism provided for in Articles 9(1) and 9(3) in the event that there is an alleged breach of a provision of the BIT. The point at issue in the present case is whether the mechanism is equally applicable to contractual disputes. The Tribunal notes that ICSID Tribunals have taken divergent positions on this matter in cases of alleged breaches of contracts entered into between a foreign investor and a State Party to a BIT. But such is not the case in this instance. Indeed, the contract at issue was entered into between the Claimants and the Jordan Valley Authority, which under the laws of Jordan governing the contract, has a legal personality distinct from that of the Jordanian State (see para. 84 above). Now, one may doubt whether Articles 9(1) and 9(3) also cover breaches of a contract concluded in name between an investor and an entity other than a State Party, and the Tribunal observes that several ICSID tribunals have already handed down decisions against such extensions of jurisdiction (see *Salini Costruttori and Italstrade v. Kingdo[m] of Morocco*, case No. ARB/00/06, decision of 23 July 2001 on jurisdiction, paras. 60 to 62; *Consortium RFCC v. Kingdom of Morocco*, case No. ARB/00/06, Decision of 22 December 2003 on jurisdiction, paras. 67 to 69)." | **[101]** "However, the Tribunal will not be required to decide on whether Articles 9(1) and 9(3), taken in isolation, could cover the contractual disputes at issue in this instance. In fact, Article 9(2) of the BIT makes it obligatory to refer such disputes to the dispute settlement mechanisms provided for in the contracts and, where such disputes are concerned, excludes recourse to the procedure set forth in Article 9(3) for such disputes (see para. 60 above)."

[Paras. 97, 100, 101]

I.17.22 MFN-TREATMENT
See also I.1.16; I.17.011

F. MFN Clause

[118] "[. . .] Article 3 of the BIT between Italy and Jordan does not include any provision extending its scope of application to dispute settlement. It does not envisage 'all rights or all matters covered by the agreement'. Furthermore, the Claimants have submitted nothing from which it might be established that the common intention of the Parties was to have the most-favored-nation clause apply to dispute settlement. Quite on the contrary, the intention as expressed in Article 9(2) of the BIT was to exclude from ICSID jurisdiction contractual disputes between an investor and an entity of a State Party in order that such disputes might be settled in accordance with the procedures set forth in the investment agreements. Lastly, the Claimants have not cited any practice in Jordan or Italy in support of their claims." | **[119]** "From this, the Tribunal concludes that Article 3 of the BIT does not apply insofar as dispute settlement clauses are concerned. Therefore the disputes foreseen in Article 9(1) of the BIT concluded between Jordan and Italy must be settled in accordance with the said Article. In the event that, as in this case, the dispute is between a foreign investor and an entity of the Jordanian State, the contractual disputes between them must, in accordance with Article 9(2), be settled under the procedure set forth in the investment agreement. The Tribunal has no jurisdiction to entertain them."

[Paras. 118, 119]

I.17.4 UMBRELLA CLAUSE
See also I.1.16; I.17.011

G. Umbrella Clause

[126] "The Tribunal notes that Article 2(4) of the BIT between Italy and Jordan is couched in terms that are appreciably different from the provisions applied in the arbitral decisions and awards cited by the Parties. Under Article 2(4), each contracting Party committed itself to create and maintain in its territory a 'legal framework' favourable to investments. This legal framework must be apt to guarantee to investors the continuity of legal treatment. It must in particular be such as to ensure compliance of all undertakings assumed under relevant contracts with respect to each specific investor. But under Article 2(4), each Contracting Party did not commit itself to 'observe' any 'obligation' it had previously assumed with regard to specific investments of investors of the other contracting Party as did the Philippines. It did not even guarantee the observance of commitments it had entered into with respect to the investments of the investors of the other Contracting Parties as did Pakistan. It only committed itself to create

and maintain a legal framework apt to guarantee the compliance of all undertakings assumed with regard to each specific investor." | **[127]** "Of course, each State Party to the BIT between Italy and Jordan remains bound by its contractual obligations. However, this undertaking was not reiterated in the BIT. Therefore, these obligations remain purely contractual in nature and any disputes regarding the said obligations must be resolved in accordance with the dispute settlement procedures foreseen in the contract. Contrary to what the Claimants argue, this is not at all an absurd solution: the States Parties to the BIT are still bound by their treaty obligations as well as their contract obligations, but the dispute settlement procedures in each case are different." | **[128]** "Articles 2(5) and 11 of the BIT invoked by the Claimants could not lead to any other conclusion. The first of these two provisions merely stipulates that 'Each Contracting Party or its designated Agency may stipulate with an investor of the other Contracting Party an investment agreement which will govern the specific legal relationship related to the investment of the investor concerned'. The Tribunal finds it difficult to see how such a provision could lead to an interpretation of Article 2(4) that is different from the interpretation given in the previous paragraph." | **[129]** "Article 11 of the BIT entitled 'Application of other provisions' covers in its paragraph 1 the case in which a matter is governed both by the agreement and other treaty or customary rules of international law. It considers in its paragraph 2 the case where the treatment accorded by one Contracting Party to the investors of the other Contracting Party according to its laws and regulations or other provisions or specific contract or investment authorizations or agreements is more favourable than that provided under the BIT. In both cases, the most favourable treatment applies. Under paragraph 2 of Article 11 '[i]n case the host Contracting Party has not applied such treatment . . . and the investors suffer a damage as a consequence thereof, the investors shall be entitled to a compensation of such damages'." | **[130]** "This Article is, to take the terms of the decision in the *SGS v. Philippines* case, 'a kind of without prejudice clause' (Decision on jurisdiction, para. 114, and notes 45 and 46) and in the opinion of the Tribunal, it could not have the effect of incorporating the commitments it mentions into the BIT (see *Young hi Oo Trading Pta v. Government of the Union of Myanmar* (ASEAN I.D. Case No. ARB/01/1 (2003) 42—ILM 540, 556.7 (paras. 79-82)."

[Paras. 126, 127, 128, 129, 130]

II.1.41 BURDEN OF PROOF

IV. BURDEN OF PROOF

[136] "The Tribunal observes that the Claimants are free to present facts they rely upon and claims they advance in the way they think appropriate. It is up to the Claimants to characterize these claims as they see fit, and, in

particular, to identify the contractual and/or Treaty provisions, which, according to them, have been violated."

[Para. 136]

V. FURTHER JURISDICTIONAL ISSUES

II.4.92 JURISDICTION

A. Determination of Its Jurisdiction by the Tribunal

[137] "When considering its jurisdiction to entertain those claims, the Tribunal must not address the merits of the claims, but it must satisfy itself that it has jurisdiction over the dispute, as presented. This has been recognized both by the International Court of Justice and by Arbitral Tribunals in many cases." | **[150]** "[. . .] [I]n *UPS v Canada,* the Arbitral Tribunal established under the NAFTA decided in its Decision on Jurisdiction that the customary rule of international law, on which the applicant based part of its claims, did not exist and, consequently, that the claim based on such a rule was not within the jurisdiction of the Tribunal." | **[151]** "The Tribunal is in full agreement with this jurisprudence. It reflects the balance to be struck between two opposing preoccupations: to ensure that courts and tribunals are not flooded with claims which have no chance of success and sometimes are even of an abusive nature; but to ensure equally that, in considering issues of jurisdiction, courts and tribunals do not go into the merits of cases without sufficient prior debate. In conformity with this jurisprudence, the Tribunal will accordingly seek to determine whether the facts alleged by the Claimants in this case, if established, are capable of coming within those provisions of the BIT which have been invoked."

[Paras. 137, 150, 151]

II.4.9215 CONTRACT CLAIMS—TREATY CLAIMS

B. Breach of Contract—Breach of Treaty

[154] "[. . .] [N]ot any breach of an investment contract could be regarded as a breach of a BIT. In the words of the Arbitral Tribunal in *Consortium RFCC v. Kingdom of Morocco*, a breach of the substantive provisions of a bilateral investment treaty can certainly result from a breach of contract, without a possible breach of the contract constituting, ipso jure and by itself, a breach of the Treaty. (See para. 48 of the Award)." | **[155]** "In fact, the State, or its emanation, may have behaved as ordinary cocontractants having a difference of approach, in fact or in law, with the investor. In order that the alleged breach of contract may constitute unfair or inequitable treatment within the meaning of the bilateral agreement, it must be the result of behaviour going beyond that which an ordinary contracting party could

adopt. Only the State, in the exercise of its sovereign authority (*puissance publique*), and not as a contracting party, has assumed obligations under the bilateral agreement. (ibid, para. 51). In other words, an investment protection treaty cannot be used to compensate an investor deceived by the financial results of the operation undertaken, unless he proves that his deception was a consequence of the behaviour of the receiving State acting in breach of the obligations which it had assumed under the treaty. (ibid, para. 108)" | **[156]** "Similarly in the case of *Joy Mining Machinery Limited v. Arab Republic of Egypt* (ICSID case No. ARB/03/11), an ICSID Arbitral Tribunal, in its Decision on jurisdiction of 6 August 2004, (paras. 72 and 82) stated that 'a basic general distinction can be made between commercial aspects of a dispute and other aspects involving the existence of some forms of State interference with the operation of the contract involved'. It concluded in the case that 'the absence of a Treaty-based claim, and the evidence that, on the contrary, all claims are contractual, justifies the finding that the Tribunal lacks jurisdiction. Neither has it been credibly alleged that there was Egyptian State interference with the Company's Contract rights.'" | **[157]** "This solution is all the more apposite because the rules of attribution governing responsibility for the performance of contract obligations may differ from those governing responsibility for the performance of BIT obligations. [. . .]"

[Paras. 154, 155, 156, 157]

I.11.0 STATE RESPONSIBILITY

C. Responsibility of Jordan

[157] "[. . .] [U]nder Jordanian law, the legal personality of the JVA is distinct from that of the Jordanian State; accordingly, it cannot be ruled out that Jordan might not be held responsible for JVA's breaches of contract. Nevertheless, in public international law, a State may be held responsible for the acts of local public authorities or public institutions under its authority and it cannot be ruled out that the Jordanian State may be held responsible for the acts of the JVA. (see the *ad hoc* Committee's Annulment Decision in the above-mentioned *Vivendi* case (para. 96))."

[Para. 157]

II.4.9215 CONTRACT CLAIMS—TREATY CLAIMS

D. Contract Claims—Treaty Claims

[160] "[. . .] [T]his Tribunal does not have jurisdiction in respect of the contractual breaches and could entertain them only if the alleged breaches were simultaneously to constitute breaches of the treaty. [. . .]"

[Para. 160]

II.4.93 CONSENT TO ICSID ARBITRATION

E. Consent to Arbitration in the Contract

[165] "In this regard, the Tribunal notes that pursuant to Article 67.2 of the General Conditions of the contract, 'any dispute in respect of which amicable settlement has not been reached . . . shall be finally settled by reference to the competent court of law in the Kingdom [of Jordan], unless both parties shall agree that the dispute be referred to arbitration'. It is not disputed that the contract contained a binding arbitration clause and that resort to contractual arbitration accordingly required the consent of both Parties. The Claimants contend that Jordan gave such consent which Jordan denies. Thus the Claimants do not assert that there has been a breach of contract in this regard; rather, they claim that Jordan reneged on an undertaking it had given, although it was not contractually bound to give it." | **[166]** "The Tribunal observes that, here again, the file submitted by the Claimants is lacking, in terms of both the facts and the law (and notably the alleged practice of Jordan as regards resort to arbitration). The Tribunal, however, does not believe that it must rule out from the outset that the alleged facts, if established, may constitute breaches of Articles 2(3) and 2(4) of the BIT. The objection to jurisdiction submitted on this point by Jordan cannot be upheld."

[Paras. 165, 166]

II.4.92 JURISDICTION
See also I.1.16; I.17.011

VI. JURISDICTION *RATIONE TEMPORIS*

[169] "The Tribunal will first observe that it is not required to decide on its jurisdiction *ratione temporis* with respect to the contractual claims filed by the Claimants. It is no more required to decide on its jurisdiction *ratione temporis* with respect to the treaty claims based on Article 2(3) of the BIT dealt with in paras. 158 to 163 above. In fact, it results from the foregoing (see paras 119, 127 and 163) that the Tribunal has no jurisdiction to entertain those claims, regardless of the date when a dispute concerning them arose between the Parties. The Tribunal will therefore address the issue of its jurisdiction *ratione temporis* only with regard to the treaty claim relating to the alleged commitment of Jordan to submit the dispute to arbitration (see paras. 164 to 166 above)." | **[170]** "In this respect, the Tribunal notes that Articles 9(1) and (3) of the BIT cover 'any dispute which may arise between one of the contracting Parties and the investors of the other contracting Party on investments'. Such language does not cover disputes which may have arisen before the entry into force of the BIT, but only disputes arising after 17 January 2000." | **[175]** "[. . .] [T]he dispute relating to the alleged commitment of Jordan to submit the dispute to contractual arbitra-

tion arose well after the 17 January 2000, date of entry into force of the BIT between Jordan and Italy. The Tribunal has jurisdiction *ratione temporis* to hear the 'Treaty claims' brought on this point by the Claimants." | **[176]** "However, the Tribunal observes that one must distinguish carefully between jurisdiction *ratione temporis* of an ICSID Tribunal and applicability *ratione temporis* of the substantive obligations contained in a BIT." | **[177]** "In this respect, the Tribunal notes that Article 1(1) of the BIT does not give the substantive provisions of the Treaty any retrospective effect. Thus, the normal principle stated in Article 28 of the Vienna Convention of Treaties applies and the provisions of the BIT 'do not bind the Party in relation to any act or facts which took place or any situation which ceased to exist before the date of entry into force of the Treaty' (see *SGS v. Republic of the Philippines*, ICSID Case No. ARB/02/6, decision of the Tribunal on objections to jurisdiction, paras. 165 and 166; see also *Mondev International [L]td. v. United States of America* (2002)-6, ICSID Reports 192, p. 208-9 (paras. 68-70)." | **[178]** "In the present case, the Claimants complain of breaches of the BIT occurring after 20 February 2000. The Treaty entered into force on 17 January 2000. In this respect also, the Tribunal has jurisdiction *ratione temporis* to hear the Treaty claims relating to the alleged commitment of Jordan to submit the dispute to arbitration."

[Paras. 169, 170, 175, 176, 177, 178]

II.4.97 DECISION ON JURISDICTION

VII. DECISION OF THE TRIBUNAL

[179] "For the foregoing reasons, the Tribunal unanimously:

(a) Decides that this Tribunal has jurisdiction over the Claimants' claims that Jordan, by refusing to accede to the Claimants' request to refer the dispute to arbitration pursuant to Article 67(3) of the Contract, breached Articles 2(3) and Article 2(4) of the Bilateral Investment Treaty concluded between Jordan and Italy on 21 July 1996;

(b) Decides that the Tribunal has no jurisdiction over the Claimants' other claims;

(c) Makes the necessary order for the continuation of the procedure pursuant to Arbitration rule 41(4); and

(d) Reserves all questions concerning the costs and expenses of the Tribunal and the costs of the Parties for subsequent determination."

[Para. 179]

Systematic Index of the Section*

* *See* Systematic Classification Scheme, at page 335 of Volume I.