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INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID)

INTRODUCTORY NOTE

From the Intricacies of *Ratione Personae* Jurisdiction to Failed Justifications on the Merits under the Necessity Defence—ICSID Arbitration in 2005

I. Introduction

The decisions and awards rendered by ICSID tribunals during the year 2005 have again contributed to the growing body of ICSID case-law, clarifying a number of highly important aspects of investor-State dispute settlement. This introductory note is intended to provide a selective overview of some of the most salient issues addressed by the 2005 ICSID cases.

II. Jurisprudential Reflections

While it is generally accepted that the decisions of ICSID tribunals, like those of other investment dispute settlement mechanisms, are not legally binding precedents, it becomes increasingly apparent that ICSID tribunals very carefully analyze and rely on the reasoning employed in previous decisions—a phenomenon also witnessed before other international courts and tribunals such as the ICJ or WTO Panels and the WTO Appellate Body.[1] This practice of developing a kind of *de facto* case-law has been aptly characterized in the *Gas Natural* case[2] where the tribunal emphasized "that it has rendered its decision independently, without considering itself bound by any other judgments or arbitral awards."[3] However, the tribunal "thought it useful to compare its conclusion with the conclusions reached in other recent arbitrations conducted pursuant to the ICSID Arbitration Rules"[4] and found that there were no "decisions or awards reaching a contrary conclusion."[5]

Also in *AES* v. *Argentina*,[6] another of the many claims currently pending against Argentina, the jurisprudential relevance of decisions of other ICSID tribunals was discussed. The tribunal reaffirmed earlier findings of other ICSID tribunals to the effect that "the decisions of ICSID tribunals are not

1 *Cf.* Raj Bhala, *The Precedent Setters: De facto stare decisis in WTO Adjudication*, 9 JOURNAL OF TRANSNATIONAL LAW & POLICY 1 (1999).

2 *Gas Natural SDG, S.A.* v. *The Argentine Republic,* ICSID Case No. ARB/03/10, Decision on Jurisdiction, 17 June 2005.

3 *Gas Natural*, *supra* note 2, para. 36.

4 *Id.*

5 *Id.*

6 *AES Corporation* v. *The Argentine Republic,* ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005.

binding precedents and that every case must be examined in the light of its own circumstances."[7] Nevertheless, the *AES* tribunal stressed that "decisions on jurisdiction dealing with the same or very similar issues may at least indicate some lines of reasoning of real interest"[8] and that "[s]uch precedents may also be rightly considered, at least as a matter of comparison and, if so considered by the Tribunal, of inspiration."[9] Indeed, it would be hard to imagine that the many ICSID tribunals, currently hearing factually similar claims against Argentina which are frequently based on similarly worded or even identical BIT provisions, should not take into account what earlier decisions have held with regard to similar issues. To act otherwise would deprive ICSID dispute settlement of its predictability and thus of an important facet of legal certainty. One may also expect that with the increased use of the ICSID-specific control mechanism of annulment proceedings under Article 52(1) ICSID Convention,[10] a body of case-law will emerge similar to what happened in the context of WTO-jurisprudence resulting from decisions of the Appellate Body. It is this potential development which the *AES* tribunal alludes to when it finds that "the institutional dimension of the control mechanisms provided for under the ICSID Convention might well be a factor, in the longer term, for contributing to the development of a common legal opinion or *jurisprudence constante*, to resolve some difficult legal issues discussed in many cases, inasmuch as these issues share the same substantial features."[11]

III. Jurisdictional Issues

A. Jurisdiction *Ratione Materiae*

One of the frequently controversial jurisdictional issues before ICSID tribunals is the question whether a dispute has arisen "directly out of an investment" as required by Article 25 ICSID Convention.[12] The lack of definition

7 *Enron Corporation and Ponderosa Assets, L.P.* v. *The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (Ancillary Claim), 2 August 2004, para. 25, cited in *AES*, *supra* note 6, para. 23.

8 *AES*, *supra* note 6, para. 30.

9 *Id.*, para. 31.

10 Article 52(1) ICSID Convention, 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), provides: "Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

(a) that the Tribunal was not properly constituted;

(b) that the Tribunal has manifestly exceeded its powers;

(c) that there was corruption on the part of a member of the Tribunal;

(d) that there has been a serious departure from a fundamental rule of procedure; or

(e) that the award has failed to state the reasons on which it is based."

11 *AES*, *supra* note 6, para. 33.

12 Article 25(1) ICSID Convention, *supra* note 10, provides: "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any

of the notion of investment under the Convention[13] has been compensated, at least to a certain degree, by the case-law of ICSID panels. Building on criteria developed by scholars, many tribunals have required 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 in order to qualify as an "investment" under Article 25 ICSID Convention.[14] Sometimes also referred to as *Salini* criteria, pursuant to the jurisdictional decision in *Salini* v. *Morocco*,[15] these requirements have been reaffirmed in the 2005 *LESI-Dipenta* case.[16] This case arose from the termination of a concession agreement for the construction of a dam in Algeria entered into by the two Italian claimant companies and an Algerian agency. While it was beyond dispute between the parties that the Italian companies had to be compensated, they failed to agree on an appropriate amount of compensation. When the claimants instituted ICSID proceedings Algeria raised a number of jurisdictional challenges, among them that the construction contract did not constitute an "investment" under the ICSID Convention. The *LESI-Dipenta* tribunal rejected this claim reaffirming that "investment" under Article 25 of the ICSID Convention requires the making of a contribution of economic value to the host State, a certain duration of the contribution and a certain degree of risk for the party making the contribution.[17] The tribunal concluded that all three criteria had been fulfilled in the pertinent case of an infrastructure construction agreement.

B. Jurisdiction *Ratione Personae*

The subject-matter jurisdiction of ICSID tribunals depends upon the cumulative existence of an "investment" according to Article 25 of the ICSID Convention and according to the applicable BIT or other instrument ex-

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."

13 *See* August Reinisch, *From Contested Jurisdiction to Indirect Expropriation and Fair and Equitable Treatment—Developments in ICSID Arbitration in 2004*, 5 The Global Community YILJ 1653 (G. Ziccardi Capaldo ed., 2005-II), at 1657.

14 Christoph Schreuer, The ICSID Convention: A Commentary (2001), at 140; Emmanuel Gaillard, C.I.R.D.I.—*Chronique des Sentences Arbitrales*, 126 Journal du Droit International 273 (1999), at 278. Approvingly cited in *Joy Mining Machinery Limited* v. *Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Decision on Jurisdiction, 6 August 2004, 44 International Legal Materials 73 (2005), para. 53.

15 *Salini Costruttori S.p.A. and Italstrade S.p.A.* v. *Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, 42 International Legal Materials 609 (2003).

16 *Consorzio Groupement L.E.S.I.—DIPENTA* c/ *République algérienne démocratique et populaire*, ICSID Case No. ARB/03/08, Decision on Jurisdiction, 10 January 2005.

17 *L.E.S.I.-Dipenta*, *supra* note 16, Part 2.2 para. 13.

pressing "consent" to the Centre's jurisdiction.[18] Similarly, the personal jurisdiction of ICSID tribunals does not only depend upon the Convention's requirement that one party be a "Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State)" and the other a "national of another Contracting State."[19] In addition, the specific provisions of the applicable instrument expressing consent, today mostly found in BITs, have to be fulfilled.

The *Plama* case[20] nicely illustrates this "double requirement." The case involved a company incorporated in Cyprus which alleged that Bulgaria had interfered with its investment, an oil refinery in Bulgaria. Plama invoked the Energy Charter Treaty (ECT)[21] which in its Article 26 provided for ICSID dispute settlement in case of a dispute between "a Contracting Party and an Investor of another Contracting Party." Both Cyprus and Bulgaria were—at the time of the institution of ICSID proceedings—parties to both the ICSID Convention and the ECT. However, Bulgaria contended that the ownership of Plama was uncertain and included persons who were not nationals of contracting parties to the ECT. Because it had availed itself of the possibility under the so-called denial-of-benefits clause of the ECT[22] by sending a letter to ICSID after having received Claimant's request for arbitration, Respondent argued that Plama as a company owned or controlled by third party nationals could not invoke ICSID arbitration. The tribunal rejected this assertion and found that Plama, as a company organized in accordance with the law applicable in Cyprus, was an investor of "another Contracting Party" who had made an investment in the area of "the former Party" by acquiring a substantial shareholding in a company operating in Bulgaria. With regard to the purported denial-of-benefits, the tribunal held that this was only possible with regard to substantive matters, not procedural ones. Otherwise, the denial-of-benefits clause would amount to a "self-judging clause", giving rise to "a license for injustice."[23] It further held

18 Cf. *Ceskoslovenska Obchodni Banka, a.s.* v. *The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999, 14 ICSID Review—Foreign Investment Law Journal 251 (1999), para. 68: "A two-fold test must therefore be applied in determining whether this Tribunal has the competence to consider the merits of the claim: whether the dispute arises out of an investment within the meaning of the Convention and, if so, whether the dispute relates to an investment as defined in the Parties' consent to ICSID arbitration, in their reference to the BIT and the pertinent definitions contained in Article 1 of the BIT."

19 Article 25 ICSID Convention, *supra* note 10.

20 *Plama Consortium Limited* v. *Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, 44 International Legal Materials 721 (2005).

21 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).

22 Article 17 ECT provides in relevant part: "Each Contracting Party reserves the right to deny the advantages of this Part to: (1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized; [. . .]."

23 *Plama*, *supra* note 20, para. 149.

that a denial-of-benefits notice could have only prospective effect and thus not apply to the claims submitted by Plama.

Another interesting personal jurisdiction issue was raised in the *Impregilo* case[24] which concerned the *locus/ius standi* of a joint venture and its participants before ICSID. Impregilo, an Italian company, was the majority participant of an unincorporated joint venture established under Swiss law. The joint venture also included a French, a German and two Pakistani companies, among which Impregilo was chosen as "leader". In 1995, the joint venture entered into two contracts with the Pakistan Water and Power Development Authority for construction works in preparation of a hydroelectric power plant. After a series of difficulties had arisen during the construction Claimant instituted ICSID proceedings also on behalf of the joint venture and its other participants, alleging, *inter alia*, that Pakistan had breached its obligations under the Pakistan-Italy BIT. With regard to its jurisdiction *ratione personae* the *Impregilo* tribunal found that Claimant was not able to bring claims on behalf of the joint venture which lacked separate legal personality because—citing Professor Schreuer's ICSID Commentary[25]—"legal personality [was] a requirement for the application of Art. 25 (2) (b) and [. . .] a mere association of individuals or of juridical persons would not qualify."[26] The tribunal also denied its jurisdiction over Impregilo's claims on behalf of the other members of the joint venture since the consent of the parties, which formed a "cornerstone of the jurisdiction of the Centre,"[27] as expressed in the Pakistan-Italy BIT, only encompassed Italian nationals. The tribunal merely allowed Impregilo to pursue claims for its own share of losses in the joint venture.

During the last years the increased use of investment arbitration has sparked concerns about treaty shopping for dispute settlement purposes, e.g. through incorporating companies according to the availability of arbitration clauses in BITs. In 2004, the *Tokios Tokelés* v. *Ukraine*[28] case led to a situation where an ICSID tribunal was sharply divided over the fulfilment of the nationality requirement under Article 25 ICSID Convention.[29] In the 2005 *Aguas del Tunari* v. *Bolivia* case[30] an ICSID tribunal held that an investor's purposive choice of nationality for dispute settlement was permissible. The tribunal found that "[i]t is not uncommon in practice, and—absent a particular limitation—not illegal to locate one's operations in a jurisdic-

24 *Impregilo S.p.A.* v. *Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005.

25 Schreuer, *supra* note 14.

26 *Impregilo*, *supra* note 24, para. 133.

27 *Id.*, para. 146.

28 *Tokios Tokelés* v. *Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004.

29 *See* Reinisch, *supra* note 13, at 1658.

30 *Aguas del Tunari S.A.* v. *Republic of Bolivia,* ICSID Case No. ARB/02/3, Decision on Jurisdiction, 21 October 2005.

tion perceived to provide a beneficial regulatory and legal environment in terms, for example, of taxation or the substantive law of the jurisdiction, including the availability of a BIT."[31] The case arose from a dispute involving the privatization of the water system in a Bolivian city. Shortly before the concession contract with Aguas del Tunari, the locally incorporated company indirectly owned by the US firm Bechtel, was cancelled Bechtel restructured its ownership so as to have a Dutch company owning Aguas del Tunari. While there was no US-Bolivia BIT, there was one between The Netherlands and Bolivia which provided for investor-State dispute settlement, *inter alia*, if a Bolivian company is "controlled" by a Dutch company. The majority of the *Aguas del Tunari* tribunal found that it was not necessary to show that the Dutch company actually participated in the management of the Bolivian subsidiary. Rather, through its ownership interest it exercised control over its subsidiary, satisfying the nationality test under the BIT. In upholding jurisdiction, the tribunal concluded that "the language of the definition of national in many BITs evidences that such national routing of investment is entirely in keeping with the purpose of the instruments and the motivations of the state parties."[32]

Various jurisdictional challenges concerning the *locus/ius standi* of claimants were also raised in the two related cases of *Camuzzi* v. *Argentina*[33] and *Sempra* v. *Argentina*[34]. Camuzzi, a Luxembourg company, and Sempra, a US firm, owned 56.91 and 43.09 % respectively of the shares of two Argentine companies which in turn owned natural gas supplying and distributing entities licensed in Argentina. The dispute mainly concerned the suspension of the distributors' right to adapt the distribution price according to inflation rates and the ensuing "pesification" imposed by the Argentine government. While the two cases were brought under two different BITs, determined by the nationality of the two investors, care was employed to prevent conflicting decisions by appointing the same arbitrators to the two, formally distinct, tribunals. The two awards on jurisdiction, rendered on the same date, did not only reach the same conclusion, they also relied on largely identical reasons in upholding their jurisdiction over the claims.

C. The Scope of MFN-Clauses

As in the previous year, the issue whether MFN-clauses could be relied upon for procedural and jurisdictional purposes was again addressed in a

31 *Id.*, para. 330.

32 *Id.*, para. 332.

33 *Camuzzi International S.A.* v. *The Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Jurisdiction, 11 May 2005.

34 *Sempra Energy International* v. *The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Jurisdiction, 11 May 2005.

number of cases before the Centre. It may be recalled that in *Maffezini*[35] an ICSID tribunal came to the conclusion that the MFN-clause of the applicable BIT[36] was not limited to substantive standards of treatment, but extended to procedural issues, *in casu* to waiting periods prior to instituting investment arbitration. The broad assertion in *Maffezini* that "dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce"[37] served as justification for this result and was particularly relied upon in the 2004 decision *Siemens* v. *Argentina*.[38]

The *Maffezini* interpretation of the MFN-clause in the Argentina-Spain BIT was strongly endorsed in *Gas Natural* v. *Argentina*.[39] The case was brought by a Spanish company which had invested in an Argentine gas production and distribution company whose shares had dramatically lost their value as a result of various emergency measures by the Argentine government, among them the suspension of tariff adaptation rights and the "pesification" of the tariff. Like in *Maffezini*, the respondent State, this time Argentina, objected to the ICSID tribunal's jurisdiction on the ground that the claimant had instituted ICSID proceedings before the applicable 18-months waiting period had expired. The *Gas Natural* tribunal rejected this argument. It underlined that the MFN-clause related to "all matters" and thus also covered dispute settlement. The tribunal reinforced its textual interpretation by policy considerations, stressing that "assurance of independent international arbitration is an important—perhaps the most important—element in investor protection."[40]

The *Plama* case,[41] however, followed the more restrictive approach pursued by *Salini* v. *Jordan*[42] in largely rejecting the *Maffezini*-doctrine. Since the applicable Bulgaria-Cyprus BIT provided only for *ad hoc* arbitration concerning disputes over the amount of compensation in the event of expropriation, Plama invoked the treaty's MFN-clause in order to gain access to ICSID arbitration also over other matters. The *Plama* tribunal, however, re-

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

36 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."

37 *Maffezini*, *supra* note 35, para. 54.

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

39 *Gas Natural, supra* note 2.

40 *Id.*, para. 49.

41 *Plama*, *supra* note 20.

42 *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, 29 November 2004, 44 International Legal Materials 573 (2005).

jected this attempt arguing that a "clear and unambiguous intention"[43] of the parties was required in order to find an agreement to arbitrate and that basically such could not be presumed through a standard MFN-clause.[44] It was highly critical of the *Maffezini* award and proposed an alternative more restrictive principle: "an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them."[45]

Again one should not overlook the fact that the apparent split of opinion between *Maffezini* and *Siemens*, on the one hand, and *Salini* and *Plama*, on the other hand, need not necessarily indicate inconsistent case-law. In both the *Maffezini* as well as the *Siemens* case obligations for dispute settlement between the investors and the respondent States existed already and MFN-clauses were invoked in order to avoid procedural obstacles. In *Plama*, however, like in the *Salini* decision of 2004, claimants tried to create a jurisdiction that would not have existed otherwise. This distinction was expressly referred to by the *Plama* tribunal reasoning that "[i]t is one thing to add to the treatment provided in one treaty more favorable treatment provided elsewhere. It is quite another thing to replace a procedure specifically negotiated by parties with an entirely different mechanism."[46]

D. Jurisdiction *Ratione Temporis*

For the first time, the issue of temporal jurisdiction played a major role in an ICSID case. In *Lucchetti* v. *Peru*,[47] a tribunal found that it lacked jurisdiction *ratione temporis* over a claim brought by a Chilean spaghetti producer and its Peruvian subsidiary which had run into administrative difficulties with Peruvian authorities. Lucchetti's construction permit for a pasta-making factory close to protected wetlands in the vicinity of Lima had already been revoked in 1997-1998. After local court proceedings an operating license was granted to Lucchetti in 1999. Subsequently, the latter conducted business until summer 2001 when, precisely on 22 August 2001, the Municipality revoked Lucchetti's operating license. Claimant then instituted ICSID proceedings.

Crucial for the tribunal's finding was Article 2 of the Peru-Chile BIT which provided that it should not apply "to differences or disputes that arose

43 *Plama*, *supra* note 20, para. 199.

44 *Plama*, *supra* note 20, para. 223.

45 *Id.*

46 *Id.*, para. 209.

47 *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A.* v. *Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Jurisdiction, 7 February 2005.

prior to its entry into force."[48] The BIT entered into force on 3 August 2001. The tribunal rejected Claimant's argument that the dispute related to the 2001 governmental acts and thus fell under its jurisdiction. Rather, it found that there was a continuing dispute arising in 1997 which was outside its jurisdiction under the BIT.

In order to determine whether the dispute submitted to it was a new one or part of one ongoing dispute, the tribunal suggested to inquire whether "the facts or considerations that gave rise to the earlier dispute continued to be central to the later dispute"[49] and whether they had the same "origin or source."[50] In the tribunal's view, both elements were clearly fulfilled because the reasons for the 2001 revocation were "directly related to the considerations that gave rise to the 1997/98 dispute: the Municipality's stated commitment to protect the environmental integrity of the Pantanos de Villa and its repeated efforts to compel Claimants to comply with the rules and regulations applicable to the construction of their factory in the vicinity of that environmental reserve."[51] Additionally, the *Lucchetti* tribunal found that there were no "other legally relevant elements that would compel a ruling that the 2001 controversy must nevertheless be treated as a new dispute."[52]

Interestingly, the tribunal did not attribute much weight to the fact that Luchetti's claims rested on different legal bases (Peruvian domestic law and subsequently the Peru-Chile BIT) in determining whether these claims comprised one single dispute or to two separate ones. On a comparative procedural level, it is also remarkable that the continuing nature of the dispute led the tribunal to deny its jurisdiction. Other international courts and tribunals tend to uphold their jurisdiction over disputes arising before the entry into force of the underlying treaty as long as they are of a continuing nature. The jurisprudence of the European Court of Human Rights in Strasbourg bears witness to this trend.[53] One will have to see whether this approach may be regarded as confirmed in *Impregilo* v. *Pakistan*[54] where another ICSID tribunal held that it did not have jurisdiction over any act that took place, or any situation that ceased to exist before the entry into force of the applicable Italy-Pakistan BIT. This could imply, however, that it may well have considered upholding its jurisdiction over disputes of a "continuing character."

48 Article 2 Peru-Chile BIT.

49 *Lucchetti*, *supra* note 47, para. 50.

50 *Id.*, para. 53.

51 *Id.*

52 *Id.*, para. 54.

53 Cf. Papamichalopoulos and Others v. Greece, Application No. 14556/89, Judgment, Series A No. 260-B (June 24, 1993); Loizidou v. Turkey, Application No. 15318/89, ECHR 1996-VI (Dec. 18, 1996).

54 *Impregilo*, *supra* note 24.

E. Contract vs. Treaty Claims and Umbrella Clauses

Also in 2005, ICSID tribunals had to address the distinction between contract and treaty claims[55] which figured prominently in the two SGS decisions, *SGS* v. *Pakistan*[56] and *SGS* v. *Philippines*.[57]

In *Impregilo*[58] the claimant had brought both contract and treaty claims against respondent alleging interference with its contracts with the Pakistan Water and Power Development Authority which was a legal entity distinct from the State of Pakistan. Since the applicable BIT did not contain an umbrella clause, nor provide for dispute settlement against entities other than a Contracting State Party, the tribunal held that Impregilo's contract claims did not fall within its jurisdiction.[59] However, the tribunal stressed that this did not prevent it from exercising jurisdiction over treaty claims since such claims under a BIT were "analytically distinct"[60] from contract claims. The tribunal then addressed the issue how to avoid possible frictions stemming from the fact that contract claims may be litigated before national courts or commercial arbitration panels while simultaneously treaty claims are pursued before investment tribunals. It briefly noted the approach of the *SGS* v. *Philippines* tribunal which had ordered a stay of ICSID proceedings until the contract claims had been determined. However, the *Impregilo* tribunal chose not to follow this example because it considered that the considerations under contract and treaty claims were "fundamentally different" and it was "not obvious that the contractual dispute resolution mechanisms in a case of this sort will be undermined in any substantial sense by the determination of separate and distinct Treaty Claims."[61]

One 2005 case extensively discussed the meaning of "umbrella clauses." In the final award in *Noble Ventures* v. *Romania*,[62] the tribunal sided with the *SGS* v. *Philippines* tribunal in concluding that a clause providing that "[e]ach Party shall observe any obligation it may have entered into with regard to investments"[63] should be considered an umbrella clause. According to the *Noble Ventures* tribunal "[a]n umbrella clause is usually seen as transforming municipal law obligations into obligations directly cognizable in

55 *See* Reinisch, *supra* note 13, at 1660.

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

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

58 *Impregilo*, *supra* note 24.

59 *Id.*, para. 216.

60 *Id.*, para. 262.

61 *Id.*, para. 289.

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

63 Article II(2)(c) Romania-US BIT.

international law."[64] Following the rules of treaty interpretation as codified in the Vienna Convention on the Law of Treaties,[65] the tribunal analyzed the wording, object and purpose of the clause in question and concluded that—contrary to broader texts referring to the maintenance of a "legal framework" favorable to investments as in *Salini* v. *Jordan*,[66]—the provision in the Romania-US BIT "clearly falls into the category of the most general and direct formulations tending to an assimilation of contractual obligations to treaty ones."[67] It remains to be seen whether this can already be regarded as the final word on the issue. Other investment tribunals, such as El Paso[68] seem to adhere to the restrictive approach taken by the *SGS* v. *Pakistan* tribunal which rejected the view that through an umbrella clause "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."[69]

In the *CMS* case,[70] the arbitral tribunal also concluded that an applicable umbrella clause of the US-Argentina BIT had been violated "to the extent that legal and contractual obligations pertinent to the investment have been breached and have resulted in the violation of the standards of protection under the Treaty."[71]

F. Burden of Proof for Jurisdictional Purposes—*Prima Facie* Cases

In order to decide on their jurisdiction arbitral tribunals frequently have to assess issues that reach into meritorious questions. However, since the merits belong to the merits and should not be determined during the jurisdictional phase, investment tribunals have relied on a relaxed standard of plausibility in order to decide on their jurisdiction. Instead of full-fledged proof, they have used a so-called *prima facie* test according to which they would merely determine "whether the facts as alleged by the Claimant [. . .], if established, are capable of coming within those provisions of the BIT which have been invoked."[72] The *Impregilo* tribunal which restated this test also explained its underlying rationale. It considered the *prima facie* test to reflect "two complementary concerns: to ensure that courts and tribu-

64 *Noble Ventures*, *supra* note 62, para. 53.

65 Vienna Convention on the Law of Treaties, 1155 UNTS 331, 8 International Legal Materials 679 (1969).

66 *Salini Costruttori*, *supra* note 42, para. 126.

67 *Noble Ventures*, *supra* note 62, para. 60.

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

69 *SGS* v. *Pakistan*, *supra* note 56, para. 172.

70 *CMS Gas Transmission Company* v. *The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, 44 International Legal Materials 1205 (2005).

71 *CMS*, *supra* note 70, para. 303.

72 *Impregilo*, *supra* note 24, para. 254.

nals are not flooded with claims which have no chance of success, or may even be of an abusive nature; and equally to ensure that, in considering issues of jurisdiction, courts and tribunals do not go into the merits of cases without sufficient prior debate."[73]

IV. Substantive Issues

Most 2005 ICSID decisions concerned jurisdictional questions. Nevertheless, important substantive issues were addressed in a number of cases. In particular, the *CMS* v. *Argentina* award set an important precedent as the first case among the numerous proceedings against Argentina which led to a decision on the merits. Equally, the *Noble Ventures* v. *Romania* award clarified a number of important questions concerning not only BIT standards but also more general public international law issues.

A. Attribution

One recurrent theme in investment arbitration is the question of attribution of acts of entities operating outside the host State's governmental and administrative structure proper to this State.

The *Noble Ventures* v. *Romania* case[74] arose from a privatization agreement between a US investor and the Romanian State Ownership Fund concerning the acquisition, management and operation of a steel mill and other assets in Romania. Claimant alleged that Romania had misrepresented the steel mill's assets in the tender process, failed to negotiate a debt rescheduling with its creditors in good faith, failed to provide full protection and security during labor unrest and, through the initiation of insolvency proceedings, failed to accord fair and equitable treatment and indirectly expropriated Claimant.

As a preliminary issue, the tribunal had to determine whether the acts of the Romanian State Ownership Fund and its successor organization could be attributed to Romania for the purposes of establishing the latter's responsibility for BIT violations. To this end the tribunal expressly relied on the 2001 ILC Draft Articles on State Responsibility[75] "widely regarded as a codification of customary international law."[76] While it found that the entities in question could not be regarded as *de jure* State organs in the sense of Article 4 of the Draft Articles, it found that they qualified as *de facto* State organs pursuant to Article 5 of the Draft Articles because they "were at all rel-

73 *Id.*

74 *Noble Ventures*, *supra* note 62.

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

76 *Noble Ventures*, *supra* note 62, para. 69.

evant times acting on the basis of Romanian law which defined their competence."[77] By way of an *obiter dictum* the tribunal added that this attribution would also stand in case of *ultra vires* acts of the entities[78] and is independent of the qualification of their acts as *iure imperii* or *iure gestionis*—a distinction relevant in the field of State immunity.[79]

B. Fair and Equitable Treatment

The claimant in *CMS* v. *Argentina*[80] was a minority shareholder in the Argentine energy provider TGN which had been granted a long-term license for the transport of gas. TGN's operating conditions included provisions according to which tariffs were to be calculated in dollars and then converted into pesos at the prevailing exchange rate, and to be adjusted every six months in order to reflect changes in inflation. Following economic difficulties in the late 1990s, TGN and other gas companies agreed to an understanding for the temporary suspension of the inflation adjustment. Subsequently, when it became clear that the suspension would remain permanent, a default on external debts was declared, and foreign exchange restrictions were introduced through an emergency law. The tribunal found that the aggregate of these measures amounted to a violation of the applicable fair and equitable treatment standard contained in the Argentina-US BIT. In interpreting the meaning of the very vague fair and equitable treatment standard, the *CMS* tribunal relied on one of the objects of the BIT as expressed in its preamble, mentioning "to maintain a stable framework for investments and maximum effective use of economic resources." It thus concluded that "a stable legal and business environment is an essential element of fair and equitable treatment."[81] According to the tribunal

> "[t]he measures that are complained of did in fact entirely transform and alter the legal and business environment under which the investment was decided and made. The discussion above, about the tariff regime and its relationship with a dollar standard and adjustment mechanisms unequivocally shows that these elements are no longer present in the regime governing the business operations of the Claimant. It has also been established that the guarantees given in this connection under the legal framework and its various components were crucial for the investment decision."[82]

The *CMS* tribunal further found "that fair and equitable treatment is inseparable from stability and predictability."[83] Since a predictable framework

77 *Id.*, para. 70.
78 *Id.*, para. 81.
79 *Id.*
80 *CMS*, *supra* note 70.
81 *Id.*, para. 274.
82 *Id.*, para. 275.
83 *Id.*, para. 276.

for Claimant's investment was not granted, the tribunal found a breach of the fair and equitable treatment standard.

C. Expropriation

The tendency to require a rather high threshold for government measures to constitute an indirect expropriation has been confirmed in the *CMS* case. The tribunal expressly endorsed the standard of "substantial deprivation" found in cases like *CME*,[84] *Metalclad*[85] and *Pope and Talbot*[86] in order to ascertain whether an indirect expropriation has taken place. According to the tribunal the essential question was "to establish whether the enjoyment of the property has been effectively neutralized."[87] Since it found that the investor remained in control of the investment, that the Government did not manage the day-to-day operations of the company and that the investor had full ownership and control of the investment, it concluded that no expropriation had taken place.[88]

D. The Necessity Defense

In addition to being the first of the Argentine ICSID cases having led to an award on the merits, the *CMS* case is likely to become known as the ICSID case discussing at length whether and, if so, under what conditions the state of necessity defense may be available to preclude the wrongfulness of a host State's measures in violation of international investment obligations. After having concluded that Argentina's unilateral suspension of the agreed-upon tariff scheme, while not amounting to expropriation, constituted a violation of the fair and equitable treatment standard under the Argentina-US BIT,[89] the *CMS* tribunal embarked on an extended discussion of the necessity defense.

Like the ICJ in the *Gabcikovo-Nagymaros* Case,[90] the *CMS* tribunal considered that Article 25 of the ILC State Responsibility Articles[91] "adequately reflect[ed] the state of customary international law on the question of

84 *CME Czech Republic B. V.* v. *The Czech Republic,* UNCITRAL Arbitral Tribunal, Partial Award, 13 September 2001, reprinted in 14 World Trade and Arbitration Materials, No. 3 (2002), at 109.

85 *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).

86 *Pope & Talbot, Inc.* v. *Government of Canada*, Interim Award, 26 June 2000, available at <http://www.naftalaw.org>.

87 *CMS*, *supra* note 70, para. 262.

88 *Id*.

89 *See supra* text at note 82.

90 *See* Gabcíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, 1997 ICJ Reports 7 (Sept. 25, 1997), at para. 51: "The Court considers [. . .] that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation."

91 *See supra* note 75.

necessity."[92] In applying the very restrictive conditions for a successful invocation of the necessity defense under Article 25,[93] the *CMS* tribunal concluded, however, that "government policies and their shortcomings significantly contributed to the crisis and the emergency and while exogenous factors did fuel additional difficulties they do not exempt the Respondent from its responsibility in the matter."[94] Nevertheless, the tribunal's finding was also important for host States in so far as it found an affirmative answer to the issue whether economic difficulties may also give rise to a necessity defense.

Also Argentina's second related attempt to justify its economic measures under the emergency clause of the applicable BIT[95] was dismissed by the tribunal. It found that—contrary to differently worded provisions in the GATT—the BIT's emergency clause was not a so-called self-judging provision[96] and that "judicial review [was] not limited to an examination of whether the plea has been invoked or the measures have been taken in good faith."[97] Rather, it performed a "substantive review" which also came to the conclusion that the emergency measures were not excused.

E. Damages

The *CMS* tribunal having found a violation of both the fair and equitable treatment standard and the umbrella clause of the applicable BIT, finally also had to address the issue of reparation. After discussing international jurisprudence on this issue, the tribunal concluded that restitution would be unrealistic[98] and that compensation would be due instead, the amount of which should be based on the investment's "fair market value." The tri-

92 *CMS*, *supra* note 70, para. 315.

93 Article 25 of the ILC Articles on State Responsibility provides:

> "1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
>
> (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
>
> (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
>
> 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
>
> (a) The international obligation in question excludes the possibility of invoking necessity; or
>
> (b) The State has contributed to the situation of necessity."

94 *CMS*, *supra* note 7070, para. 329.

95 Article XI of the Argentina-US BIT provides: "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests."

96 *CMS*, *supra* note 70, para. 373.

97 *Id.*, para. 374.

98 *Id.*, para. 406.

bunal decided to calculate the fair market value by employing the discounted cash-flow (DCF) method.[99]

V. Interpretation of Awards

2005 also saw the first interpretation of an ICSID award under Article 50 of the Convention which provides that "[i]f any dispute shall arise between the parties as to the meaning or scope of an award, either party may request interpretation of the award by an application in writing addressed to the Secretary-General."[100] In the *Wena* v. *Egypt* case[101] the successful claimant sought an interpretation of the original 2003 award[102] in which an ICSID tribunal had found, *inter alia*, that Egypt had expropriated the applicant's hotel leases in Cairo and Luxor. As regards the admissibility of a request for interpretation, the tribunal first established that there existed a dispute between the parties as to the meaning or scope of the operative part of the original award[103] and then found that the request aimed at obtaining an interpretation of the award. Relying on ICJ and PCIJ precedents,[104] the tribunal held that "the purpose of interpretation is to enable the Tribunal to clarify points which had been settled with binding force in the award, without deciding new points which go beyond the limits of the award."[105] With regard to the substance of the requested interpretation, the tribunal declared that the notion of "expropriation" as used in the original award was "to be understood to mean that the expropriation constituted a total and permanent deprivation of Wena's fundamental rights of ownership [and that] subsequent legal actions by Egypt, as a party to the arbitration, that presume the contrary [we]re precluded."[106]

99 *Id.*, para. 416.

100 Article 50(1) ICSID Convention, *supra* note 10.

101 *Wena Hotels Ltd.* v. *Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Application for Interpretation of Award, 31 October 2005.

102 *Wena Hotels Ltd.* v. *Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 21 November 2000; 41 International Legal Materials 896 (2002).

103 *Wena*, *supra* note 101, para. 102.

104 Request for Interpretation of the Judgment of November 20, 1950 in the *Asylum Case* (Colombia v. Peru), Judgment, 1950 ICJ Reports 395 (Nov. 27, 1950); Delimitation of the Continental Shelf (U.K. v. France): Interpretation of the Decision of June 30, 1977, Decision of an *ad hoc* Arbitration Tribunal of 14 March 1978, 54 International Law Reports 139 (1978); Interpretation of Judgments Nos. 7 and 8 (the Chorzów Factory), Judgment No. 11, 1927, PCIJ Series A, No. 13 (Dec. 16, 1927).

105 *Wena*, *supra* note 101, para. 106.

106 *Id.*, para. 137.

VI. Conclusions

The 2005 decisions of ICSID tribunals both on jurisdiction and on the merits have again contributed to the growing body of ICSID jurisprudence providing guidance to future arbitration panels in settling investment disputes.

AUGUST REINISCH*

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LEGAL MAXIMS: SUMMARIES AND EXTRACTS FROM SELECTED CASE LAW*

Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. Republic of Peru, ARB/03/4, Award, 7 February 2005

Plama Consortium Limited v. Republic of Bulgaria, ARB/03/24, Decision on Jurisdiction, 8 February 2005

Impregilo S.p.A. v. Islamic Republic of Pakistan, ARB/03/3, Decision on Jurisdiction, 22 April 2005

AES Corporation v. The Argentine Republic, ARB/02/17, Decision on Jurisdiction, 26 April 2005

Sempra Energy International v. The Argentine Republic, ARB/02/16, Decision on Jurisdiction, 11 May 2005

Camuzzi International S.A. v. The Argentine Republic, ARB/03/2, Decision on Jurisdiction, 11 May 2005

CMS Gas Transmission Company v. The Argentine Republic, ARB/01/8, Award, 12 May 2005

Gas Natural SDG, S.A. v. The Argentine Republic, ARB/03/10, Decision on Jurisdiction, 17 June 2005

Noble Ventures, Inc. v. Romania, ARB/01/11, Award, 12 October 2005

Aguas del Tunari S.A. v. Republic of Bolivia, ARB/02/3, Decision on Jurisdiction, 21 October 2005

Wena Hotels Ltd. v. Arab Republic of Egypt, ARB/98/4, Decision on Application for Interpretation of Award, 31 October 2005

Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ARB/03/29, Decision on Jurisdiction, 14 November 2005

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

Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. Republic of Peru*, ARB/03/4, Award, 7 February 2005

Original: English and Spanish

Present: Buergenthal, *President of the Tribunal*
Cremades, Paulsson, *Arbitrator*s

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II.4.911 REQUEST FOR ARBITRATION
See also I.17.011

I. THE DISPUTE

[3] "On December 24, 2002, the International Centre for Settlement of Investment Disputes (ICSID or the Centre) received a request for arbitration from Empresas Lucchetti, S.A. and Lucchetti Perú, S.A. against the Republic of Peru. The dispute concerned a pasta factory in the Municipality of Lima and was brought to ICSID under the ICSID Convention. Claimants invoked the dispute settlement provisions of the Bilateral Investment Treaty between the Republic of Peru and the Republic of Chile (the BIT)."

[Para. 3]

* Summaries prepared by Christina Knahr, MPA, Research Assistant, Department for European, International and Comparative Law, University of Vienna, Austria. The full text of the Award is reprinted in 19 ICSID Review-Foreign Investment Law Journal 359 (2004) and is also available at <http://ita.law.uvic.ca/documents/luchetti.pdf> . Original footnote numbers are indicated in brackets: [ ].

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

II. OBJECTIONS TO JURISDICTION

II.4.9213 LEGAL DISPUTE

A. The Existence of a Dispute

[25] "Respondent raises the following three objections to the jurisdiction of the Tribunal:

1. Lack of Jurisdiction *Ratione Temporis*.

   (i) The provisions of the BIT do not apply to disputes and controversies that arose before the BIT entered into force;

   (ii) the BIT entered into force on August 3, 2001;

   (iii) the dispute between the Claimant and the Peruvian authorities began in 1997-1998;

   (iv) therefore, because the dispute arose before the BIT entered into force, the Tribunal has no jurisdiction.

This submission is based on Article 2 of the BIT (Ámbito de Aplicación), which provides as follows:

> 'ARTICLE 2
>
> *Scope*
>
> This Treaty shall apply to investments made before or after its entry into force by investors of one Contracting Party, in accordance with the legal provisions of the other Contracting Party and in the latter's territory. It shall not, however, apply to differences or disputes that arose prior to its entry into force.'

There is no dispute that the BIT entered into force on August 3, 2001. Claimants submit that the dispute began after the BIT came into force, and that, therefore, the Tribunal has jurisdiction *ratione temporis*. [. . .]" | **[48]** "The Tribunal notes that as a legal concept, the term dispute has an accepted meaning. It has been authoritatively defined as a 'a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons,'[1] or as a 'situation in which two sides hold clearly opposite views concerning the question of the performance or non-performance' of a legal obligation.[2] In short, a dispute can be held to exist when the parties assert clearly conflicting legal or factual claims bearing on their respective rights or obligations or that 'the claim of one party is positively opposed by

1 [1] Mavrommatis Palestine Concessions (Greece v. United Kingdom), Judgment of 30 August 1924 (Merits), 1924 P.C.I.J. (ser. A), No. 2, p. 11.

2 [2] Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion of March 1950, I.C.J. Reports 1950, p. 65 at 74.

the other.'[3]" | **[49]** "It is clear [. . .] that by 1998, after Decree 01 was adopted and Claimants challenged that decree in the *amparo* proceedings, a dispute had arisen between Claimants and the municipal authorities of Lima. The Tribunal finds that at that point in time, the parties were locked in a dispute in which each side held conflicting views regarding their respective rights and obligations." | **[50]** "The parties disagree, however, as to whether the earlier dispute ended with the judgments rendered by the Peruvian courts in Claimants' favor or whether it continued and came to a head in 2001 with the adoption of Decrees 258 and 259. The Tribunal must therefore now consider whether [. . .] the present dispute is or is not a new dispute. In addressing that issue, the Tribunal must examine the facts that gave rise to the 2001 dispute and those that culminated in the 1998 dispute, seeking to determine in each instance whether and to what extent the subject matter or facts that were the real cause of the disputes differ from or are identical to the other.[4] According to a recent ICSID case, the critical element in determining the existence of one or two separate disputes is whether or not they concern the same subject matter.[5] The Tribunal considers that, whether the focus is on the 'real causes' of the dispute or on its 'subject matter', it will in each instance have to determine whether or not the facts or considerations that gave rise to the earlier dispute continued to be central to the later dispute." | **[51]** "It is undisputed that the subject matter or origin of the 2001 dispute, if it was a new dispute, was the promulgation of Decrees 258 and 259. Decree 258 was designed to establish a regulatory framework for the permanent protection of the Pantanos de Villa as an ecological reserve. It authorized the municipal authorities of Lima to adopt measures necessary to achieve that objective. Decree 259 ordered the revocation of Claimants' operating license for the production of pasta and decreed the closing and removal of the factory. [. . .]" | **[52]** "In setting out the administrative, legislative and judicial history of Claimants' efforts to obtain permission for and to operate their pasta factory in the vicinity of the environmental reserve of Pantanos de Villa, Decree 259 related the action it mandated directly to the measures the municipal authorities took in 1998 in order to force Claimants to comply with the environmental and zoning requirements applicable to the construction of their pasta factory. It also focuses on the failure of the municipal authorities to achieve their objective because of the judgments entered in Claimants' favor in 1998 that forced them to issue the licenses they had previously denied Claimants." | **[53]** "The reasons for the adoption of Decree 259 were thus directly related to the considerations that gave rise to the 1997/98 dispute: the municipality's stated commitment to protect the environmental integrity of the Pantanos

3 [3] South West Africa, Preliminary Objections. Judgment, I.C.J. Reports 1962, p. 319, at 328.

4 [4] See Electricity Company of Sofia and Bulgaria (Preliminary Objection), 1939 P.C.I.J., p. 64 at 82.

5 [5] CMS Gas Transmission Co. v. Argentina, Case No. ARB/ 01/ 8, July 17, 2003, 42 ILM 788, para. 109 (2003).

de Villa and its repeated efforts to compel Claimants to comply with the rules and regulations applicable to the construction of their factory in the vicinity of that environmental reserve. The subject matter of the earlier dispute thus did not differ from the municipality's action in 2001 which prompted Claimants to institute the present proceedings. In that sense, too, the disputes have the same origin or source: the municipality's desire to ensure that its environmental policies are complied with and Claimants' efforts to block their application to the construction and production of the pasta factory. The Tribunal consequently considers that the present dispute had crystallized by 1998. The adoption of Decrees 258 and 259 and their challenge by Claimants merely continued the earlier dispute."

[Paras. 25, 48, 49, 50, 51, 52, 53]

II.1.08 *RES JUDICATA*

B. *Res Judicata*

[54] "[. . .] [T]he Tribunal considers that it should address the further question whether there are other legally relevant elements that would compel a ruling that the 2001 dispute must nevertheless be treated as a new dispute. [. . .] Claimants point to the fact that Decree 259 revoked their operating license whereas Decree 01 voided their construction license and that the earlier dispute involved only Decree 01, which was concerned with construction issues rather than the environmental issue dealt with in Decrees 258 and 259. They also note that their plant had been in operation for more than two years before Decree 259 was issued. There was thus a substantial time gap between the adoption of Decree 259 and the judgments of 1998 which, according to Claimants, put an end to the earlier dispute, and had become *res judicata*. Finally, Claimants assert that their claim before this Tribunal alleges a violation of the BIT, which was not yet in effect in 1998. It must thus be seen as a new dispute—a proceeding to enforce BIT rights and obligations that did not exist in 1998. They consider that as a BIT claim, it does not come within the provisions of the *ratione temporis* reservation set forth in Article 2 of the BIT." | **[55]** "The Tribunal finds that the issues in dispute in 1998 did not concern only matters dealt with in Decree 01. The dispute involved a series of legal measures that addressed environmental matters, among them Decrees 01 and 126, and Official Letter 771-MML-DMDU, which formed the basis for Claimants' successful *amparo* action. Thereafter, moreover, the municipality enacted Ordinance 184, which established a comprehensive environmental regulatory scheme and required activities not in compliance with the plan to be brought into compliance therewith within a five-year period. Claimants successfully challenged that ordinance as applied to them in the same court that granted their *amparo* action. That ruling compelled the municipal authorities to grant Claimants

their construction and operating license. It is thus clear that the issues in dispute in 1998 dealt with the same environmental concerns reflected in Decrees 258 and 259 of 2001, and that those concerns did not only focus on the construction but also the operation of the plant." | **[56]** "As for the time that elapsed between the judgments rendered in Claimants' favor in 1998 and Decree 259, that fact alone will not transform an ongoing dispute into two disputes, unless the evidence indicates that the earlier dispute had come to an end or had not as yet crystallized into a dispute.[6] Here the municipality continued throughout to seek to apply its environmental regulatory scheme to Claimants' plant, only to be blocked in its efforts by the various judicial proceedings Claimants instituted and which the municipality vigorously contested and sought to circumvent. [. . .] Moreover, the municipality adopted Decrees 258 and 259 as soon as it concluded that the disclosures about the manner in which the judgments had been procured enabled it to reassert its earlier position and to apply its environmental regulatory scheme to Claimants' operations. That the municipality never considered that its dispute with Claimant had ended with the judgments is further evidenced by the language of the preamble to Decree 259 which, as has been seen above, recounts and relies on the municipality's earlier efforts to force Claimants to comply with its environmental rules and regulations. Accordingly, the Tribunal is of the view that the lapse of two and half years between these judgments and the adoption of Decrees 258 and 259 does not in and of itself compel the conclusion that the earlier dispute had come to an end and that a new dispute arose in 2001. The Tribunal considers, moreover, that Decrees 258 and 259 did not generate a new dispute notwithstanding the fact that the 1998 judgments had become *res judicata* under Peruvian law. The *res judicata* status of these judgments, standing alone, does not compel that result since the facts before the Tribunal indicate, as has already been shown, that the original dispute continued. Moreover, the public controversy concerning these judgments, stimulated by the continuing judicial and parliamentary inquiries relating to them, further demonstrates that, as a practical matter, the *res judicata* status of the judgments was not deemed to have put an end to the dispute."

[Paras. 54, 55, 56]

6 [6] *Cf.* Maffezini v. Spain (Decision on Jurisdiction), ICSID Case No. ARB/97/77, 16 ICSID Review 212, paras 90-98 (2001). Here the tribunal had before it a provision similar to Article 2 of the BIT in the present case. It found that the events leading to a dispute had been the subject of discussions between the parties for a number of years before the entry into effect of the BIT there in issue. These discussions did not produce "the conflict of legal views and interests" necessary to transform them into a dispute until after the entry into force of the BIT. Therefore, the challenged dispute was not barred by the BIT. *Id.*, para. 96. In the present case, "the conflict of legal views and interests" had crystallized prior to the entry into force of the BIT. Had that been the case in Maffezini, its tribunal would have reached the same conclusion as this Tribunal.

II.4.923 JURISDICTION *RATIONE TEMPORIS*

C. Jurisdiction *Ratione Temporis*

[58] "Finally, Claimants contend that in these proceedings they invoke rights and obligations arising under the BIT and that they therefore are entitled to have the Tribunal adjudicate this claim. According to them, moreover, being a BIT claim, the present dispute is not and cannot be the same dispute as the one that existed prior to the BIT's entry into force." | **[59]** "It is true, of course, that Claimants are entitled to have this Tribunal adjudge rights and obligations set forth in the BIT. But this is so only if and when the claim seeks the adjudication of a dispute which, pursuant to Article 2 of the BIT, is not a dispute that arose prior to that treaty's entry into force. The allegation of a BIT claim, however meritorious it might be on the merits, does not and cannot have the effect of nullifying or depriving of any meaning the *ratione temporis* reservation spelled out in Article 2 of the BIT.[7] Further, a pre-BIT dispute can relate to the same subject matter as a post-BIT dispute and, by that very fact, run afoul of Article 2. That, as has been seen above, is the case here." | **[60]** "Given that the present Award is responsive to a jurisdictional objection, the factual and legal propositions at the heart of Lucchetti's substantive case have naturally not been tested. Lucchetti contends that it was invited to invest in Peru, made its investment properly, expended tens of millions of dollars in building the most advanced industrial installations in the country, and established a model of operational success, employing a substantial workforce and making good, competitive products with export potential. Lucchetti also stresses that it has not been alleged (let alone proved) that its establishment in Peru as an investor was procured by irregular means. It is therefore in a fundamentally different position than someone whose initial agreement is said to have been procured by fraud or corruption. Most of all, it claims that its assets have been spoliated in a purely arbitrary and pretextual fashion." | **[61]** "Lucchetti may therefore consider it a harsh result that its effort at obtaining an international remedy is brought to a halt before the merits of its contentions are even examined. Such a conclusion, however, would not be warranted in light of the fact that Lucchetti did not have an *a priori* entitlement to this international forum. It cannot say that it made its investment in reliance on the BIT, for the simple reason that the treaty did not exist until years after Lucchetti had acquired the site, built its factory, and was well into the second year of full production. It cannot conceivably contend that it invested in reliance on the existence of this international remedy."

[Paras. 58, 59, 60, 61]

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7 [7] See, *e.g.*, Asian Agricultural Products, LTD. (AAPL) v. Sri Lanka, ICSID Case No. ARB/87/3, 6 ICSID Review 526 (1991), where the tribunal points out that "nothing is better settled, as a canon of interpretation in all systems of law, than that a clause must be so interpreted as to give it a meaning rather than so as to deprive it of meaning." *Id.*, para. 40, Rule (E).

II.4.93 CONSENT TO ICSID ARBITRATION

D. Consent to Arbitration

[62] "The only question entertained by this Tribunal is precisely whether the claim brought by Lucchetti falls within the scope of Peru's consent to international adjudication under the BIT. Lucchetti has not satisfied the Tribunal that this is the case, and thus finds itself in the same situation as it would have been if the BIT had not come into existence. Its substantive contentions remain as they were, to be advanced, negotiated, or adjudicated in such a manner and before such instances as it may find available."

[Para. 62]

II.4.98 AWARD

III. AWARD

"Taking all the foregoing considerations into account, the Tribunal holds that it has no jurisdiction to hear the merits of the present claim. The Tribunal decides that each Party shall pay one half of the arbitration costs and bear its own legal costs."

Plama Consortium Limited v. Republic of Bulgaria, ARB/03/24, Decision on Jurisdiction, 8 February 2005*

Original: English

Present: Salans, *President of the Tribunal*
Veeder, van den Berg, *Arbitrators*

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II.4.911 REQUEST FOR ARBITRATION
See also I.17.011

I. THE DISPUTE

[1] "By letter of 24 December 2002, Plama Consortium Limited ('Plama' or 'the Claimant'), a Cypriot company, filed a request for arbitration with the International Centre for Settlement of Investment Disputes ('ICSID' or 'the Centre') against the Republic of Bulgaria ('Bulgaria' or 'the Respondent').

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* Summaries prepared by Christina Knahr, MPA, Research Assistant, Department for European, International and Comparative Law, University of Vienna, Austria. The full text of the Decision is reprinted in 20 ICSID Review-Foreign Investment Law Journal 262 (2005) and 44 International Legal Materials 721 (2005). It is also available at <http://www.worldbank.org/icsid/cases/plama-decision.pdf>. Original footnote numbers are indicated in brackets: [ ].

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

The request invoked the ICSID arbitration provisions of the Energy Charter Treaty ('ECT') and the most favored nation ('MFN') provision of a bilateral investment treaty ('BIT') entered into in 1987 between the Government of the Republic of Cyprus and the Government of the People's Republic of Bulgaria, the Agreement on Mutual Encouragement and Protection of Investments ('the BIT'), which would import into the BIT the ICSID arbitration provisions of other BITs entered into by Bulgaria." | **[19]** "According to the Request for Arbitration, the Claimant—then known as Trammel Investment Limited—purchased from EuroEnergy Holding OOD (hereafter, 'EEH') all of EEH's 49,837,849 shares of Plama AD, which later changed its name to Nova Plama AD ('Nova Plama'), a Bulgarian company which owned an oil refinery in Bulgaria, representing 96.78% of Nova Plama's capital. [. . .]" | **[20]** "The refinery's key industrial asset was a lubricants manufacturing unit which processes base-oils produced by the refinery into a wide range of industrial and consumer lubricants which were used as raw materials for lubricants at the refinery or by third party blenders. Nova Plama also has its own power plant with a capacity for sales of excess electric power to the local grid." | **[21]** "The Claimant alleges that the Bulgarian government, the national legislative and judicial authorities and other public authorities and agencies deliberately created numerous grave problems for Nova Plama and/or refused or unreasonably delayed the adoption of adequate corrective measures. These actions and omissions, according to the Claimant, caused and are still causing material damage to the operations of the refinery and have had, and are still having, a direct negative impact on the reputations and market values of the respective Plama group companies. Bulgaria's actions and/or omissions violate the ECT, to which both Bulgaria and Cyprus are parties,[1] and the BIT. The Claimant seeks an award of damages for breaches of the treaties and compensation for expropriation."

[Paras. 1, 19, 20, 21]

II. CONSIDERATIONS OF THE TRIBUNAL

A. The Energy Charter Treaty

I.14.2 ARBITRATION

1. Article 26 ECT

[121] "The Claimant here rests its case on Article 26 ECT. Part V of the ECT regulates the settlements of disputes, with Article 26 providing for state-investor disputes and Article 27 for state-state disputes. In relevant part taken from the ECT's English version, Article 26 (1), (2) and (4) provide:

1 [1] Bulgaria ratified the ECT on 15 November 1996 and Cyprus, on 16 January 1998.

'*Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably*'; and if not so amicably settled within a period of three months, '*the Investor party to the dispute may choose to submit it for resolution*' to, *inter alia*, international arbitration under the ICSID Convention. Article 26 is limited to the state's obligations under Part III ECT; whereas state-state arbitration under Article 27 is not so limited. [. . .]"

[Para. 121]

II.4.9211 QUALIFICATION AS INVESTMENT

a. Definition of Investment

[125] "[. . .] There is undoubtedly a dispute between the Respondent and the Claimant, the first relevant issue being whether the dispute relates to the Claimant's 'Investment in the Area' of Bulgaria. As defined by Article 1(6) ECT, ''*Investment' means every kind of asset, owned or controlled directly or indirectly by an Investor*'; and there follows a broad, non-exhaustive list of different kinds of assets encompassing virtually any right, property or interest in money or money's worth, including '*(b) . . . shares, stock or other forms of equity participation in a company . . . '*. As defined by Article 1(10), ''*Area' means with respect to any state that is a Contracting Party (a) the territory under its sovereignty*'. The Claimant asserts that its substantial shareholding in Nova Plama, as a company carrying on business in Bulgaria, qualifies as an 'Investment'. [. . .]." | **[126]** "The Respondent contended [. . .] that there was no 'Investment' under Article 1(6) ECT because the Claimant had materially misrepresented or willfully failed to disclose the Claimant's true ownership to the Bulgarian authorities in violation of Bulgarian law. [. . .] [T]he Respondent had stated that it '*reserves the right, should the Tribunal sustain jurisdiction on the basis that Mr. Vautrin was at all times the sole owner of PCL, to raise an objection relating to whether Claimant's investment was made in accordance with law*'. Subsequently, [. . .] Bulgaria's Counsel stated that it was now making its objection and 'exercising that right' [D1.227-229]." | **[127]** "As understood by the Tribunal, as a jurisdictional objection, this submission is distinct from albeit factually similar to the broader case advanced by the Respondent on 'misrepresentation', which the Tribunal considers separately below. [. . .]. It is however appropriate to decide this particular submission here because, in the Tribunal's view, it necessarily fails *in limine* as a jurisdictional challenge on several grounds." | **[128]** "First, whatever the eventual merits of the Respondent's 'misrepresentation' case [. . .], it remains the case that the Claimant was an 'Investor' under Article 1(7) ECT: it is here irrelevant who owns or controls the Claimant at any material time. The definition of 'Investment'

under Article 1(6) refers to the Investor's investment, in other words it is again here irrelevant who owns or controls the Claimant at any material time; and as already noted above, the definition is broad, extending to '*any right conferred by law or contract*'. That definition would be satisfied by a contractual or property right even if it were defeasible. Applying Judge Higgins' approach to disputed facts, the Tribunal must accept, *pro tem*, the investment as alleged by the Claimant; and on this ground alone, the Tribunal decides that Bulgaria's submission fails." | **[129]** "Second, it is clear that no point was taken by the Respondent on the validity of the Privatization Agency's consent as a jurisdictional point until the September Hearing. In particular, as at the time of the Claimant's Request for Arbitration of 24 December 2002 and the Respondent's Memorial of 26 May 2004, the Claimant's investment as an 'Investment' under Article 1(6) ECT had not been impugned by the Respondent, no attempt having been made to avoid or to treat as null and void under Bulgarian law the Privatization Agency's consent. In these circumstances, the actual state of the Privatization Agency's consent under Bulgarian law and its effect on the Claimant's investment remains unclear to the Tribunal. The Tribunal here expresses no criticism of either party's conduct; but it decides that this submission cannot be admitted so belatedly as a jurisdictional challenge. This decision is limited to this jurisdictional submission; and in particular it does not extend to the merits of the Respondent's case on 'misrepresentation'." | **[130]** "In any event, the Tribunal notes that the Respondent's charges of misrepresentation are not directed specifically at the parties' agreement to arbitrate found in Article 26 ECT. The alleged misrepresentation relates to the transaction involving the sale of the shares of Nova Plama by EEH to PCL and the approval thereof given by Bulgaria in the Privatization Agreement and elsewhere. It is not in these documents that the agreement to arbitrate is found. Bulgaria's agreement to arbitrate is found in the ECT, a multilateral treaty, a completely separate document. The Respondent has not alleged that the Claimant's purported misrepresentation nullified the ECT or its consent to arbitrate contained in the ECT. Thus not only are the dispute settlement provisions of the ECT, including Article 26, autonomous and separable from Part III of that Treaty but they are independent of the entire Nova Plama transaction; so even if the parties' agreement regarding the purchase of Nova Plama is arguably invalid because of misrepresentation by the Claimant, the agreement to arbitrate remains effective." | **[131]** "Accordingly, in the Tribunal's view, the present dispute does relate to an 'Investment' by the Claimant as an 'Investor' in Bulgaria's 'Area'."

[Paras. 125, 126, 127, 128, 129, 130, 131]

II.4.93 CONSENT TO ICSID ARBITRATION

b. Consent to Arbitration

[138] "The Claimant contends that Bulgaria's signature and accession to the ECT constitutes the Respondent's 'consent in writing' to ICSID arbitration, required by Article 25(1) of the ICSID Convention. It submits that Article 26 ECT contains a standing, open written offer of (*inter alia*) ICSID arbitration by Contracting States to Investors of other Contracting States. By filing its Request for Arbitration [. . .] the Claimant accepted that offer; and having given its own written consent to arbitration under Article 25(1) of the ICSID Convention, the Tribunal's jurisdiction is established under the ICSID Convention and Article 26 ECT." | **[140]** "The Tribunal accepts the Claimant's analysis of the ECT and ICSID Convention of investor-state arbitration; but [. . .] it wishes to emphasize several characteristics of the parties' arbitration agreement created by these two instruments. First, Article 26(3)(a) ECT provides that the Contracting Parties thereby give their 'unconditional assent' to such state-investor arbitration (subject to specific exceptions which are here immaterial); and accordingly, as a Contracting Party, the Respondent thereby expressed unconditionally its written consent required under the ICSID Convention. Second, Article 46 ECT provides that no reservations may be made to the ECT; none were in fact made in regard to Article 26 by Bulgaria; and accordingly Bulgaria's consent was unreserved. Third, under Article 25(1) of the ICSID Convention, when the parties have given their consent, no party 'may withdraw its consent unilaterally'; and accordingly the Respondent's consent was also irrevocable from the date of the Claimant's Request for Arbitration. Lastly, Article 45(1) ECT provides that each signatory agrees to apply the treaty provisionally pending its entry into force for such signatory; and in accordance with Article 25 of the Vienna Convention, it follows that Article 26 ECT provisionally applied from the date of a state's signature, unless that state declared itself exempt from provisional application under Article 45(2)(a) ECT. (Bulgaria made no such declaration)." | **[141]** "For all these reasons, Article 26 ECT provides to a covered investor an almost unprecedented remedy for its claim against a host state. The ECT has been described, together with NAFTA, as '*the major multilateral treaty pioneering the extensive use of legal methods characteristic of the fledging regulation of the global economy*', of which '*perhaps the most important aspect of the ECT's investment regime is the provision for compulsory arbitration against governments at the option of foreign investors . . .*'; and these same distinguished commentators concluded: '*With a paradigm shift away from mere protection by the home state of investors and traders to the legal architecture of a liberal global economy, goes a coordinated use of trade and investment*

law methods to achieve the same objective: a global level playing field for *activities in competitive markets*'[2]. By any standards, Article 26 is a very important feature of the ECT which is itself a very significant treaty for investors, marking another step in their transition from objects to subjects of international law."

[Paras. 138, 140, 141]

II.4.92 JURISDICTION

c. Decision on Article 26 ECT

[142] "In conclusion [. . .] it follows from the decisions so far that this Tribunal decides that it would have jurisdiction to determine on its merits the present dispute between the Claimant and the Respondent under Article 26 ECT and the ICSID Convention, and that both parties to the dispute have given their written consent thereto within the meaning of Article 25(1) of the ICSID Convention."

[Para. 142]

II.4.9224 FOREIGN CONTROL
See also II.4.9223

2. Article 17 ECT

[143] "Article 17 ECT is contained in Part III of the ECT, the same part containing the ECT's substantive protections for Investors but a different part from Part V containing the provisions for dispute settlement. Article 17 is entitled 'Non-Application of Part III in Certain Circumstances'; [. . .] Article 17(1) provides: '*Each Contracting Party reserves the right to deny the advantages of this Part* [i.e., Part III] *to: (1) a legal entity [Limb i] if citizens or nationals of a third state own or control such entity and [Limb ii] if that entity has no substantial business activities in the Area of the Contracting Party in which it is organised*; . . . '. The Tribunal attaches significance to the word 'and' linking both limbs of Article 17(1), thereby requiring both to be satisfied. (For ease of reference below, the Tribunal has added in the quotation above the roman numerals in square brackets to indicate these first and second limbs). Article 17(2) ECT contains a similar provision for an 'Investment' in differently specified circumstances. [. . .]"

[Para. 143]

2 [8] Bamberger, Lineham and Wälde, The Energy Charter Treaty in 2000 (in Energy Law in Europe, ed Roggenkamp; 2000), pp. 11, 31 and 32 (Legal Appendix to Reply, Exhibit 73).

I.1.16 TREATY INTERPRETATION

a. Article 17 as Jurisdictional Issue

[146] "The first question is whether any issue raised under Article 17(1) by Bulgaria can deprive this Tribunal of all jurisdiction to decide the merits of the parties' dispute. [. . .] [T]he Claimant submits that the Respondent's reliance on Article 17(1) can only relate to the merits and not to jurisdiction, whereas Bulgaria primarily contends the opposite. The Respondent contends that there can be no dispute over its obligations under Part III of the ECT when the Claimant has no relevant 'advantages' under Part III legally capable of giving rise to any claim pleaded under Part III. The Respondent contends that the denial of such 'advantages' are not limited to those conferred by Part III of the ECT but include also all advantages relating to Part III, including the right to invoke international arbitration under Article 26 of Part V of the ECT alleging any breach of Part III. [. . .]" | **[147]** "In the Tribunal's view, the Respondent's jurisdictional case here turns on the effect of Articles 17(1) and 26 ECT, interpreted under Article 31(1) of the Vienna Convention. The express terms of Article 17 refer to a denial of the advantages 'of this Part', thereby referring to the substantive advantages conferred upon an investor by Part III of the ECT. The language is unambiguous; but it is confirmed by the title to Article 17: 'Non-Application of *Part III* in Certain Circumstances' (emphasis supplied). All authentic texts in the other five languages are to the same effect. From these terms, interpreted in good faith in accordance with their ordinary contextual meaning, the denial applies only to advantages under Part III. It would therefore require a gross manipulation of the language to make it refer to Article 26 in Part V of the ECT. Nonetheless, the Tribunal has considered whether any such manipulation is permissible in the light of the ECT's object and purpose." | **[148]** "Article 26 provides a procedural remedy for a covered investor's claims; and it is not physically or juridically part of the ECT's substantive advantages enjoyed by that investor under Part III. As a matter of language, it would have been simple to exclude a class of investors completely from the scope of the ECT as a whole, as do certain other bilateral investment treaties; but that is self-evidently not the approach taken in the ECT. This limited exclusion from Part III for a covered investor, dependent on certain specific criteria, requires a procedure to resolve a dispute as to whether that exclusion applies in any particular case; and the object and purpose of the ECT, in the Tribunal's view, clearly requires Article 26 to be unaffected by the operation of Article 17(1). As already noted above, for a covered investor, Article 26 is a very important feature of the ECT." | **[149]** "In the Tribunal's view, the contrary approach would clearly not accord with the ECT's object and purpose. Unlike most modern investment treaties, Article 17(1) does not operate as a denial of all benefits to a covered investor under the treaty but is expressly limited to a denial of the advan-

tages of Part III of the ECT. A Contracting State can only deny these advantages if Article 17(1)'s specific criteria are satisfied; and it cannot validly exercise its right of denial otherwise. A disputed question of its valid exercise may arise, raising issues of treaty interpretation, other legal issues and issues of fact, particularly as regards the first and second limbs of Article 17(1) ECT. It is notorious that issues as to citizenship, nationality, ownership, control and the scope and location of business activities can raise wide-ranging, complex and highly controversial disputes, as in the present case. In the absence of Article 26 as a remedy available to the covered investor (as the Respondent contends), how are such disputes to be determined between the host state and the covered investor, given that such determination is crucial to both? According to the Respondent, there is no remedy available to a covered investor under the ECT at all: it has no advantages under Article 26 to amicable negotiations or international arbitration; and any attempt to initiate arbitration before ICSID will be met with a demand by the host state that the request for arbitration should not be registered under Article 36(3) of the ICSID Convention [. . .]. Towards the covered investor, under the Respondent's case, the Contracting State invoking the application of Article 17(1) is the judge in its own cause. That is a license for injustice; and it treats a covered investor as if it were not covered under the ECT at all. It is not tempered, as the Respondent's counsel tentatively suggested [. . .] by the possibility that the Contracting State might choose, in its discretion, to extend in a friendly but wholly voluntary way any or all of the advantages of Part III during amicable negotiations with the aggrieved investor [D1.151ff]." | **[150]** "This contrary approach also cannot be reconciled with Article 27 ECT on state-state arbitration. Under Article 27, a Contracting Party can refer to arbitration a dispute with the host state (as another Contracting Party) any dispute concerning the application or interpretation of the ECT, including the host state's exercise of its right of denial to a covered investor under Article 17(1) ECT. The Contracting Party's right to arbitration is unqualified by the host state's invocation of Article 17(1); and it follows that a Contracting Party could pursue a claim against the host state for its improper reliance on Article 17(1) towards a covered investor. In other words, even if (as the Respondent contends), the investor cannot invoke Article 26 at all, it would leave intact its home state's right, as a Contracting State, to invoke Article 27 against the host state. It seems an unnecessarily complicated result to resolve that dispute when, on the ordinary meaning of Article 17(1), the covered investor could invoke Article 26 directly against the host state without the assistance of its home state. The Tribunal notes again that for a covered investor, Article 26 is a very important feature of the ECT; and as a remedy exercisable by an investor by itself and in its own right against the host state, it cannot be equated with Article 27. Under the ECT, the covered investor is more than an object of international law [. . .]." | **[151]** "[. . .] For these reasons, the Tribunal decides that

the Respondent's case on Article 17(1) cannot support a complaint to the jurisdiction of the Tribunal in this case. [. . .]"

[Paras. 146, 147, 148, 149, 150, 151]

b. Article 17 as an Issue on the Merits

[152] "The Tribunal addresses this part of the parties' submissions on the assumption [. . .] that the Tribunal has jurisdiction to decide the Claimant's claims against the Respondent for one or more alleged breaches of Part III of the ECT. These submissions raise distinct issues of legal interpretation and related factual issues."

[Para. 152]

I.1.16 TREATY INTERPRETATION

3. Exercise of the Right to Deny

[155] "In the Tribunal's view, the existence of a 'right' is distinct from the exercise of that right. For example, a party may have a contractual right to refer a claim to arbitration; but there can be no arbitration unless and until that right is exercised. In the same way, a Contracting Party has a right under Article 17(1) ECT to deny a covered investor the advantages under Part III; but it is not required to exercise that right; and it may never do so. The language of Article 17(1) is unambiguous; and that meaning is consistent with the different state practices of the ECT's Contracting States under different bilateral investment treaties: certain of them applying a generous approach to legal entities incorporated in a state with no significant business presence there (such as the Netherlands) and certain others applying a more restrictive approach (such as the USA). The ECT is a multilateral treaty with Article 17(1) drafted in permissive terms, not surprisingly, in order to accommodate these different state practices." | **[157]** "The Tribunal has also considered whether the requirement for the right's exercise is inconsistent with the ECT's object and purpose. The exercise would necessarily be associated with publicity or other notice so as to become reasonably available to investors and their advisers. To this end, a general declaration in a Contracting State's official gazette could suffice; or a statutory provision in a Contracting State's investment or other laws; or even an exchange of letters with a particular investor or class of investors. Given that in practice an investor must distinguish between Contracting States with different state practices, it is not unreasonable or impractical to interpret Article 17(1) as requiring that a Contracting State must exercise its right before applying it to an investor and be seen to have done so. By itself, Article 17(1) ECT is at best only half a notice; without further reasonable notice of its exercise by the host state, its terms tell the investor little; and for all practical purposes,

something more is needed. [. . .]" | **[158]** "For these reasons, in the Tribunal's view, the interpretation of Article 17(1) ECT under Article 31(1) of the Vienna Convention requires the right of denial to be exercised by the Contracting State. Accordingly, the Tribunal decides in the present case that the Respondent was required to exercise its right against the Claimant; and that it did so only on 18 February 2003, more than four years after the Claimant made its investment in Nova Plama. The real point at issue, therefore, is whether that exercise had retrospective effect to 1998 or only prospective effect from 2003, on the Claimant's 'advantages' under Part III ECT."

[Paras. 155, 157, 158]

I.1.16 TREATY INTERPRETATION
See also I.1.15

4. Retrospective or Prospective Effect

[159] "[. . .] The language of Article 17(1) ECT is not by itself clear on this important point. There is some slight guidance from Article 17(1) suggesting a prospective effect, given the use of the present tense to coincide with the right's exercise ('own or control' . . . 'has no substantial activities' . . . 'is organized'); and likewise, Article 17(2) ECT suggests only a prospective effect to a denial of advantages to an Investment (' . . . if the denying Contracting Party establishes . . . ' etc). However, the Tribunal would not wish to base its decision on such semantic indications only." | **[160]** "The Tribunal returns to the object and purpose of the ECT under Article 31 of the Vienna Convention. The parties did not here invoke under Article 31(3) and (4) any subsequent agreement or practice between the ECT's Contracting Parties or under Article 32 any of the ECT's preparatory work. Accordingly [. . .] it is a short point of almost first impression." | **[161]** "The covered investor enjoys the advantages of Part III unless the host state exercises its right under Article 17(1) ECT; and a putative covered investor has legitimate expectations of such advantages until that right's exercise. A putative investor therefore requires reasonable notice before making any investment in the host state whether or not that host state has exercised its right under Article 17(1) ECT. At that stage, the putative investor can so plan its business affairs to come within or without the criteria there specified, as it chooses. It can also plan not to make any investment at all or to make it elsewhere. After an investment is made in the host state, the 'hostage-factor' is introduced; the covered investor's choices are accordingly more limited; and the investor is correspondingly more vulnerable to the host state's exercise of its right under Article 17(1) ECT. At this time, therefore, the covered investor needs at least the same protection as it enjoyed as a putative investor able to plan its investment. The ECT's express 'purpose' under Article 2

ECT is the establishment of '*. . . a legal framework in order to promote long-term co-operation in the energy field . . . in accordance with the objectives and principles of the Charter*' (emphasis supplied). It is not easy to see how any retrospective effect is consistent with this 'long-term' purpose." | **[162]** "In the Tribunal's view, therefore, the object and purpose of the ECT suggest that the right's exercise should not have retrospective effect. A putative investor, properly informed and advised of the potential effect of Article 17(1), could adjust its plans accordingly prior to making its investment. If, however, the right's exercise had retrospective effect, the consequences for the investor would be serious. The investor could not plan in the 'long term' for such an effect (if at all); and indeed such an unexercised right could lure putative investors with legitimate expectations only to have those expectations made retrospectively false at a much later date. Moreover, in the present case, the Respondent asserts a retrospective effect from a very late date, even after the Claimant's Request for Arbitration and the accrual of the Claimant's causes of action under Part III ECT." | **[165]** "In conclusion, the Tribunal decides that the Respondent's exercise of its right under Article 17(1) ECT by its letter dated 18 February 2003 only deprived the Claimant of the advantages under Part III of the ECT prospectively from that date onwards. [. . .]"

[Paras. 159, 160, 161, 162, 165]

5. Summary on the Energy Charter Treaty

[179] "It is convenient to summarize the Tribunal's several decisions on the ECT: (A) As to the *jurisdictional* issues: (1) Under Article 26 ECT and the ICSID Convention, the Tribunal has jurisdiction to decide on the merits the Claimant's claims against the Respondent for alleged breaches of Part III of the ECT; (2) Article 17(1) ECT has no relevance to the Tribunal's jurisdiction to determine those claims; (3) Accordingly, the Tribunal rejects the Respondent's objection to the Tribunal's jurisdiction under the ECT and ICSID Convention; and (B) as to the *merits* of the Respondent's case under Article 17(1) ECT; (4) Article 17(1) requires the Contracting State to exercise its right of denial and such exercise operates with prospective effect only, as it did in this case from the date of the Respondent's exercise by letter of 18 February 2003; (5) the second limb of Article 17(1) regarding 'no substantial business activities' is satisfied to the Tribunal's satisfaction; and (6) the Tribunal declines for the time being to decide the first limb of article 17(1) regarding the Claimant's 'ownership' and 'control'."

[Para. 179]

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

B. Jurisdiction of the Tribunal under the BIT

[184] "The Tribunal concludes that the MFN provision of the Bulgaria-Cyprus BIT cannot be interpreted as providing consent to submit a dispute under the Bulgaria-Cyprus BIT to ICSID arbitration for the reasons set forth hereafter." | **[185]** "[. . .] [T]he question before the Tribunal is how the MFN provision in that BIT should be interpreted." | **[187]** "The MFN provision set forth in Article 3 of the Bulgaria-Cyprus BIT reads as follows:

> 1. Each Contracting Party shall apply to the investments in its territory by investors of the other Contracting Party a treatment which is not less favourable than that accorded to investments by investors of third states.
>
> 2. This treatment shall not be applied to the privileges which either Contracting Party accords to investors from third countries in virtue of their participation in economic communities and unions, a customs union or a free trade area." |

[189] "It is not clear whether the ordinary meaning of the term 'treatment' in the MFN provision of the BIT includes or excludes dispute settlement provisions contained in other BITs to which Bulgaria is a Contracting Party. Inclusion or exclusion may or may not satisfy the ejusdem generis principle (i.e., when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same type as those listed), but [. . .] it is not relevant to address that question." | **[190]** "In this connection, the difference between the terms '*treatment . . . accorded to investments*,' as appearing in Article 3(1) of the Bulgaria-Cyprus BIT, and '*treatment. . . accorded to investors*,' as appearing in other BITs, is to be noted. The Tribunal does not attach a particular significance to the use of the different terms, in particular not since Article 3(1) contains the words '*investments by investors*'[3]." | **[191]** "The second paragraph of Article 3 of the Bulgaria-Cyprus BIT contains an exception to MFN treatment relating to economic communities and unions, a customs union or a free trade area. This may be considered as supporting the view that all other matters, including dispute settlement, fall under the MFN provision of the first paragraph of Article 3 (on the basis of the principle *expressio unius est exclusio alterius*). However, the fact that the second paragraph refers to 'privileges' may be viewed as indicating that MFN treatment should be understood as relating to substantive protection. Hence, it can be argued with equal force that the second paragraph demonstrates that the first paragraph is solely concerned with provisions relating to substantive protection to the exclusion of the procedural provisions relating to dispute settlement." | **[192]**

3 [11] See also, Siemens v. The Argentine Republic, ICSID Case No. ARB/02/8, Decision of 3 August 2004, at paragraphs 91-92, http://www.asil.org/ilib/Siemens_Argentina.pdf.

"The 'context' may support the Claimant's interpretation since the MFN provision is set forth amongst the Treaty's provisions relating to substantive investment protection. However, the context alone, in light of the other elements of interpretation considered herein, does not persuade the Tribunal that the parties intended such an interpretation. And the Tribunal has no evidence before it of the negotiating history of the BIT to convince it otherwise." | **[193]** "The object and purpose of the Bulgaria-Cyprus BIT are: '*the creation of favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party*.' (Preamble, see also title which refers to '*mutual encouragement and protection of investments*'). The Claimant places much reliance on the foregoing and on the Report of the Executive Directors on the ICSID Convention of 1965, according to which: '*the creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital in those countries which wish to attract it*' (Exhibit C60, at paragraph 9). [. . .] The Claimant also points to the Maffezini decision in which it is observed: '*dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce*'[4]. Such statements are as such undeniable in their generality, but they are legally insufficient to conclude that the Contracting Parties to the Bulgaria-Cyprus BIT intended to cover by the MFN provision agreements to arbitrate in other treaties to which Bulgaria (and Cyprus for that matter) is a Contracting Party. Here, the Tribunal is mindful of Sir Ian Sinclair's warning of the '*risk that the placing of undue emphasis on the 'object and purpose' of a treaty will encourage teleological methods of interpretation [which], in some of its more extreme forms, will even deny the relevance of the intentions of the parties*'[5]." | **[194]** "The Tribunal finds no guidance in the provisions of paragraphs 2 and 3 of Article 31 of the Vienna Convention, as there are no facts or circumstances that point to their application. The same goes for paragraph 4 of Article 31 of the Vienna Convention ('*A special meaning shall be given to a term if it is established that the parties so intended*')." | **[195]** "It is true that treaties between one of the Contracting Parties and third States may be taken into account for the purpose of clarifying the meaning of a treaty's text at the time it was entered into. The Claimant has provided a very clear and insightful presentation of Bulgaria's practice in relation to the conclusion of investment treaties subsequent to the conclusion of the Bulgaria-Cyprus BIT in 1987. In the 1990s, [. . .] it began concluding BITs with much more liberal dispute resolution provisions, including resort to ICSID arbitration. However, that practice is not particularly relevant in the present case since subsequent negotiations between Bul-

4 [12] Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction of 25 January 2000, reprinted in 16 ICSID Rev.-F.I.L.J. 212 (2001), at paragraph 54.

5 [13] The Vienna Convention on the Law of Treaties, 2nd ed. 1984, at 130.

garia and Cyprus indicate that these Contracting Parties did not intend the MFN provision to have the meaning that otherwise might be inferred from Bulgaria's subsequent treaty practice. Bulgaria and Cyprus negotiated a revision of their BIT in 1998. The negotiations failed but specifically contemplated a revision of the dispute settlement provisions [. . .]. It can be inferred from these negotiations that the Contracting Parties to the BIT themselves did not consider that the MFN provision extends to dispute settlement provisions in other BITs." | **[196]** "It may be mentioned here [. . .] that the parties to the present arbitration have not produced preparatory work of the Bulgaria-Cyprus BIT. They did provide some indication of the circumstances surrounding its conclusion. At that time, Bulgaria was under a communist regime that favored bilateral investment treaties with limited protections for foreign investors and with very limited dispute resolution provisions." | **[197]** "The previous two paragraphs indicate that, at the time of conclusion, Bulgaria and Cyprus limited specific investor-state dispute settlement to the provisions set forth in the BIT and had no intention of extending those provisions through the MFN provision." | **[198]** "In the view of the Tribunal, the following consideration is equally, if not more, important. With the advent of bilateral and multilateral investment treaties since the 1980s (today estimated to be more than 1,500), the traditional diplomatic protection mechanism by home states for their nationals investing abroad has been largely replaced by direct access by investors to arbitration against host states. Nowadays, arbitration is the generally accepted avenue for resolving disputes between investors and states. Yet, that phenomenon does not take away the basic prerequisite for arbitration: an agreement of the parties to arbitrate. It is a well-established principle, both in domestic and international law, that such an agreement should be clear and unambiguous. In the framework of a BIT, the agreement to arbitrate is arrived at by the consent to arbitration that a state gives in advance in respect of investment disputes falling under the BIT, and the acceptance thereof by an investor if the latter so desires." | **[199]** "Doubts as to the parties' clear and unambiguous intention can arise if the agreement to arbitrate is to be reached by incorporation by reference. The Claimant argues that the MFN provision produces such effect, stating that in contractual relationships the incorporation by reference of an arbitration agreement is commonplace. In support thereof, the Claimant relies on Article 7(2) of the UNCITRAL Model Law on International Commercial Arbitration of 1985. The Claimant adds that in treaty relationships the importation of the arbitration agreement through the MFN provision operates in exactly the same way." | **[200]** "Article 7(2) of the UNCITRAL Model Law provides:

> *The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.* (emphasis added)

Thus, a reference may in and of itself not be sufficient; the reference is required to be such as to make the arbitration clause part of the contract (*i.e.*, in this case, the Bulgaria-Cyprus BIT). This is another way of saying that the reference must be such that the parties' intention to import the arbitration provision of the other agreement is clear and unambiguous. A clause reading '*a treatment which is not less favourable than that accorded to investments by investors of third states*' as appears in Article 3(1) of the Bulgaria-Cyprus BIT, cannot be said to be a typical incorporation by reference clause as appearing in ordinary contracts. It creates doubt whether the reference to the other document (in this case the other BITs concluded by Bulgaria) clearly and unambiguously includes a reference to the dispute settlement provisions contained in those BITs." | **[201]** "The Claimant contends that the MFN provision in the Bulgaria-Cyprus BIT is a broad provision and is in contrast to other types of MFN provisions, such as Article 1103 NAFTA [. . .]" | **[202]** "The same provision can be found in Free Trade of the Americas (FTAA) draft of 21 November 2003. [. . .]" | **[203]** "This shows that in NAFTA and probably in the FTAA the incorporation by reference of the dispute settlement provisions set forth in other BITs is explicitly excluded. Yet, if such language is lacking in an MFN provision, one cannot reason *a contrario* that the dispute resolution provisions must be deemed to be incorporated. The specific exclusion in the draft FTAA is the result of a reaction by States to the expansive interpretation made in the *Maffezini* case. That interpretation went beyond what State Parties to BITs generally intended to achieve by an MFN provision in a bilateral or multilateral investment treaty. [. . .]" | **[204]** "Rather, the intention to incorporate dispute settlement provisions must be clearly and unambiguously expressed. [. . .]" | **[205]** "The expression '*with respect to all matters*' as appearing in MFN provisions in a number of other BITs (but not the Bulgaria-Cyprus BIT) does not alleviate the doubt as pointed out in *Siemens v. The Argentine Republic*[6]." | **[206]** "Doubt may be further created by the scope of the dispute settlement provisions in the other BITs. A number of them refer to disputes arising out of the particular BIT[7]. It appears to be difficult to interpret the MFN clause as importing into the particular BIT such specific language from other BITs." | **[207]** "Conversely, dispute resolution provisions in a specific treaty have been negotiated with a view to resolving disputes under that treaty. Contracting States cannot be presumed to have agreed that those provisions can be enlarged by incorporating dispute resolution provisions from other treaties negotiated in an entirely different context." | **[208]** "Moreover, the doubt as to the relevance of the MFN clause in one BIT to the incorporation of dispute resolution provisions in other agreements is compounded by the

6 [14] See footnote 11 [4] , supra.

7 [15] See, for example Article 10(1) of the Bulgaria-Morocco BIT and Article 9(1) of the Bulgaria-Tunisia BIT, referring to disputes relating to "failure to perform obligations under this Agreement" or obligations "arising from this Agreement". Article 8 of the Bulgaria-Finland BIT on which Claimant relies is not entirely clear in that respect.

difficulty of applying an objective test to the issue of what is more favorable. The Claimant argues that it is obviously more favorable for the investor to have a choice among different dispute resolution mechanisms [. . .]. The Tribunal is inclined to agree with the Claimant that in this particular case, a choice is better than no choice. But what if one BIT provides for UNCITRAL arbitration and another provides for ICSID? Which is more favorable?" | **[209]** "It is also not evident that when parties have agreed in a particular BIT on a specific dispute resolution mechanism, as is the case with the Bulgaria-Cyprus BIT (*ad hoc* arbitration), their agreement to most-favored nation treatment means that they intended that, by operation of the MFN clause, their specific agreement on such a dispute settlement mechanism could be replaced by a totally different dispute resolution mechanism (ICSID arbitration). It is one thing to add to the treatment provided in one treaty more favorable treatment provided elsewhere. It is quite another thing to replace a procedure specifically negotiated by parties with an entirely different mechanism." | **[212]** "[. . .] When concluding a multilateral or bilateral investment treaty with specific dispute resolution provisions, states cannot be expected to leave those provisions to future (partial) replacement by different dispute resolution provisions through the operation of an MFN provision, unless the States have explicitly agreed thereto (as in the case of BITs based on the UK Model BIT). This matter can also be viewed as forming part of the nowadays generally accepted principle of the separability (autonomy) of the arbitration clause. Dispute resolution provisions constitute an agreement on their own, usually with interrelated provisions." | **[213]** "In the *Case Concerning Rights of Nationals of America in Morocco*[8] the United States claimed '*privileges with regard to consular jurisdiction*' as appearing in treaties that Morocco had concluded with Spain and the United Kingdom, on the basis of the MFN provision in the treaty of 1936 between Morocco and the United States *('whatever indulgence, in trade or otherwise, shall be granted to any of the Christian Powers, the citizens of the United States shall be equally entitled to them')*. The International Court of Justice rejected such reliance by the United States because Spain and the United Kingdom had terminated those provisions. The United States had argued that such treaty provisions were intended to be '*incorporated permanently by reference*'. The International Court of Justice, however, examined the intent of the Contracting Parties and the 'general treaty pattern' of the other treaties concluded by Morocco. Such a broader examination shows that, in the view of the International Court of Justice, an MFN provision does not operate as an automatic incorporation by reference." | **[214]** "In the *Anglo-Iranian Oil Co. Case*[9], the International Court of Justice specifically stated: '*Without considering the meaning and the scope of the most-favoured-nation clause . . .*' (at para. 109). The Court concluded that the MFN provisions

8 [17] 152 I.C.J. Rep. 176, Judgment of 27 August 1952.

9 [18] United Kingdom v. Iran, 1952 I.C.J. 39, Judgment on preliminary objection of 22 July 1952.

in the Iran-United Kingdom treaties '*had no relation whatsoever to jurisdictional matters*' between those two States." | **[215]** "In the *Ambatielos* Case[10] the International Court of Justice did not reach the issue, although as a matter of principle it may be that the Court accepted that an MFN provision can extend to jurisdictional matters. In the ensuing arbitration[11], the parties differed on the question whether 'administration of justice' was comprised by the term 'commerce and navigation' appearing in the MFN provision in the Anglo-Greek Treaty of Commerce and Navigation of 1886. The Commission of Arbitration held that it did. However, that ruling relates to provisions concerning substantive protection in the sense of denial of justice in the domestic courts. It does not relate to the import of dispute resolution provisions of another treaty into the basic treaty." | **[216]** "In *Emilio Agustín Maffezini v. Kingdom of Spain*[12], the question arose whether the requirement set forth in the dispute settlement provisions in the Argentina-Spain BIT of 1991 that '*domestic courts [be given] the opportunity to deal with a dispute for a period of eighteen months before it may be submitted to arbitration*' was inapplicable by reliance on the dispute settlement provisions in the Chile-Spain BIT (which does not impose such condition) through operation of the MFN provision in the Argentina-Spain BIT. The arbitral tribunal in that case answered the question in the affirmative." | **[217]** "In *Maffezini* the tribunal relied on *Case Concerning Rights of Nationals of America in Morocco*, *Anglo-Iranian Oil Co. Case*, and *Ambatielos Claim*. However, the foregoing review of those decisions shows that they do not provide a conclusive answer to the question." | **[218]** "The tribunal in *Maffezini* also noted that in other treaties the MFN provision mentions '*all rights contained in the present Agreement*' or '*all matters subject to this Agreement*,' in which case, according to the tribunal, '*it must be established whether the omission [in the Argentina-Spain BIT] was intended by the parties [i.e., Contracting Parties] or can reasonably be inferred from the practice followed by the parties in their treatment of foreign investors and their own investors*' (Decision, paragraph 53). The present Tribunal considers such a basis for analysis in principle to be inappropriate for the question whether dispute resolution provisions in the basic treaty can be replaced by dispute resolution provisions in another treaty. As explained above, an arbitration clause must be clear and unambiguous and the reference to an arbitration clause must be such as to make the clause part of the contract (treaty)." | **[219]** "The tribunal in *Maffezini* further referred to '*the fact that the application of the most favoured nation clause to dispute settlement arrangements in the context of investment treaties might result in the harmonization and enlargement of the scope of such arrangements*' (Decision at paragraph 62). The present Tribunal fails to see how harmonization of dispute settlement

10 [19] Greece v. United Kingdom, 1953 I.C.J. 10, Judgment on the Obligation to Arbitrate, 19 May 1953.

11 [20] Ambatielos Claim, Greece v. United Kingdom, XII U.N. R.I.A.A. 9, Award of 6 March 1956.

12 [21] See footnote 12 [5] , supra.

provisions can be achieved by reliance on the MFN provision. Rather, the 'basket of treatment' and 'self-adaptation of an MFN provision' in relation to dispute settlement provisions (as alleged by the Claimant) has as effect that an investor has the option to pick and choose provisions from the various BITs. If that were true, a host state which has not specifically agreed thereto can be confronted with a large number of permutations of dispute settlement provisions from the various BITs which it has concluded. Such a chaotic situation—actually counterproductive to harmonization—cannot be the presumed intent of Contracting Parties." | **[220]** "The *Maffezini* tribunal was apparently aware of this risk when it added:

> [T]here are some important limits that ought to be kept in mind. As a matter of principle, the beneficiary of the clause should not be able to override public policy considerations that the [C]ontracting [P]arties might have envisaged as fundamental conditions for their acceptance of the agreement in question, particularly if the beneficiary is a private investor, as will often be the case. The scope of the clause might thus be narrower than it appears at first sight. (id.)

The examples given by the tribunal are: (1) exhaustion of local remedies condition; (2) fork in the road provision; (3) 'if the agreement provides for a particular arbitration forum, such as ICSID, for example, this option cannot be changed by invoking the clause, in order to refer the dispute to a different system of arbitration'; (4) 'if the parties have agreed to a highly institutionalized system of arbitration that incorporates precise rules of procedure' (referring as example to NAFTA). (Decision at paragraph 63)." | **[221]** "The present Tribunal was puzzled as to what the origin of these 'public policy considerations' is [. . .]. The present Tribunal does not wish to go that far in its appraisal of the Maffezini decision. Rather, it seems that the effect of the 'public policy considerations' is that they take away much of the breadth of the preceding observations made by the tribunal in Maffezini." | **[222]** "In Maffezini the tribunal pointed out:

> It is clear, in any event, that a distinction has to be made between the legitimate extension of rights and benefits by means of the operation of the clause, on the one hand, and disruptive treaty-shopping that would play havoc with the policy objectives of underlying specific treaty provisions, on the other hand. (Id.)" |

[223] "The present Tribunal agrees with that observation, albeit that the principle with multiple exceptions as stated by the tribunal in the *Maffezini* case should instead be a different principle with one, single exception: an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them." | **[224]** "The decision in *Maffezini* is perhaps understandable. The case concerned a curious requirement that during the first 18 months the dispute be tried in the local courts. The pres-

ent Tribunal sympathizes with a tribunal that attempts to neutralize such a provision that is nonsensical from a practical point of view. However, such exceptional circumstances should not be treated as a statement of general principle guiding future tribunals in other cases where exceptional circumstances are not present." | **[225]** "Whilst the Tribunal has not relied on it since the parties have not been in a position to include it in their pleadings, the Tribunal notes that the foregoing considerations are in line with the recent award in *Salini v. Jordan* [. . .]." | **[227]** "For the foregoing reasons, the Tribunal concludes that the MFN provision of the Bulgaria-Cyprus BIT cannot be interpreted as providing consent to submit a dispute under the Bulgaria-Cyprus BIT to ICSID arbitration and that the Claimant cannot rely on dispute settlement provisions in other BITs to which Bulgaria is a Contracting Party in the present case."

[Paras. 184, 185, 187, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 227]

II.4.97 DECISION ON JURISDICTION

III. DECISION

[240] "In light of the foregoing considerations, the Arbitral Tribunal makes the following decisions:

A. As to the jurisdictional issues with respect to the ECT:

(1) Under Article 26 ECT and the ICSID Convention, the Tribunal has jurisdiction to decide on the merits the Claimant's claims against the Respondent for alleged breaches of Part III of the ECT.

(2) Article 17(1) ECT has no relevance to the Tribunal's jurisdiction to determine the Claimant's claims against the Respondent under Part III of the ECT.

B. As to the merits of the Respondent's case under Article 17(1) ECT:

(1) Article 17(1) requires the Contracting State to exercise its right of denial and such exercise operates with prospective effect only, as it did in this case from the Respondent's exercise by letter of 18 February 2003.

(2) The second limb of Article 17(1) regarding 'no substantial business activities' is met to the Tribunal's satisfaction in favor of the Respondent; and

(3) The Tribunal declines for the time being to decide the first limb of Article 17(1) regarding the Claimant's 'ownership' and 'control'.

C. The most favored nation provision of the Bulgaria-Cyprus BIT, read with other BITs to which Bulgaria is a Contracting Party (in particular the Bulgaria-Finland BIT), cannot be interpreted as providing the Respondent's consent to submit the dispute with the Claimant under the Bul-

garia-Cyprus BIT to ICSID arbitration or entitling the Claimant to rely in the present case on dispute settlement provisions contained in these other BITs.

D. The Tribunal rejects the Respondent's application to suspend the proceedings pending the final outcome of the litigation concerning Dolsamex and Mr. O'Neill.

E. The arbitration will now move to the second phase, that is, an examination of the parties' claims on the merits.

F. A decision on costs is deferred to the second phase of the arbitration on the merits."

[Para. 240]

Impregilo S.p.A. v. Islamic Republic of Pakistan, ARB/03/3, Decision on Jurisdiction, 22 April 2005*

Original: English

Present: Guillaume, Cremades, Landau, *Members of the Tribunal*

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* Summaries prepared by Christina Knahr, MPA, 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/impregilo-decision.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 21 January 2003, the International Centre for Settlement of Investment Disputes ('ICSID' or 'the Centre') received a request for arbitration dated 17 January 2003 (the 'Request') from Impregilo S.p.A. ('Impregilo' or 'the Claimant'), a company organized under the laws of Italy, against the Islamic Republic of Pakistan ('Pakistan' or 'the Respondent'). The Request invoked the provisions of the Agreement between the Government of the Italian Republic and the Government of the Islamic Republic of Pakistan on the Promotion and Protection of Investments signed on 19 July 1997 (the 'BIT' or 'Treaty'), and those of the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the 'ICSID Convention')." | **[8]** "[. . .] [O]n 27 April 1995 a joint venture called Ghazi-Barotha Contractors ('GBC' or the 'Joint Venture') was formed under the laws of Switzerland, in order to prepare and submit tenders for, and if successful to construct, hydroelectric power facilities in Pakistan known as the Ghazi-Barotha Hydropower Project (the 'Project')." | **[10]** "GBC was established pursuant to a 'Joint Venture Agreement' ('JVA') concluded between five joint venture participants [. . .]." | **[13]** "[. . .] On 19 December 1995, two Contracts ('the Contracts') were concluded between Impregilo (acting on behalf of GBC) and the Pakistan Water and Power Development Authority ('WAPDA' or the 'Employer'). Contract C-01 called for the construction of a barrage downstream of the Tarbela Dam that would control the flow of the Indus River. Contract C-02 called for the construction of a 52 km channel that would convey the water from the barrage to a powerhouse, as well as the construction of 47 bridge structures, a railway bridge, and 30 drainage structures. [. . .]" | **[14]** "The performance of the Contracts was to be controlled by an Engineer acting as an agent for the Employer. Pakistan Hydro Consultants ('PHC' or the 'Engineer') was selected by WAPDA to fulfill this task." | **[15]** "Construction under the Contracts began in early 1996 with original completion dates foreseen in March 2000. [. . .] [T]he performance of the work was delayed, according to the Claimant, due to obstacles created by the Respondent and to unforeseen conditions discovered over the course of the work. The Engineer and WAPDA denied GBC's requests for adequate time extensions and reimbursement of costs. The denial of GBC's claims led to a series of disputes."

[Paras. 1, 8, 10, 13, 14, 15]

II. OBJECTIONS TO JURISDICTION

A. Jurisdiction *Ratione Personae*

II.4.9212 QUALIFICATION AS INVESTOR
See also II.1.211; II.4.922; II.4.92232; II.4.943

1. Claims on Behalf of GBC

[131] "[. . .] The Tribunal [. . .] considers that Impregilo may not pursue claims in these proceedings on behalf of GBC." | **[132]** "By Article 25(1) of the ICSID Convention, the jurisdiction *ratione personae* of the Centre extends to legal disputes between a Contracting State and a national of another Contracting State. [. . .]." | **[133]** "Schreuer[1] notes as follows (by reference to the Convention's drafting history):

> 'This indicates that legal personality is a requirement for the application of Art. 25(2)(b) and that a mere association of individuals or of juridical persons would not qualify. In such a case, the individuals might be brought under Art. 25(2)(a) or the juridical persons forming the association would have to be brought separately under Article 25(2)(b).'
>
> . . .
>
> '. . . for the purposes of the Convention the quality of legal personality is inherent in the concept of 'juridical person' and is part of the objective requirement for jurisdiction.'" |

[134] "It follows that the consent to arbitration contained in the BIT here does not cover claims by GBC, since GBC is not a 'juridical person' for the purposes of the ICSID Convention." | **[135]** "The Tribunal considers that the position is no different if Impregilo pursues a claim 'on behalf of GBC'[2]. The claim remains that of GBC, albeit advanced by Impregilo in some form of representative capacity. If this were permissible, it would constitute a simple and effective means of evading the limitations in Article 25 of the Convention, and expanding the scope of the BIT. Indeed, on this basis, any party could bring itself within the ambit of the Convention and the BIT by simply appointing a representative. This cannot have been intended by the careful delimitation of both the Convention's and the BIT's scope.[3]" | **[136]** "In the Tribunal's view, the fact that Impregilo is empowered to represent

1 [66] *Op.Cit.,* [Ch. Schreuer, The ICSID Convention: A Commentary] at pp.276-7, 457-9.

2 [67] *i.e.* as distinct from a claim on its own behalf, which is considered below.

3 [68] The Tribunal notes the slightly different analysis of this issue by C.F. Amerasinghe in *Jurisdiction of International Tribunals*, Kluwer 2003, pp.667-8, where it is suggested that there is no definition of *juridical person* in the ICSID Convention; that it is therefore within the competence of a Tribunal to decide whether or not an entity is a juridical person to which the nationality requirements of Article 25(2)(b) apply; and that special circumstances may exist in which an association or group of entities which does not have the status of a juridical person under the law of either the host state or the other Contracting state, ought nevertheless to be treated as within the scope of the Convention. Even if this analysis were to be applied, the Tribunal considers that no such special circumstances exist here.

GBC by virtue of the provisions of the JVA does not change this analysis. This must be so, since it remains a fundamental proposition that the scope of the BIT cannot be expanded by a municipal law contract to which Pakistan is not a party. To this end, none of the arbitral awards relied upon by Impregilo appears to address this situation." | **[137]** "In so far as this is a claim in respect of GBC's alleged losses, it remains a claim by an unincorporated grouping that fails to meet the requirements of the BIT and the ICSID Convention, and lies beyond the scope of Pakistan's consent to arbitration. Indeed, each of the contractual factors upon which Impregilo relies simply reinforces the representative nature of its position in these proceedings. As 'Leader' of GBC, Impregilo is entrusted with a wide range of duties that are to be performed on behalf of the joint venture, including matters of management. However, these are internal GBC management issues. Ultimately, GBC cannot be identified exclusively with Impregilo, nor characterised as 'Impregilo's joint venture' [. . .]." | **[138]** "This conclusion is confirmed by a careful review of the JVA, and in particular the fact that the role of 'Leader' forms only one element in an intricate internal management structure comprising a Board of Representatives as well as an Executive Committee." | **[139]** "The fact that GBC has no separate legal personality may lead to the conclusion that this cannot be 'GBC's claim' in any event, since GBC is nothing more than a contractual relationship between different entities. This, however, does not convert the claim into Impregilo's own claim. Rather, any claim advanced by Impregilo in respect of GBC's losses is tantamount to a claim on behalf of the other joint venture partners. [. . .]"

[Paras. 131, 132, 133, 134, 135, 136, 137, 138, 139]

II.4.93 CONSENT TO ICSID ARBITRATION

2. Claims on Behalf of Other Joint Venture Partners

[144] "[. . .] In the Tribunal's view, Impregilo cannot advance claims in these proceedings on behalf of the other participants in GBC." | **[145]** "Of the three joint venture partners:

(a) None is a protected 'investor', within the ambit of the BIT; and

(b) Two of the three are not nationals 'of another Contracting State' for the purposes of Article 25(1) of the ICSID Convention." |

[146] "Again the question is raised whether a party who does fall within the ambit of a BIT and the Convention may act in arbitration proceedings in a representative capacity, in order to advance claims on behalf of other entities who do not so qualify. In the Tribunal's view, this issue turns upon the precise scope of the parties' respective consent to the jurisdiction of ICSID.

It is now well-accepted that 'consent of the parties is the cornerstone of the jurisdiction of the Centre.'[4]" | **[147]** "In this case, Pakistan's consent is delineated by the BIT. In concluding the Treaty with Italy, Pakistan has conferred certain rights on Italian nationals in connection with the protection of investments in Pakistan. It has not conferred any rights on nationals of any other state, nor on nationals of Pakistan itself." | **[148]** "It must follow that the scope of Pakistan's consent to ICSID is correspondingly limited. On a proper construction, Pakistan has consented to the resolution by ICSID of disputes arising out of investments made by Italian nationals in Pakistan. There is nothing in the BIT to extend this to claims of nationals of any other state, even if advanced on their behalf by Italian nationals.[5] Any other interpretation would obviously expose Pakistan to claims by nationals of any state worldwide." | **[149]** "To this end, investors of German nationality (Ed. Züblin AG) and Pakistani nationality (Saadullah Khan & Brothers of Pakistan and Nazir & Company (Private) Limited) cannot benefit from the protection conferred upon Italian investors by the 1997 BIT. Indeed, it might be noted as far as Ed. Züblin AG is concerned that there exists a BIT between Germany and Pakistan (Treaty for the Promotion and protection of Investments of 25th November 1959). This Treaty, however, does not provide for any dispute resolution mechanism between the States parties and investors. It would be a curious result indeed if investors from Germany could secure additional rights under a different BIT." | **[150]** "As to Impregilo's reliance on the terms of the JVA, and its own contractual rights and obligations as 'Leader', the Tribunal's jurisdiction remains circumscribed by the 1997 BIT and the ICSID Convention. As noted above, that jurisdiction cannot be expanded either by municipal law (*i.e.* Swiss law) or a municipal law contract to which only the Claimant is a party." | **[151]** "The fact that Impregilo may be empowered to advance claims on behalf of its partners is an internal contractual matter between the participants of the Joint Venture. It cannot, of itself, impact upon the scope of Pakistan's consent as expressed in the BIT. Equally, the fact that Impregilo may be obliged to account to its partners in respect of any damages obtained in these proceedings is also an internal GBC matter, which has no

4 [69] Report of the Executive Directors of the IBRD on the ICSID Convention, *1 ICSID Reports 28*, para 23. We are reminded, in this regard, of the cautionary observation of the arbitral Tribunal in *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/02, Award of 15 March 2002, 6 *ICSID Reports* 310, at paras 55-56.

"... the question of jurisdiction of an international instance involving consent of a sovereign State deserves a special attention at the outset of any proceeding against a State Party to an international Convention creating the jurisdiction. As a preliminary matter, the question of the existence of jurisdiction based on consent must be examined *proprio motu*, *i.e.* without objection being raised by the Party. *A fortiori*, since the Respondent has raised preliminary objections to the jurisdiction, the existence of consent to the jurisdiction must be closely examined."

5 [70] It is to be noted that, by Article 34 of the Vienna Convention on the Law of Treaties: "A Treaty does not create either obligations or rights for a third State . . . without the consent of that State . . .".

bearing on Pakistan's agreed exposure under the BIT. If this were not so, any party would be at liberty to conclude a variety of private contracts with third parties, and thereby unilaterally expand the ambit of a BIT." | **[152]** "Indeed, there is a further counter to Impregilo's argument that it requires recovery in respect of GBC's total losses in order to be left with compensation in respect of its own 57.8% stake (because its own contractual arrangements with its partners oblige it to share out any proceeds in any event). As pointed out in the decision of the Iran-U.S. Claims Tribunal in *Blount Brothers Corporation v. Iran*[6], a tribunal has no means of compelling a successful Claimant to pass on the appropriate share of damages to other shareholders or participants:

> '. . . once the Tribunal has rendered an Award on an indirect claim, including the portion owned by the minority shareholders, those minority shareholders would be left without independent recourse, except insofar as the applicable corporate law might permit them to recover against the majority. The Tribunal has no means of compelling a successful Claimant to distribute the proceeds of its claim, were it to receive 100%.
>
> Furthermore, to grant 100% in such an indirect claim would still not fully exclude the admitted risk that the corporation itself might at some point bring an action based on the same facts against the same Respondent in another forum.'"

[Paras. 144, 145, 146, 147, 148, 149, 150, 151, 152]

II.4.922 JURISDICTION *RATIONE PERSONAE*

3. Conclusions

[153] "It follows that this Tribunal has no jurisdiction in respect of claims on behalf of, or losses incurred by, either GBC itself, or any of Impregilo's joint venture partners." | **[154]** "[. . .] [T]his conclusion is in line with a number of decisions of ICSID tribunals, as well as other international courts and arbitral tribunals. Indeed, there is an established principle of international law that a shareholder of a company, or one member of a partnership or joint venture, may not claim for the entire loss suffered by the corporate entity or group." | **[155]** "By way of example, the Tribunal was referred to *American Manufacturing & Trading Inc. v. Democratic Republic of the Congo*, in which an ICSID tribunal determined that a U.S. Claimant could not claim for the total damages caused to the Zairian company SINZA, in which it had a mi-

6 [71] Award No.215-52-1, 28 February 1986 *Blount Brothers Corporation v. The Government of the Islamic Republic of Iran, et al*, 10 Iran-U.S. C.T.R., p.64. Similar points have been made in a number of other awards, such as Award No. 232-97-2, 2 May 1986 *Richard D. Harza, et al v. The Islamic Republic of Iran, et al,* 11 Iran-U.S. C.T.R., p.86; Award No 244-68-2, 8 August 1986, *Howard, Needles, Tammen & Bergendorff v. The Government of the Islamic Republic of Iran*, 11 Iran-U.S. C.T.R., p.314; Award No. 282-10853 to 6-1, 17 December 1986, *Ian L. McHarg v. The Islamic Republic of Iran*, 13 Iran-U.S. C.T.R., p.302.

nority interest.[7] Similarly, awards in the Iran-US Claims Tribunal have frequently limited claims of shareholders and partners to the extent of their respective shares or participation in the entity or partnership that has suffered loss.[8] As one example, the Chamber in *Housing and Urban Services International v. Iran* held that:

> '. . . international law seems to accept that as a rule a partner may not sue in his own name alone on a cause of action accruing to the partnership.'
>
> and that
>
> '. . . there is a widespread agreement that, where claims of individual partners for their personal interest are allowed, those claims are limited to the extent of such interest.'[9]"

[Paras. 153, 154, 155]

II.4.92 JURISDICTION
See also II.4.9215

4. Impregilo's Standing to Bring a Claim for Its Own Share of Any Losses

[166] "The Tribunal accepts Pakistan's description of the way in which the partners in this Joint Venture have conducted themselves to date. The fact that the individual participants have acted jointly in the past, however, does not of itself give rise to any principle of law that they must do so in the future, or that this Tribunal has no jurisdiction to consider the claims of one of the entities pursued on its own behalf." | **[167]** "Equally, none of the provisions of the Contracts or the JVA upon which Pakistan relies in this context appears to limit (or indeed could limit) the scope of Pakistan's consent to arbitration as expressed in the BIT. Whether or not Impregilo's action in commencing this ICSID proceeding gives rise, for example, to a claim by the other joint venture participants for breach of the JVA (a municipal law agreement to which Pakistan is not a party) is a different matter, analytically distinct from the question whether or not Impregilo has standing to pursue its claims against Pakistan as a matter of the BIT, the ICSID Conven-

7 [72] *American Manufacturing & Trading, Inc. v. Democratic Republic of the Congo*, ICSID Case No. ARB/93/1, Award of 21 February 1997, *5 ICSID Reports*, pp.14-36, as referred to by the Tribunal in the *Mihaly* case, *6 ICSID Reports 310*, para 25.

8 [73] Unusually, the Algiers Declarations provide that a controlling shareholder is entitled to claim for damage caused to the company in which it has shares—1 Iran-U.S. C.T.R., p.9.

9 [74] Award No. 201-174-1, 22 Nov 1985 *Housing and Urban Services International, Inc v. The Government of the Islamic Republic of Iran et al.*, 9 Iran-U.S. C.T.R., p. 330-3. The principle has been recognised for some time. The Tribunal was referred to the Decision of 20 February 1870, in *Ruden & Co* (synopsis in J.B. Moore, *International Arbitration*, Vol. 2 (1898), pp.1654-1655, where an American national and partner of a citizen of New Granada brought a claim for the entire damage caused to the business. The Umpire held that only Ruden's claims for his *pro rata* share were properly before the Commission, and awarded him his one-half interest only. Other examples were referred to in Scribner K. Fauver, "Partnership Claims Before the Iran-United States Claims Tribunal", *Virginia Journal of International Law*, 1987, Vol 27, p.328).

tion, and the law applicable to these instruments.[10]" | **[168]** "As for the legal authorities relied upon by Pakistan:

> (a) The fact that the Claimants in the *Klöckner* case chose to pursue their claims collectively does not reflect any particular legal requirement that this be done. Indeed, as Pakistan itself points out, the question of the identity or standing of the Claimants was not addressed by the tribunal in that case, since Cameroon had accepted its jurisdiction.
>
> (b) Similarly, the fact that the Claimants in the *Salini v. Morocco* case took part in that arbitration as joint Claimants does not appear to reflect any mandatory principle that both partners pursue their claims jointly, or, put another way, any restriction upon one partner pursuing its own claims separately.
>
> (c) In so far as the Iran-U.S. Claims Tribunal recognised such a restriction, as Pakistan itself notes, it was not seen as an absolute rule. Rather, as was stated by Chamber One in *Housing and Urban Services International*, in reviewing the decisions of other international tribunals:
>
> > 'While international law seems to accept that as a rule a partner may not sue in his own name alone on a cause of action accruing to the partnership, where special reasons or circumstances required it, 'international tribunals have had little difficulty in disaggregating the interests of partners and in permitting' partners to recover their *pro rata* share of partnership claims. The most relevant 'special circumstance' in this sense exists when a partner's claim is for its own interest, which is independent and readily distinguishable from a claim of the partnership as such.'[11]" |

[169] "Here [. . .] the relevant causes of action in these proceedings are alleged breaches of Treaty. [. . .] [N]o consideration need be given for present purposes to Impregilo's allegations of breach of the Contracts. Given the nature of the BIT, the alleged breaches of Treaty could only be causes of action accruing to Impregilo alone, and not to the Joint Venture itself or any of its other participants. It follows that this is not a case in which one member of a partnership is seeking to pursue in its own name a cause of action accruing to the partnership." | **[170]** "If particular 'circumstances' are required to allow such a claim, which the Tribunal doubts, then in the words of the Iran-U.S. Claims Tribunal in *Housing and Urban Services International*, Impregilo's claim is properly characterised as one for its own interest, which is readily distinguishable from a claim of the partnership as such. To this end, the Tribunal is satisfied that adequate circumstances exist such as to allow Impregilo to pursue these proceedings on its own, albeit only in re-

10 [85] Similarly, it is to be noted that a number of decisions of the Iran-U.S. Claims Tribunal support the proposition that the characterisation of a relationship either under municipal law or by the parties to a Contract is not determinative of a "partner's" right to bring a claim before that Tribunal. See e.g. *Phillips Petroleum Company Iran*, 21 Iran-U.S. C.T.R. at 103-4.

11 [86] 9 Iran-U.S. C.T.R 313, p.330. It might be noted that this decision has been criticised as misstating the general rule. See Note, *Partnership Claims before the Iran-United States Claims Tribunal*, 27 Va.J.Int'l L. 307, 340 (1987), asserting that *pro rata* recovery is the general rule, not the exception.

spect of its own alleged loss [. . .].[12]" | **[171]** "Lastly, Pakistan points out that nowhere has Impregilo specified any damage it might have suffered individually. Rather, any loss could only be that of the Joint Venture overall. To this end, Pakistan contends that Impregilo has not shown any right 'independent and readily distinguishable' from a claim of the other parties to the Joint Venture." | **[172]** "The Tribunal disagrees. As stated, the relevant causes of action for present purposes (breaches of Treaty) are distinguishable from the claims that may be available to the other joint venture partners (breaches of the Contracts). Whether or not Impregilo can actually establish any actionable loss is a question to be resolved at the substantive hearing of this dispute. It does not, of itself, impact on the question of jurisdiction." | **[173]** "The Tribunal therefore concludes that Impregilo is not prevented from pursuing its claims for breach of the BIT on the basis that it is acting alone." | **[174]** "This conclusion accords with the previous ICSID decisions which Impregilo has cited, as set out above, and to which may be added further decisions such as *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*.[13] The Tribunal in that case again confirmed the analogous right of minority and non-controlling shareholders to claim independently of a separate corporate entity for the measures that affect their investment. As stated there: '[t]his right has been upheld both under international law and the ICSID Convention.'"

[Paras. 166, 167, 168, 169, 170, 171, 172, 173, 174]

II.4.92232 JURIDICAL PERSON
See also I.17.011

5. Claimant's Authority to Bring the Arbitration

[175] "The third of Pakistan's objections *ratione personae* concerns the question of Impregilo's authority to commence this arbitration, and its compliance with the ICSID Institution Rules. Rule 2 of the Institution Rules sets out requirements for the contents of a request for arbitration. Rule 2(1)(f) provides as follows:

'The request shall:

12 [87] Pakistan further objects to Impregilo acting alone in these proceedings on the basis that ". . . this would not only frustrate the purpose of having an exclusive Contractual dispute settlement mechanism, but it would also mean that the same issue was being pursued in two separate sets of proceedings simultaneously. In effect, to allow Impregilo to bring ICSID proceedings even for a *pro rata* share would enable it to steal a march on its partners in the joint venture." This ignores the fundamental distinction between claims for breach of the Contracts, and claims for breach of the BIT—a distinction that is addressed later in this Decision. The circumstance here that warrants Impregilo pursuing these proceedings alone is precisely the fact that the cause of action in question is exclusive to this participant, and is fundamentally different from the causes of action that might be referred to the Contractual dispute settlement mechanism.

13 [88] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No ARB/01/3, Decision on Jurisdiction of 14 January 2004, an electronic text is provided by *International Law in Brief* at http://www.asil.org/ilib/Enron.pdf.

. . .

(f) state, if the requesting party is a juridical person, that it has taken all necessary internal actions to authorize the request.'

Rule 2(2) provides as follows:

'The information required by subparagraphs (1)(c), (1)(d)(iii) and (1)(f) shall be supported by documentation.'" |

[181] "In the Tribunal's view, Impregilo is properly authorised to commence and pursue these arbitration proceedings, and has satisfied the requirements of Rule 2(1) and (2) of the Institution Rules." | **[182]** "This is a claim by Impregilo which, properly analysed, is limited to alleged breaches of the BIT[14], and Impregilo's own alleged loss. As such, it is Impregilo, and neither GBC nor the other joint venture participants, that constitutes the 'juridical person' for the purposes of Rule 2(1)(f) of the Institution Rules. Contrary to Pakistan's case, it follows that the 'internal actions' referred to in Rule 2 are those internal to Impregilo. As far as the requirements of the ICSID Convention and Rules and the BIT are concerned, there is no need for authorisation by GBC or any other joint venture partners for arbitration to be commenced pursuant to Article 9 of the BIT." | **[183]** "On this basis, the Tribunal considers that the authorisation granted in the Minutes of the Meeting of the Executive Committee of Impregilo on 22 January 2002 is sufficient for these proceedings."

[Paras. 175, 181, 182, 183]

6. Conclusions on Objections *Ratione Personae*

[184] "It follows that this Tribunal has jurisdiction *ratione personae* over Impregilo's claims, only in so far as such claims concern Impregilo's own alleged loss, being (at most) proportionate to its *pro rata* participation in the Joint Venture."

[Para. 184]

B. Jurisdiction *Ratione Materiae*

1. Contract Claims

II.4.9215 CONTRACT CLAIMS—TREATY CLAIMS
See also I.11.0; II.4.921

a. The Scope of Article 9 of the BIT

[198] "Both Contracts were concluded with WAPDA and not with the State of Pakistan. Whether or not Article 9 of the BIT extends to disputes be-

14 [89] As follows from the analysis in Section V of this Decision.

tween Impregilo and Pakistan arising out of contracts concluded with WAPDA therefore turns upon the precise status of this authority, and the legal consequences to be drawn from this status." | **[199]** "[. . .] The status of WAPDA as a party to the Contracts is a matter for the law of Pakistan, being both the law by which WAPDA was established and exists, and also the law governing the Contracts." | **[200]** "WAPDA was established by the Pakistan Water and Power Development Authority Act of 1958[15] ('the 1958 Act'). [. . .]" | **[209]** "Although the Government of Pakistan exercises a strict control on WAPDA, in light of the terms of the 1958 Act that established it, the Tribunal considers that WAPDA is properly characterised as an autonomous corporate body, legally and financially distinct from Pakistan." | **[210]** "Much of Impregilo's argument on this issue rested upon international law principles of state responsibility and attribution. However, a clear distinction exists between the responsibility of a State for the conduct of an entity that violates international law (e.g. a breach of Treaty), and the responsibility of a State for the conduct of an entity that breaches a municipal law contract (i.e. Impregilo's Contract Claims). As noted by the *ad hoc* Committee in its decision on annulment in *Compañia de Aguas del Aconquija and Vivendi Universal v. Argentine Republic*, the international law rules on State responsibility and attribution apply to the former, but not the latter:

> '. . . whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own applicable law—in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract . . . For example, in the case of a claim based on a treaty, international law rules of attribution apply, with the result that the State . . . is internationally responsible for the acts of its provincial authorities. By contrast, the State . . . is not liable for the performance of contracts entered into by [a provincial authority], which possesses a separate legal personality under its own law and is responsible for the performance of its own contracts.'[16]" |

[211] "[. . .] Article 9 of the BIT covers only 'disputes arising between a Contracting Party and the investors of the other'. As is clear from its own terms, the scope of application of this provision is limited to disputes between the entities or persons concerned." | **[212]** "As was stated in *Salini Costruttori SpA v. Kingdom of Morocco*, where a State has organised a sector of activity through a distinct legal entity, whether or not a State entity, it does not follow *a priori* that the State has extended its jurisdiction offer in a BIT to contractual breaches committed by such other entity or its agents." | **[213]**

15 [90] Pakistan Act No. XXX1 of 1958, as subsequently amended.

16 [91] *Compañia de Aguas del Aconquija SA and Vivendi Universal* (formerly *Compagnie Générale des Eaux*) v. *Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment of 3 July 2002, *6 ICSID Reports 340*, para.96.

"*Salini Costruttori SpA v. Kingdom of Morocco*[17] concerned claims for the alleged breach of a contract between Salini (an Italian corporation) and Société Nationale des Autoroutes du Maroc ('ADM'). [. . .] The tribunal [. . .] concluded that it did not have jurisdiction over mere breaches of the contract concluded between Salini and ADM, in so far as such breaches did not simultaneously constitute breaches of treaty [. . .]." | **[214]** "This analysis applies in terms to Article 9 of the BIT between Italy and Pakistan. In the Tribunal's view, the jurisdiction offer in this BIT does not extend to breaches of a contract to which an entity other than the State is a named Party. Indeed, had the intention been to extend each Contracting Party's jurisdiction offer in this way, the language of Article 9 would have been so crafted." | **[215]** "The Tribunal notes that this conclusion is also consistent with a number of other decisions of ICSID tribunals in comparable cases[18]." | **[216]** "[…] Given that the Contracts at issue were concluded between the Claimant and WAPDA, and not between the Claimant and Pakistan; that under the law of Pakistan, which governs both the Contracts and the status and capacity of WAPDA for the purposes of the Contracts, WAPDA is a legal entity distinct from the State of Pakistan; and given that Article 9 of the BIT does not cover breaches of contracts concluded by such an entity, it must follow that this Tribunal has no jurisdiction under the BIT to entertain Impregilo's claims based on alleged breaches of the Contracts." | **[218]** "[…] However, as stated by the *ad hoc* Committee in its decision on annulment in *Compañia de Aguas del Aconquija and Vivendi Universal v. Argentine Republic*:

> '. . . it is one thing to exercise contractual jurisdiction . . . and another to take into account the terms of a contract in determining whether there has been a breach of a distinct standard of international law such as that reflected in . . . the BIT'[19]." |

[219] "The fact that Article 9 of the BIT does not endow the Tribunal with jurisdiction to consider Impregilo's Contract Claims does not imply that the Tribunal has no jurisdiction to consider Treaty Claims against Pakistan which at the same time could constitute breaches of the Contracts. [. . .]"

[Paras. 198, 199, 200, 209, 210, 211, 212, 213, 214, 215, 216, 218, 219]

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17 [92] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction of 23 July 2001, *op. cit.*, paras. 59 to 61.

18 [97] E.g. *Consortium RFCC v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Decision on Jurisdiction of 16 July 2001, para. 68, French original available at http://www.worldbank.org/icsid/cases.htm; see also *Cable Television of Nevis v. Federation of St. Kitts and Nevis*, ICSID Case No. ARB/95/2, Award of 13 January 1997, *5 ICSID Reports 106*, para. 2.22.

19 [98] *Compañia de Aguas del Aconquija SA and Vivendi Universal* (formerly *Compagnie Générale des Eaux*) *v. Argentine Republic*, *op.cit.*, para. 105.

I.17.22 MFN-TREATMENT

b. The "MFN" Provision in Article 3 of the BIT

[220] "Aside from Article 9, Impregilo also relies upon Article 3(2) of the BIT, which contains a most-favoured nation ('MFN') clause. Impregilo observes that several of the BITs concluded by Pakistan include an 'observance of commitments' or 'umbrella clause'. More specifically, under Article 11 of the Swiss-Pakistani BIT, each Party is required to 'constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party'." | **[223]** "In the Tribunal's view, given that the Contracts were concluded by Impregilo with WAPDA, and not with Pakistan. Impregilo's reliance upon Article 3 of the BIT takes the matter no further. Even assuming *arguendo* that Pakistan, through the MFN clause and the Swiss-Pakistan BIT, has guaranteed the observance of the contractual commitments into which it has entered together with Italian investors[20], such a guarantee would not cover the present Contracts—since these are agreements into which it has not entered. On the contrary, the Contracts were concluded by a separate and distinct entity."

[Paras. 220, 223]

2. Treaty Claims

II.4.921 JURISDICTION *RATIONE MATERIAE*
See also II.4.0

a. Qualification as a Treaty Claim

[237] "When considering its jurisdiction to entertain the Treaty Claims, the Tribunal considers that it must not make findings on the merits of those claims [. . .] but rather must satisfy itself that it has jurisdiction over the dispute [. . .]. This has been recognised both by the ICJ and by arbitral tribunals in many cases." | **[238]** "The ICJ, in the *Ambatielos* Case in 1953, stated:

> 'In order to decide, in these proceedings, that the Hellenic Government's claim on behalf of Mr. Ambatielos is 'based on' the Treaty of 1886 within the meaning of the Declaration of 1926, it is not necessary for the Court to find and indeed the Court is without jurisdiction to do so—that the Hellenic Government's interpretation of the Treaty is the correct one. The Court must determine, however, whether the arguments advanced by the Hellenic Government in respect of the treaty provisions on which the *Ambatielos* claim is said to be based, are of a sufficiently plausible character to warrant a conclusion that the claim is based on the Treaty. It is not enough for the

20 [100] *i.e.* putting aside, for the sake of argument, the restrictive analysis of the umbrella clause in the Swiss-Pakistan BIT that was adopted by the tribunal in *SGS v. Pakistan*.

claimant Government to establish a remote connection between the facts of the claim and the Treaty of 1886.'[21]" |

[239] "More recently, in comparable cases, the ICJ has used more objective criteria. Rather than referring to the 'plausibility' of the claims, in the *Oil Platforms (Islamic Republic of Iran v. United States of America)*, the Court stated that:

'the Parties differ on the question whether the dispute between the two States with respect to the lawfulness of the actions carried out by the United States against the Iranian oil platforms is a dispute 'as to the interpretation or application of the Treaty of 1955'. In order to answer that question, the Court cannot limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it. It must ascertain whether the violations of the Treaty of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain, pursuant to Article XXI, paragraph 2.

17. The objection to jurisdiction raised by the United States comprises two facets. One concerns the applicability of the Treaty of 1955 in the event of the use of force; the other relates to the scope of various Articles of that Treaty.'[22]" |

[240] "In the cases concerning the *Legality of Use of Force* in Yugoslavia, the ICJ adopted a similar approach. It stated that:

'in order to determine, even *prima facie*, whether a dispute within the meaning of Article IX of the Genocide Convention exists, the Court cannot limit itself to noting that one of the Parties maintains that the Convention applies, while the other denies it; . . . [It] must ascertain whether the breaches of the Convention alleged by Yugoslavia are capable of falling within the provisions of the instrument and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain pursuant to Article IX.'[23]" |

[241] "Arbitral tribunals have adopted a similar approach. Thus, in *SGS v. Philippines*[24], the ICSID tribunal stated that:

'The Tribunal's jurisdiction, if it exists, must arise by virtue of the ICSID Convention associated with the BIT. . . It is not enough that the Claimant

21 [102] *Ambatielos*, Merits Judgment, I.C.J. Reports 1953, p. 18.

22 [103] I.C.J. Reports 1996, II, p. 810, para. 16-17. In her separate Opinion, Judge Higgins proposed the following approach: "The only way in which, in the present case, it can be determined whether the claims of [Claimant] are sufficiently plausibly based upon the 1955 Treaty is to accept pro tem the facts as alleged by [Claimant] to be true and in that light to interpret Articles I, IV and X for jurisdictional purposes, that is to say, to see if on the basis of Iran's claims of fact there could occur a violation of one or more of them" (para 32 of the separate Opinion).

23 [104] *Legality of Use of Force* (Yugoslavia v. Italy), I.C.J. Reports 1999—I, p. 490, para. 25.

24 [105] *Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction of 29 January 2004, available at http://www.worldbank.org/icsid/cases/pending.htm.

raises an issue under one or more provisions of the BIT which Respondent disputes. To adopt the words of the International Court in the *Oil Platforms Case*, the Tribunal 'must ascertain whether the violations of the [BIT] pleaded by [SGS] do or do not fall within the' provisions of the Treaty and whether, as a consequence, the dispute is one which the [Tribunal] has jurisdiction *ratione materiae* to entertain' (para. 26)." |

[242] "In another passage of this decision, the arbitral tribunal stated that:

'In accordance with the basic principle formulated in the *Oil Platforms Case* (above, para. 26), it is not enough for the Claimant to assert the existence of a dispute as to fair treatment and expropriation' (para. 157)." |

[243] "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:

'. . . it is for the Claimant to formulate its case. Provided that the facts 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' (para 157).[25]" |

[244] "On this approach, the ICJ and individual arbitral tribunals have arrived at decisions on jurisdiction that vary from one case to another." | **[245]** "In the *Ambatielos* Case, the ICJ, after having considered the possible interpretations of the Anglo-Greek commercial treaty of 1886 concluded that 'the difference between the Parties is the kind of difference which, according to the Declaration of 1926, should be submitted to arbitration' (p. 22)." | **[246]** "In the *Oil Platforms Case*, the ICJ determined the scope of various Articles of the 1955 Treaty of Friendship and Commerce between Iran and the United States of America and decided that it had jurisdiction to entertain the Iranian claims only on the basis of Article XXI, paragraph 2, of the Treaty relating to freedom of commerce and navigation and not on the basis of the other provisions invoked by Iran." | **[247]** "In the cases concerning the *Legality of Use of Force* in Yugoslavia, the ICJ stated that 'it does not appear at the present stage of the proceedings that the bombings which form the subject of the Yugoslav Application 'indeed entail the element of intent'' which is necessary to characterise conduct as genocide. As a consequence, the Court was 'therefore not in a position to find, at [that] stage of the proceedings, that the acts imputed by Yugoslavia to the Respondent [were] capable of coming within the provisions of the Genocide Convention.' Accordingly, it decided that it had no jurisdiction *prima facie*.[26]" | **[248]** "In *SGS v. Pakistan*, the arbitral tribunal concluded that: 'if the facts asserted

25 [106] *Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/1, Decision on Objections to Jurisdiction of 6 August 2003, *18 ICSID Rev.—FILJ 301 (2003)*. See similarly *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No ARB/02/13, Award of 29 November 2004, available at http://www.worldbank.org/icsid/cases/pending.htm.

26 [107] *Legality of Use of Force* (Yugoslavia v. Italy), I.C.J. Reports 1999-I, p. 491, paras. 27 and 28.

by the Claimants are capable of being regarded as alleged breaches of the BIT consistently with the practice of ICSID tribunals, the Claimant should be able to have them considered on their merits. . .'. 'We do not exclude the possibility that there may arise a situation where the Tribunal may find it necessary at the very beginning to look to the Claimant's factual claims but this is not such a case' (para 144).[27]" | **[249]** "Similarly, in *Wena Hotels Ltd v. Arab Republic of Egypt*, the arbitral tribunal stated that:

> 'Wena raised allegations against Egypt . . . which if proven, clearly satisfy the requirements of a legal dispute under Article 25(1) of the ICSID Convention. In addition, Wena has presented at least some evidence that suggests Egypt's possible culpability.'[28]" |

[250] "The tribunal concluded that it had jurisdiction and reserved its decision on the merits." | **[251]** "The arbitral tribunal, in *SGS v. Philippines* arrived at a different conclusion in respect of part of the claim in that case. It stated that:

> '. . . the present dispute is on its face a dispute about the amount of money owed under a contract. SGS accepts that the provision of services under the CISS Agreement came to an end by the effluxion of time. No question of a breach of the BIT independent of breach of contract is raised (as, arguably, in *SGS v. Pakistan*); there is no allegation of a conspiracy by local officials to frustrate the investment (as in *Vivendi*). As presented to the Tribunal by the Claimant, the unresolved issues between the Parties concern the determination of the amount still payable' (para. 159).[29]" |

[252] "The tribunal then recalled that, in its request for arbitration, SGS had invoked Articles IV, VI and X(2) of the BIT. The tribunal commented that:

> '. . . an unjustified refusal to pay sums admittedly payable under an award or a contract at least raises arguable issues under Article IV' (fair and equitable treatment) (para. 162).[30]

However, it added that 'on the material presented by the Claimant, no case of expropriation has been raised. . . A refusal to pay is not an expropriation when there is an unresolved dispute as to the amount payable' (para. 161). As a consequence, the tribunal dismissed the claim 'so far as it is based on Article VI of the BIT' (expropriation)." | **[253]** "Similarly, in *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

27 [108] *Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/1, Decision on Objections to Jurisdiction of 6 August 2003, *op. cit.*

28 [109] *Wena Hotels Ltd. V. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Jurisdiction of 29 June 1999, *6 ICSID Reports 74*, page 86.

29 [110] *Op. cit.*

30 [111] *Op. cit.*

claim based on such a rule was not within the jurisdiction of the tribunal." | **[254]** "The present Tribunal is in full agreement with the approach evident in this jurisprudence. It reflects two complementary concerns: to ensure that courts and tribunals are not flooded with claims which have no chance of success, or may even be of an abusive nature; and equally to ensure 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 has considered whether the facts as alleged by the Claimant in this case, if established, are capable of coming within those provisions of the BIT which have been invoked (see paragraph 263 below)."

[Paras. 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254]

II.4.9215 CONTRACT CLAIMS-TREATY CLAIMS

b. Analysis of Treaty Claims and the Interrelationship Between Contract and Treaty Claims

[255] "[. . .] [T]he principal jurisdiction objection to the Treaty Claims raised by Pakistan concerns their coincidence with the Contract Claims." | **[256]** "In the decision of the *ad hoc* Committee in *Compañia de Aguas del Aconquija SA and Vivendi Universal v. Argentine Republic*, a number of pertinent observations were made as to the interrelationship between treaty claims and contract claims. In particular, it was noted that:

> 'A particular investment dispute may at the same time involve issues of the interpretation and application of the BIT's standards and questions of contract.'[31]
>
> 'A State may breach a treaty without breaching a contract, and vice-versa.'[32]
>
> 'Whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law—in the case of the BIT, by international law, in the case of the Concession Contract, by the proper law of the contract.'[33]" |

[257] "Applying these criteria, the *ad hoc* Committee in the *Vivendi* Case, went on to state that the *Vivendi* claim:

> '. . . was not simply reducible to so many civil or administrative claims concerning so many individual acts alleged to violate the concession Contract or the administrative law of Argentina. It was open to Claimants to claim, as

31 [112] *Compañia de Aguas del Aconquija SA and Vivendi Universal v. Argentine Republic,* Decision of Annulment, 3 July 2002, *op. cit*., para. 60.

32 [113] *Ibid.,* para. 95.

33 [114] *Ibid.,* para. 96.

> they did, that these acts taken together, or some of them, amounted to a breach of . . . the BIT.'[34]

The Committee added 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 relevant treaty standards'. Thus, in choosing to commence an ICSID arbitration, the Claimant takes 'the risk of a Tribunal holding that the acts complained of neither individually nor collectively rose to the level of a breach of the BIT.'[35]" |

[258] "Hence [. . .] the fact that a breach may give rise to a contract claim does not mean that it cannot also—and separately—give rise to a treaty claim. Even if the two perfectly coincide, they remain analytically distinct, and necessarily require different enquiries." | **[259]** "Thus, not every breach of an investment contract can be regarded as a breach of a BIT. In the words of the arbitral tribunal in *Consortium RFCC v. Kingdom of Morocco*:

> 'Une telle violation peut certes résulter d'une violation du contrat, mais sans qu'une éventuelle violation du contrat ne constitue, ipso jure et en elle-même, une violation du Traité, comme le Tribunal l'a rappelé ci-dessus.'[36]" |

[260] "In fact, the State or its emanation, may have behaved as an ordinary contracting party having a difference of approach, in fact or in law, with the investor. In order that the alleged breach of contract may constitute a violation of the BIT, it must be the result of behaviour going beyond that which an ordinary contracting party could adopt.[37] Only the State in the exercise of its sovereign authority ('*puissance publique*'), and not as a contracting party, may breach the obligations assumed under the BIT. In other words, the investment protection treaty only provides a remedy to the investor where the investor proves that the alleged damages were a consequence of the behaviour of the Host State acting in breach of the obliga-

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34 [115] *Ibid.,* para. 112.

35 [116] *Ibid.,* para. 113.

36 [117] "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"—*Consortium RFCC v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Award of 22 December 2003, para. 48, French original available at http://www.worldbank.org/icsid/ cases.htm.

37 [118] See e.g. the review of jurisprudence in Stephen M. Schwebel "*Justice in International Law*" (Grotius / CUP), Chapter 26 : "*On Whether the Breach by a State of a Contract with an Alien is a Breach of International Law*" : "… there is more than doctrinal authority in support of the conclusion that, while mere breach by a State of a contract with an alien (whose proper law is not international law) is not a violation of international law, a 'non-commercial' act of a State contrary to such a contract may be. That is to say, the breach of such a contract by a State in ordinary commercial intercourse is not, in the predominant view, a violation of international law, but the use of the sovereign authority of a State, contrary to the expectations of the parties, to abrogate or violate a contract with an alien, is a violation of international law. … when the State employs its legislative or administrative or executive authority as only a State can employ governmental authority to undo the fundamental expectation on the basis of which parties characteristically contract —performance, not non-performance—then it engages its international responsibility."

tions it had assumed under the treaty." | **[261]** "Similarly, in the case of *Joy Machinery Limited v. Arab Republic of Egypt*,[38] an ICSID tribunal 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'.

The tribunal concluded in that 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.'[39]" |

[262] "This approach to the issue of overlapping Treaty and Contract Claims—*i.e.* to recognise that even if the two coincide, they remain analytically distinct—is all the more apposite because of the different rules of attribution that govern responsibility for the performance of BIT obligations, as opposed to responsibility for breaches of municipal law contracts. In this respect, the Tribunal has noted in Section IV.A above that the legal personality of WAPDA is distinct from that of the State of Pakistan, and that the Contracts were concluded by that authority rather than the State itself. As a consequence, the Tribunal has declined to exercise jurisdiction over the Contract Claims presented by Impregilo. In contrast, under public international law (*i.e.* as will apply to an alleged breach of treaty), a State may be held responsible for the acts of local public authorities or public institutions under its authority. The different rules evidence the fact that the overlap or coincidence of treaty and contract claims does not mean that the exercise of determining each will also be the same." | **[263]** "[. . .] Having decided that the fact that some Treaty Claims here may coincide with Contract Claims does not deprive this Tribunal of jurisdiction, the question remains whether, applying the approach set out above, Impregilo's Treaty Claims fall within the scope of the BIT, assuming *pro tem* that they may be sustained on the facts." | **[265]** "The Tribunal observes that Impregilo bases its Treaty Claims both on (1) the way the Contract was implemented, and the frustration of the dispute resolution provisions, by the Engineer and by WAPDA, and (2) the attitude and conduct of Pakistan itself. According to Impregilo, in both cases, Article 2(2) of the BIT has been violated by Pakistan." | **[266]** "In the Tribunal's view, if it is assumed *pro tem* that Impregilo can establish the facts upon which it relies, it is possible, at least in theory,

38 [119] *Joy Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Decision on Jurisdiction of 6 August 2004, an electronic text is provided by *International Law in Brief* at http://www.asil.org/ilib/JoyMining_Egypt.pdf.

39 [120] *Ibid.*, at paras. 72 and 82.

that Impregilo might establish breaches of the BIT in this regard. Whether or not this is so will depend upon:

> (a) Whether Impregilo is able to establish 'attribution' to Pakistan in so far as the acts of other entities are concerned, and
>
> (b) Whether Impregilo is able to meet the threshold for treaty claims outlined above, *i.e.* activity beyond that of an ordinary contracting party ('*puissance publique*')." |

[267] "The threshold to establish that a breach of the Contracts constitutes a breach of the Treaty is a high one. This may be illustrated by the Tribunal's conclusion, set out below, that certain matters that are the subject of a current reference to the Lahore arbitration do not so qualify—even assuming, *pro tem*, that Impregilo is able to establish the facts upon which it relies."

[Paras. 255, 256, 257, 258, 259, 260, 261, 262, 263, 265, 266, 267]

I.17.24 FAIR AND EQUITABLE TREATMENT
See also I.17.26

[268] "[. . .] [T]he Tribunal considers that Impregilo's claims in respect of unforeseen geological conditions [. . .] are not capable of constituting 'unfair or inequitable treatment' or 'unjustified or discriminatory measures' for the purposes of Article 2 of the BIT. These are matters that concern the implementation of the Contracts, and do not involve any issue beyond the application of a contract, and the conduct of contracting parties. In particular, the matter does not concern any exercise of '*puissance publique*' by the State." | **[269]** "Accordingly, these claims do not enter within the purview of Article 2(2) of the BIT, and the Tribunal has no jurisdiction to consider them in this regard." | **[270]** "[. . .] [W]ith respect to the other alleged breaches of the Contracts, in the absence of detailed factual information, the Tribunal is not presently in a position to decide whether or not these could be considered as breaches of Article 2(2) of the BIT. Only after a careful examination of those alleged breaches will the Tribunal be able to determine whether the behaviour of Pakistan went beyond that which an ordinary Contracting party could have adopted, and constituted 'unfair and inequitable treatment' or 'unjustified or discriminatory measures' as contemplated in the BIT." | **[271]** "The Tribunal therefore has no choice but to decide upon its jurisdiction with respect to these alleged breaches when considering the merits, as contemplated by Rule 41(4) of the ICSID Arbitration Rules."

[Paras. 268, 269, 270, 271]

I.17.12 INDIRECT EXPROPRIATION

[272] "[. . .] Impregilo also submits that the 'Respondent's conduct is tantamount to an expropriation under Article 5(2) of the BIT.'[40] In support of this submission, it invokes decisions rendered both within ICSID and by the Iran-United States Claim Tribunal.[41]" | **[274]** "The Tribunal recognises that the taking of contractual rights could, potentially, constitute an expropriation or a measure having an equivalent effect.[42] It notes that the present case does not concern a situation of nationalisation or expropriation in the traditional sense of those terms, but behaviour that could, at least in theory, constitute an indirect expropriation or a measure having an effect equivalent to expropriation." | **[275]** "Usually, expropriation or nationalisation are effected:

> '. . . par le biais d'actes législatifs ou réglementaires, qu'ils soient individuels ou de portée générale'.[43]" |

[276] "'Measures of an equivalent effect' could for their part consist of State intervention even in the absence of such acts. Thus, in *Ethyl Corp. v. the Government of Canada*, in a NAFTA dispute, an arbitral tribunal considered whether the announcement made by the Canadian government stating that it would soon pass a law limiting the import of a chemical substance of which the Claimant, a US company, had engaged in importation and distribution, could constitute a 'measure' having an effect equivalent to expropriation. In the course of its enquiry, it concluded that for the purposes of NAFTA, '[c]learly something other than a 'law', even something in the nature of a 'practice,' which may not even amount to a legal stricture, may qualify' as such a 'measure'.[44]" | **[277]** "An ICSID tribunal has taken a similar decision in a case of a refusal without justification of a construction permit, where such refusal deprived an investor of part or whole of its investment.[45]" | **[278]** "The Tribunal observes that in those two cases, the measures in question had a unilateral character and were taken by a State or a Province acting in the exercise of its sovereign authority ('*puissance publique*') and not as a contracting party. Indeed, all the key decisions relating to indirect expropriation mention the 'interference' of the Host State in

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40 [122] Counter-Memorial on jurisdiction, para. 72.

41 [123] Limited Memorial on the merits, para. 158 and following paragraphs.

42 [125] *Norwegian shipowner's claims* (Norway v. USA), R. International Arbitral Awards 307 (1922); *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award of 20 May 1992, *3 ICSID Reports 189*, paras. 42-46; *Consortium RFCC v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Award of 22 December 2003; *Philips Petroleum Company v. Islamic Republic*, Iran-United States Claims Tribunal, Award 425-39-2, 29 June 1989, para. 76; *SEACO v. Islamic Republic of Iran*, Award 531-260-2, 25 June 1992, para. 45.

43 [126] "through legislative acts or regulations, whether specific or general", *Consortium RFCC v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, *op. cit*., para. 65.

44 [127] Arbitration NAFTA/UNCITRAL, *Ethyl Corp. v. The Government of Canada,* Award on Jurisdiction, 24 June 1998, *38 ILM 708* (1999), para. 66.

45 [128] *Metalclad Corporation v. Mexico*, ICSID Case No. ARB (AF) 97/1.

the normal exercise, by the investor, of its economic rights. However, a Host State acting as a contracting party does not 'interfere' with a contract; it 'performs' it. If it performs the contract badly, this will not result in a breach of the provisions of the Treaty relating to expropriation or nationalisation, unless it be proved that the State or its emanation has gone beyond its role as a mere party to the contract, and has exercised the specific functions of a sovereign authority.[46]" | **[279]** "Moreover, the effect of the measures taken must be of such importance that those measures can be considered as having an effect equivalent to expropriation.[47]" | **[281]** "Following the analysis above, it is the Tribunal's view that only measures taken by Pakistan in the exercise of its sovereign power ('*puissance publique*'), and not decisions taken in the implementation or performance of the Contracts, may be considered as measures having an effect equivalent to expropriation. Therefore, the Tribunal has jurisdiction only to consider the former, and not the latter, for the purposes of Article 5 of the BIT."

[Paras. 272, 274, 275, 276, 277, 278, 279, 281]

II.4.9215 CONTRACT CLAIMS-TREATY CLAIMS

c. The Effect of the Contractual Dispute Resolution Clauses

[286] "The above approach to treaty claims and contract claims has the consequence that a treaty claim may be the subject of consideration alongside—and in a different forum from—the consideration of an overlapping contract claim. This gives rise to an issue that has been the subject of much debate, and much argument in this case: how might the integrity of the contractual dispute resolution clauses be protected?" | **[287]** "In the Tribunal's view, this issue, of itself, does not deprive this Tribunal of jurisdiction over the Treaty Claims, where such jurisdiction otherwise exists." | **[288]** "A variety of approaches have been taken by other ICSID tribunals [. . .] including the use of the doctrine of 'admissibility' and the ordering of a stay as in *SGS v. Philippines*." | **[289]** "The Tribunal considers that, whilst arguably justified in some situations, a stay of proceedings would be inappropriate here, for a number of reasons. Firstly, such a stay, if anything, would confuse the essential distinction between the Treaty Claims and the Contract Claims as set out above. Since the two enquiries are fundamentally different (albeit with some overlap), it is not obvious that the contractual dispute resolution mechanisms in a case of this sort will be undermined in any substantial sense by the determination of separate and distinct Treaty

46 [129] *Consortium RFCC v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Award of 22 December 2003, para. 65, *op. cit.*

47 [130] *Compañia del desarrolo de Santa Ana* [sic] *SA (CDSE) v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award of 17 February 2000, 5 *ICSID Reports* 157; *Starrett Housing v. Islamic Republic of Iran*, Iran/USA Claims Tribunal 4 Iran US CTR 122; *Consortium RFCC v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, *op. cit.*, paras. 67-68.

Claims. Indeed, this is all the more so in a case such as the present, where (unlike *SGS v. Philippines*) the parties to these proceedings (Impregilo and Pakistan) are different from the parties to the contract arbitration proceedings (GBC and WAPDA)." | **[290]** "Further, if a stay was ordered [. . .] it is unclear for how long this should be maintained; what precise events might trigger its cessation; and what attitude this Tribunal ought then to take on a resumed hearing to any proceedings or findings that may have occurred in the interim in Lahore."

[Paras. 286, 287, 288, 289, 290]

II.4.921 JURISDICTION *RATIONE MATERIAE*

3. Conclusions on Objections *Ratione Materiae*

[291] "It follows that:

(a) This Tribunal has no jurisdiction *ratione materiae* over Impregilo's Contract Claims;

(b) The alleged breaches of the Contracts may constitute breaches of Articles 2(2) and 5 of the BIT if they meet the criteria defined in the present section; but

(c) This Tribunal has no jurisdiction *ratione materiae* to entertain the claims relating to the unforeseen geological conditions encountered during the implementation of the Contracts, which were the subject of DRB Recommendation 14; and

(d) With respect to the other Treaty Claims, including the Treaty Claims relating to the frustration of the dispute resolution mechanism, the Tribunal will determine its jurisdiction when considering the merits."

[Para. 291]

C. Jurisdiction *Ratione Temporis*

II.4.923 JURISDICTION *RATIONE TEMPORIS*

1. Analysis

[299] "[. . .] The BIT, which entered into force on 22 June 2001, applies to:

'. . . any dispute arising between a contracting Party and the investors of the other' (Article 9, para. 1, English version)

or to

'. . . le controversie che dovessero insorgere tra una delle Parti contra enti et gli investitori dell'altra parte contraente' (Article 9, para. 1, Italian version)." |

[300] "Such language—and the absence of specific provision for retroactivity—infers that disputes that may have arisen before the entry into force of the BIT are not covered (*i.e.* disputes arising before 22 June 2001)." | **[301]** "[. . .] There is an abundant jurisprudence on the definition of 'disputes' in international law, and on the date on which such disputes are considered to arise." | **[302]** "The Permanent Court of International Justice and the ICJ have taken a position on these questions on numerous occasions. They have defined a dispute as:

> '. . . a disagreement on a point of law or fact, a conflict of legal views or interests between the Parties.'[48]" |

[303] "In order to establish the existence of a dispute, 'It must be shown that the Claim of one party is positively opposed by the other.'[49] Further, 'Whether there exists an international dispute is a matter for objective determination.'[50]" | **[304]** "ICSID arbitral tribunals have also considered the matter on a number of occasions.[51] As was observed, for example, in *Maffezini v. Kingdom of Spain*:

> '. . . there tends to be a natural sequence of events that leads to a dispute. It begins with the expression of a disagreement and the statement of a difference of views. In time, those events acquire a precise legal meaning through the formulation of legal claims, their discussion and eventual rejection or lack of response by the other party. The conflict of legal views and interests will only be present in the latter stage, even through the underlying facts predate them. . . this sequence of event has to be taken into account in establishing the critical date.'[52]" |

[305] "[. . .] In the present case, Impregilo pursues a number of Contract Claims that were initially advanced between 1997 and 2003 [. . .]. However [. . .] the Tribunal has no jurisdiction *ratione personae* to consider these claims, and therefore the issue of jurisdiction *ratione temporis* need not be addressed." | **[306]** "[. . .] As for Impregilo's Treaty Claims, the Tribunal

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48 [135] See *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.J.I. Series A, No. 2*, p. 11 ; *Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 27 ; and *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, p. 27, para. 35.

49 [136] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328.

50 [137] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74)" (Case concerning *East Timor (Portugal v. Australia), Judgment, 30 June 1995, I.C.J. Reports 1995*, p. 99, para. 22.

51 [138] See e.g. *AGIP. Congo,* ICSID Case No. ARB/77/1, Award of 30 November 1979, *1 ICSID Reports 306*; *AALP v. Sri Lanka,* ICSID Case No. ARB/87/3, Award of 27 June 1990, *4 ICSID Reports 25*.

52 [139] *Emilio Agustín Maffezini v. Kingdom of Spain,* ICSID Case No. ARB/97/7, Decision on Jurisdiction of 25 January 2000, para. 96, *5 ICSID Reports 396*.

notes that in a letter dated 27 July 2001 to the Secretary of the Ministry of Water and Power, Impregilo requested an 'intervention' by Pakistan:

> '. . . in order to seat and agree on an amicable settlement of the disputes that, in the light of WAPDA's inactions and omissions, have been seriously aggravated during the most recent period of time.'[53]" |

[307] "In the months that followed, negotiations between GBC and WAPDA took place without success. Then, on 28 January 2002, Impregilo filed a Request for Arbitration against Pakistan before ICSID. After the registration of that Request, Impregilo and WAPDA engaged in discussions in an effort to settle the dispute. As a result of those discussions, and with the assistance of the Pakistani authorities, a supplementary Arrangement to the Contract was signed on 14 April 2002 and Impregilo withdrew this First Request. However, this attempt ultimately did not succeed, and on 17 January 2003, Impregilo filed the Request presently under consideration." | **[308]** "At first sight, therefore, it appears that Impregilo presented its Treaty Claims to Pakistan after 22 June 2001, such that the Tribunal has jurisdiction to consider the corresponding dispute." | **[309]** "However, in the Tribunal's view, care must be taken to distinguish between (1) the jurisdiction *ratione temporis* of an ICSID tribunal and (2) the applicability *ratione temporis* of the substantive obligations contained in a BIT." | **[310]** "In this respect, it is to be noted 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 on the Law of Treaties applies, and the provisions of the BIT:

> '. . . do not bind the Party in relation to any act of facts which took place or any situation which ceased to exist before the date of entry into force of the Treaty.'[54]" |

[311] "Impregilo complains of a number of acts for which Pakistan is said to be responsible. The legality of such acts must be determined, in each case, according to the law applicable at the time of their performance. The BIT entered into force on 22 June 2001. Accordingly, only the acts effected after that date had to conform to its provisions." | **[312]** "[. . .] However, Impregilo contends otherwise, by reference to Article 14 of the Articles of the International Law Commission on State Responsibility ('Extension in time of the breach of an international obligation'), which, in its opinion, reflects customary international law. Whether or not this Article does in fact reflect customary international law need not be addressed for present purposes. It suffices to observe that, in the Tribunal's view, the present case is

53 [140] Annex 6 to the Request.

54 [141] See *Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction of 29 January 2004, *op. cit.*, paras. 165 and 166; see also *Mondev International Ltd. v. United States of America,* ICSID Case No. ARB(AF)/99/2, *6 ICSID Reports 192*, p. 208-9, paras. 68-70.

not covered by Article 14. Acts attributed to Pakistan and perpetrated before 22 June 2001 could without any doubt have consequences after that date. However, the acts in question had no 'continuing character' within the meaning of Article 14; they occurred at a certain moment and their legality must be determined at that moment, and not by reference to a Treaty which entered into force at a later date." | **[313]** "In this respect, the present case is completely different from that described in the *SGS v. Philippines* award [. . .]. In that case, the Respondent recognised its obligation to pay sums due under a contract, and disputed only the quantum of the indemnity. In contrast, the current dispute is to be compared with cases of expropriation as mentioned by the Rapporteur of the draft Articles in the International Law Commission [. . .] in which the effects may be prolonged, whereas the act itself occurred at a specific point in time, and must be assessed by reference to the law applicable at that time:

> 'The prolongation of such effects will be relevant, for example, in determining the amount of compensation payable. They do not, however, entail that the breach itself is a continuing one.'[55]"

[Paras. 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313]

2. Conclusions on Objections *Ratione Temporis*

[314] "It follows that the provisions of the BIT do not bind Pakistan in relation to any act that took place, or any situation that ceased to exist, before 22 June 2001 and the jurisdiction of the Tribunal *ratione temporis* is limited accordingly." | **[315]** "Having articulated the relevant principles, the Tribunal is unable at this stage to make any final determinations as to which (if any) of Impregilo's Treaty Claims are thereby excluded. This will have to await a full analysis of each of the claims, at the merits stage of these proceedings."

[Paras. 314, 315]

II.4.97 DECISION ON JURISDICTION

III. DECISION

[316] "For the foregoing reasons, the Tribunal unanimously decides:

(a) That it has jurisdiction *ratione personae* over Impregilo's claims only in so far as such claims concern Impregilo's own alleged loss, being (at most) proportionate to its *pro rata* participation in the Joint Venture.

(b) That it has no jurisdiction *ratione materiae* over Impregilo's claims based on the alleged breaches of the Contracts.

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55 [142] Crawford, Commentary on *The International Law Commission's Articles on State Responsibility*, (CUP, 2002), Art 14, para 6.

(c) That alleged breaches of the Contracts may however constitute breaches of Articles 2(2) and/or 5 of the BIT if they meet the criteria defined in Section V.B (v) above.

(d) That it has no jurisdiction *ratione materiae* to entertain the claims relating to the unforeseen geological conditions encountered during the implementation of the Contracts, which were the subject of DRB Recommendation 14.

(e) That with respect to the other Treaty Claims, including the Treaty Claims relating to the frustration of the dispute resolution mechanism, the Tribunal will determine its jurisdiction when considering the merits.

(f) That the provisions of the BIT do not bind Pakistan in relation to any act that took place, or any situation that ceased to exist, before 22 June 2001 and the jurisdiction of the Tribunal *ratione temporis* is limited accordingly.

(g) To make the necessary Order for the continuation of the procedure pursuant to Arbitration Rule 41(4).

(h) To reserve all questions concerning the costs and expenses of the Tribunal and the costs of the Parties for subsequent determination."

[Para. 316]

AES Corporation v. The Argentine Republic*, ARB/02/17, Decision on Jurisdiction, 26 April 2005

Original: English

Present: Dupuy, *President of the Tribunal*
Böckstiegel, Bello Janeiro, *Arbitrators*

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II.4.911 REQUEST FOR ARBITRATION
See also I.17.011

I. THE DISPUTE

[1] "On November 5, 2002, the International Centre for Settlement of Investment Disputes ('ICSID' or 'the Centre') received a Request for Arbitration against the Argentine Republic ('the Respondent' or 'Argentina') from the AES Corporation ('the Claimant' or 'AES'), a company incorporated in the State of Delaware, with headquarters in Arlington, Virginia, United States of America. The Request concerns AES' investment in eight electricity generation companies and three major electricity distribution companies in Argentina, and Argentina's alleged refusal to apply previously agreed tariff calculation and adjustment mechanisms." | **[2]** "In its request,

* Summaries prepared by Christina Knahr, MPA, 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/AES-Argentina-Jurisdiction_000.pdf>. Original footnote numbers are indicated in brackets: [ ].

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

AES invoked the provisions of the 1991 Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment (the 'Argentina–US Bilateral Investment Treaty' or the 'BIT').[1]"

[Paras. 1, 2]

II.1.71 EFFECTS OF JUDGMENT
See also I.17.011; I.17.02

II. RELEVANCE OF DECISIONS OF OTHER ICSID TRIBUNALS

[23] "For this Tribunal, Argentina is right to insist on the limits imposed on it as on any other arbitral ICSID tribunal. The provisions of Article 25 of the ICSID Convention together with fundamental principles of public international law dictate, among others, that the Tribunal respects:

a) the autonomy of the will of the Parties to the ICSID Convention as well as that of the Parties to the pertinent bilateral treaty on the protection of investments;

b) the rule according to which '*specialia generalibus deroga*', from which it derives that treaty obligations prevail over rules of customary international law under the condition that the latter are not of a peremptory character;

c) the fact that the extent of the jurisdiction of each tribunal is determined by the combination of the pertinent provisions of two '*leges specialia*': on the one hand, the ICSID Convention and, on the other hand, the BIT in force between the two concerned States; as the case may be, the arbitration clause in contracts between the private investor and the State or its emanation may also interfere with the two previous ones for determination of the scope of the tribunal's jurisdiction.

d) the rule according to which each decision or award delivered by an ICSID Tribunal is only binding on the parties to the dispute settled by this decision or award.[2] There is so far no rule of precedent in general international law; nor is there any within the specific ICSID system for the settlement of disputes between one State party to the Convention and the National of another State Party. This was in particular illustrated by diverging positions respectively taken by two ICSID tribunals on issues dealing with the interpretation of arguably similar language in two different BITs.[3] As rightly stated by the Tribunal in SGS v. Philippines:

'. . .although different tribunals constituted under the ICSID system should in general seek to act consistently with each other, in the end it

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

2 [13] Article 53 of the ICSID Convention.

3 [14] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case N° ARB/01/13 and *SGS Société Générale de Surveillance S.A v. Republic of the Philippines*, ICSID Case N° ARB/02/6.

> 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.'[4]

The same position was echoed by the *ENRON* Tribunal on jurisdiction:

> 'The Tribunal agrees with the view expressed by the Argentine Republic in the hearing on jurisdiction held in respect of this dispute, to the effect that the decisions of ICSID tribunals are not binding precedents and that every case must be examined in the light of its own circumstances.'[5]" |

[24] "The present Tribunal indeed agrees with Argentina that each BIT has its own identity; its very terms should consequently be carefully analyzed for determining the exact scope of consent expressed by its two Parties." | **[25]** "This is in particular the case if one considers that striking similarities in the wording of many BITs often dissimulate real differences in the definition of some key concepts, as it may be the case, in particular, for the determination of 'investments' or for the precise definition of rights and obligations for each party." | **[26]** "From the above derive at least two consequences: the *first* is that the findings of law made by one ICSID tribunal in one case in consideration, among others, of the terms of a determined BIT, are not necessarily relevant for other ICSID tribunals, which were constituted for other cases; the *second* is that, although Argentina had already submitted similar objections to the jurisdiction of other tribunals prior to those raised in the present case before this Tribunal, Argentina has a valid and legitimate right to raise the objections it has chosen for opposing the jurisdiction of this Tribunal. According to Article 41(2) of the ICSID Convention:

> 'Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.'" |

[27] "Under the benefit of the foregoing observations, the Tribunal would nevertheless reject the excessive assertion which would consist in pretending that, due to the specificity of each case and the identity of each decision on jurisdiction or award, absolutely no consideration might be given to other decisions on jurisdiction or awards delivered by other tribunals in similar cases." | **[28]** "In particular, if the basis of jurisdiction for these other tribunals and/or the underlying legal dispute in analysis present either a high level of similarity or, even more, an identity with those met in the

4 [15] *SGS Société Genérale de Surveillance S.A v. Republic of the Philippines*, ICSID Case N° ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, January 29, 2004, available at http://www.worldbank.org/icsid/cases/SGSvPhil-final.pdf.

5 [16] *ENRON v. Argentina*, Decision on Jurisdiction (Ancillary Claim), August 2, 2004, at 8, § 25.

present case, this Tribunal does not consider that it is barred, as a matter of principle, from considering the position taken or the opinion expressed by these other tribunals." | **[29]** "In that respect, it should be noted that the US-Argentina BIT, in conjunction with the ICSID Convention, provides the very same basis for the jurisdiction in this case and in some previous ones, as, in particular, those in which Argentina faced or is still facing a dispute with *ENRON Corp., CMS, AZURIX Corp,* or *LG&E and others*; in each and every of these cases the tribunals respectively constituted have already delivered their decisions on jurisdiction." | **[30]** "An identity of the basis of jurisdiction of these tribunals, even when it meets with very similar if not even identical facts at the origin of the disputes, does not suffice to apply systematically to the present case positions or solutions already adopted in these cases. Each tribunal remains sovereign and may retain, as it is confirmed by ICSID practice, a different solution for resolving the same problem; but decisions on jurisdiction dealing with the same or very similar issues may at least indicate some lines of reasoning of real interest; this Tribunal may consider them in order to compare its own position with those already adopted by its predecessors and, if it shares the views already expressed by one or more of these tribunals on a specific point of law, it is free to adopt the same solution." | **[31]** "One may even find situations in which, although seized on the basis of another BIT as combined with the pertinent provisions of the ICSID Convention, a tribunal has set a point of law which, in essence, is or will be met in other cases whatever the specificities of each dispute may be. Such precedents may also be rightly considered, at least as a matter of comparison and, if so considered by the Tribunal, of inspiration." | **[32]** "The same may be said for the interpretation given by a precedent decision or award to some relevant facts which are basically at the origin of two or several different disputes, keeping carefully in mind the actual specificities still featuring each case. If the present Tribunal concurs with the analysis and interpretation of these facts as they generated certain special consequences for the parties to this case as well as for those of another case, it may consider this earlier interpretation as relevant." | **[33]** "From a more general point of view, one can hardly deny that the institutional dimension of the control mechanisms provided for under the ICSID Convention might well be a factor, in the longer term, for contributing to the development of a common legal opinion or *jurisprudence constante*, to resolve some difficult legal issues discussed in many cases, inasmuch as these issues share the same substantial features."

[Paras. 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33]

III. OBJECTIONS TO JURISDICTION

II.4.9213 LEGAL DISPUTE
See also I.14.0; II.4.92

A. Legal Dispute

[43] "The Tribunal wants to stress that in the present case there are, in substance, two elements to be met for a dispute to be considered as a *legal* one in conformity with the requirement set forth in Article 25 (1) of the ICSID Convention. The first deals with the intrinsic definition of what is a legal dispute; the second deals with the inherent logic which presided over the creation of ICSID.

a. In general terms, as it is also more generally the case in international law, and according to the definition recalled by the International Court of Justice in the Case concerning East Timor, a dispute in the legal sense is:

> 'a disagreement on a point of law or fact, a conflict of legal views or interests between parties'[6]

b. Within the specific context of the ICSID Convention, as rightly commented by Professor Ch. Schreuer with regard to Article 25 (1):

> 'It is submitted that the disagreement between the parties must also have some practical relevance to their relationship and must not be purely theoretical. It is not the task of the Centre to clarify legal questions *in abstracto*.'[7]" |

[44] "The Tribunal consequently considers that the true test of jurisdiction consists in determining

(a) whether, in its claim, AES raises some *legal* issues in relation with a concrete situation, and

(b) if the Tribunal's determination of the answer to be given to these issues would have some practical and concrete consequences.

It is enough, here, to state that, considering the very features of AES' claims the Tribunal be also *prima facie* convinced that AES' interest may have not only been 'merely affected' but hurt." | **[45]** "Yet, on the basis of the elements already brought by the Memorial filed by AES together with a number of supporting evidence, AES' claim seems *prima facie* a substantial one. It deals with a series of legal issues which manifest an evident disagreement among the parties." | **[46]** "AES declares to have invested 1 billion US dollars in the sector of electricity in Argentina; AES alleges to be in control

6 [23] 1995 ICJ Reports 89, § 99 with reference to earlier cases.

7 [24] Ch. Schreuer, The ICSID Convention, op.cit. at 102, § 36.

of 6 generators and 3 distributors of electricity in Argentina; AES invokes the breach by Argentina of articles II(2)(a), II(2)(b), II(2)(c) and IV(1) of the Treaty binding upon Argentina and the United States of America on the protection of investments.[8] It is precisely the substantial interest constituted by the importance of AES investment that the Claimant argues to have been affected by a determined Argentine legislation. AES depicts in particular some Argentine legislation including the Executive Decree N° 570/01, the National Emergency Law N° 25.561 and posterior decrees of application as being at the origin of the breach by Argentina of its international obligations. AES further provided the Tribunal with a detailed estimation of the cost of damages produced to its investment in Argentina by the enforcement of this legislation. Claimant has also articulated a documented claim for compensation." | **[47]** "All these elements are *prima facie* convincing evidence for considering that the AES' claims involve a legal dispute in the terms of Article 25 of the ICSID Convention, therefore falling within the ICSID jurisdiction."

[Paras. 43, 44, 45, 46, 47]

II.4.9214 DISPUTE ARISING DIRECTLY OUT OF AN INVESTMENT
See also I.1.16; II.4.9212

B. Dispute Arising Directly out of an Investment

[51] "[. . .] [T]he Tribunal notes that the factual and legal elements at the origin of the present dispute are basically the same as those considered by other tribunals which, at the same time, share the same sources of jurisdiction (ICSID Convention and US-Argentina BIT). So was it, among others, in the *CMS,* the *Azurix* and the *ENRON* cases." | **[52]** "It is then of real interest to look at the way in which these tribunals considered the measures reputed by claimants to be at the origin of the damage directly produced on their respective investments." | **[53]** "In particular, the Argentinean legislation which brought to an end the regime of convertibility and parity of the Argentine peso with the United States dollar[9] is, due to its concrete consequences on the interests of claimants invested in Argentina prior to December 2001, at the source of the respective claims filed before ICSID in the cases already mentioned above." | **[54]** "In the decision on jurisdiction issued by the ICSID Tribunal in the *CMS* case, in particular, the Tribunal

8 [25] See The AES Corporation Memorial on the Merits, October 6, 2003, at 84, §§ 218-376.

9 [29] National Emergency Act N°25.561 in particular.

referred to the legislation referred to above in paragraph 53 and said pertinently that it should make:

> 'a clear distinction between measures of a general economic nature, particularly in the context of the economic and financial emergency discussed above, and measures specifically directed to the investment's operation.'[10]" |

[55] "The same tribunal further observed:

> 'What is brought under the jurisdiction of the Centre is not the general measures in themselves but the extent to which they may violate those specific commitments.'[11]" |

[56] "In the present case, the situation seems *prima facie* to be the same. At this stage, the Tribunal notes that AES' claims are not broadly based on Argentina's general economic policies. Their ground is provided by the fact that the regulatory and legal framework AES relied upon in making its investments was dismantled by the Argentinean legislative measures here at stake. It is, in particular, Argentina's alleged refusal to apply a previously agreed tariff calculation and adjustment regime which is at the core of AES' claims. It is also the impact of the legislative and regulatory measures taken by Argentina which is reputed by the Claimant to have breached the commitment made to it by the host State through the US-Argentina BIT." | **[57]** "This Tribunal shares consequently the views earlier expressed by the Tribunal in the *CMS* decision on jurisdiction. What is at stake in the present case, as it was in the *CMS* one, are not the measures of a general economic nature taken by Argentina in 2001 and 2002 but their specific negative impact on the investments made by AES. As a sovereign State, the Argentine Republic had a right to adopt its economic policies; but this does not mean that the foreign investors under a system of guarantee and protection could be deprived of their respective rights under the instruments providing them with these guarantees and protection. Without anticipating, at this stage, on the consideration of the issue, whether this delicate balance between the respective rights of the host State and those of the investor were respected in substance, the present Tribunal states that it has jurisdiction for considering this issue." | **[58]** "It should be further noted that reliance by Respondent on the *Methanex* case is inaccurate. As stated above, and in conformity with what has been strongly asserted from the outset by Argentina itself, one should take each agreement on its term and avoid drawing out of other treaties which are *not* applicable to this case, any conclusion neglecting the substantial difference of terminology, scope and meaning existing between these instruments." | **[59]** "Now, it is well known that *Methanex* relied on the NAFTA. In that multilateral treaty, only binding upon the United States, Canada and Mexico, the definition of 'in-

10 [30] *CMS* , Decision on Jurisdiction, at § 25.

11 [31] Ibid. at § 27.

vestors' and of 'investments' used in Chapter 11 (Investment) is quite specific in terms and substance. This definition is all the way narrower than the definition of 'investment' provided by Article VII(1) of the US-Argentina BIT. The latter states that 'an investment dispute is a dispute . . . arising out of or relating to (a) an investment agreement between the Party and such national or company; . . . or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment'. This definition is much larger than the one at stake in *Methanex*, since NAFTA Article 1101(1) provides that Chapter 11 'applies to measures adopted or maintained by a Party to: a) investors of another Party [or] b) investments of investors of another Party in the territory of a Party.' It should be stressed that the element of 'directness' under NAFTA Chapter 11 deals with the way in which the measures at stake affect the investor or the investment. The measure must directly affect the investment. 'Directness' in ICSID Convention (Art. 25) is something different." | **[60]** "As to the interpretation of the terms 'any legal dispute arising directly out of an investment' used in Article 25 of the ICSID Convention, it is well established by commentators relying on constant practice that it should not be given a restrictive interpretation.[12] Under this provision, directness has to do with the relationship between the dispute and the investment rather than between the measure and the investment." | **[61]** "As a result, in the light both of Article VII of the US-Argentina BIT and of the interpretation to be given to Article 25 (1) of the ICSID Convention this Tribunal rejects the second objection to its jurisdiction raised by Argentina."

[Paras. 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61]

II.4.92 JURISDICTION
See also I.14.11

C. AES's Claim Is not Ripe

[64] "In respect to the first aspect of Argentina's objection, according to which ongoing negotiations would prevent the claim from being legitimately filed, the Tribunal recalls what it has already said with regard to the basis and scope of its jurisdiction. This basis [. . .] is predominantly defined by the specific instruments binding upon the Argentine Republic i.e. the BIT and the ICSID Convention. This does not mean that the Tribunal could not apply, as the case may be, any customary rule of international law which it would consider compatible with the pertinent provisions of these two '*leges specialia*'." | **[65]** "The Tribunal recognizes that a negotiation process, being a diplomatic or political means of settlement of disputes and not a judicial one, presents some specific features. Consequently, negotiation

12 [32] See in particular Ch. Schreuer, op.cit.supra at 116, § 71, quoting *Holiday Inns v. Morocco*, ICSID Case N° ARB/72/. See also the *Amco* and *Kaiser Bauxite v. Jamaica* cases, as referred to by Ch. Schreuer at 119-120, § 76.

should not be assimilated to *judicial* remedies. Still, there is no rule relevant in this procedure, either in the ICSID Convention or in the US-Argentina BIT, which would subordinate recourse to the ICSID system of settlement to any 'prior exhaustion of local negotiations'." | **[66]** "In its Memorial on Jurisdiction, the Argentine Republic did not rely on any specific or general source of international law for supporting its argument. Argentina only referred to the case law of the US Supreme Court,[13] which, as such, is irrelevant for the present case. There is no need here for having recourse to any 'general principle of law' as mentioned in Article 38 of the Statute of the International Court of Justice. It is enough to concentrate on the two treaties mentioned above, the US-Argentina BIT and the ICSID Convention." | **[67]** "In the US-Argentina BIT, Article VII (2) provides:

> 'In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution' (. . .)." |

[68] "In the present case, the Tribunal notes that it is only following the established fact that the parties had been unable to resolve the dispute within six month that AES filed its Request for Arbitration with ICSID; and it did so pursuant to Article VII(3) of the US-Argentina BIT.[14]" | **[69]** "As for Article 25 of the ICSID Convention, the Tribunal reiterates that there is no rule according to which a 'legal dispute' should only be brought to ICSID subject to prior exhaustion of local remedies, including negotiations between the investor and the authorities of the host State. On the contrary, the ICSID system has been established on the basis of a reversed rule of exhaustion of local remedies. Under Article 26 of the Convention, for entering into play, exhaustion of local remedies shall be expressly required as a condition of the consent of one party to arbitration under the Convention. Absent this requirement, exhaustion of local remedies cannot be a precondition for an ICSID Tribunal to have jurisdiction. What is only needed is that the claimant prima facie demonstrates that there is a 'legal dispute arising directly out of an investment between a Contracting State (. . .) and a national of another Contracting State' and that both disputing parties have consented in writing to dispute settlement through ICSID arbitration. The conditions set forth in Article 25 of the ICSID Convention are cumulative but do not give room for further conditions." | **[70]** "International practice confirms the interpretation given above. Without even considering here the numerous decisions that rejected recourse to local judicial remedies as a condition for jurisdiction, no ICSID Tribunal so far has subordinated its jurisdiction to the demonstration of prior ending of negotiations between

13 [35] Argentina's Memorial on Jurisdiction, op.cit.supra, at § 48. Abbott Laboratories v. Gardner, 387 US 136 (1967).

14 [36] See Request for Arbitration dated November 5, 2002.

the parties to the dispute. On the contrary, confronted with a very similar argument by Argentina, the Tribunal in *CMS* declared that:

> '. . . it is not for the Tribunal to rule on the perspectives of the negotiation process or on what TGN might do in respect of its shareholders, as these are matters between Argentina and TGN or between TGN and its shareholders'.[15]" |

[71] "In the present case, equally, negotiations are reputed to go on in particular between two distributors, EDELAP and EDEN on the one side, the Argentinean authorities, respectively at the federal and at the local level, on the other side. But, even if the taking into account of such negotiations were relevant, it is impossible for this Tribunal to assess whether there is any reasonable prospect for any settlement to be reached at one stage or the other throughout negotiations." | **[72]** "With respect to the second aspect of the objection raised by Respondent, which consists in saying that the damages claimed by AES in relation with electricity generation are not quantifiable, the Tribunal recalls that AES has provided the Tribunal on December 2003 with an expert report on damages. This document sets out in detail the quantification of AES' claim as it relates to electricity generation.[16]" | **[73]** "Furthermore, as rightly stated by the *Azurix* tribunal:

> 'the question before the Tribunal at this stage is whether it has jurisdiction; whether the Claimant can prove loss is a matter to be considered as part of the merits.'[17]" |

[74] "This Tribunal shares this view and finds accordingly no ground for accepting the third objection raised by Argentina to its jurisdiction."

[Paras. 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74]

II.4.9212 QUALIFICATION AS INVESTOR
See also II.1.4; II.4.9223

D. The Position of AES as an Investor

[77] "[. . .] *First*, [. . .], the clear terms of the US-Argentina BIT, which define a company, should be taken into account. Pursuant to Article I(1)(b) of this treaty:

> 'Company' of a Party means any kind of corporation, company, association, state enterprise, or other organization, legally constituted under the laws and regulations of a Party or political subdivision thereof whether or not organized for pecuniary gain, and whether privately or governmentally owned." |

15 [37] *CMS*, Decision on Jurisdiction at § 86.

16 [38] See AES' Counter-Memorial on Jurisdiction at § 67, referring to LECG Report at 91-92.

17 [39] *Azurix* Decision on Jurisdiction, at § 101.

[78] "*Second*, Argentina wrongly considers that Article 42 of the ICSID Convention is applicable to this issue of nationality. This is not correct. As rightly pointed out by Professor Ch. Schreuer:

> '[An] issue that is not governed by the rule of Art. 42 is the nationality of the investor. The nationality of a natural person is determined primarily by the law of the State whose nationality is claimed (. . .). The nationality of a juridical person is determined by the criteria of incorporation or seat of the company in question subject to pertinent agreements, treaties and legislation.'[18]" |

[79] "The same author indicates also that:

> 'During the Convention's preparatory work, it was generally acknowledged that nationality would be determined by reference to the law of the State whose nationality is claimed subject, where appropriate, to the applicable rules of international law (History, Vol. II, pp. 67, 286, 321, 448, 580, 705, 839).'[19]" |

[80] "In the present case, the Tribunal is satisfied that AES, already at the stage of its Request for Arbitration, has indicated, and convincingly proved, to be incorporated in the State of Delaware with headquarters in Arlington, Virginia (USA). This was in particular evidenced by the production of a certificate signed by Mr. Leith Mann, AES' Assistant Secretary, attaching a true copy of AES' Certificate of Incorporation authenticated by Delaware's Secretary of State, in conformity with Delaware legislation. Mr. Mann also confirmed that at the time the Request for Arbitration was submitted the Certificate had not subsequently been modified and remained in force.[20]" |
[81] "[. . .] Argentina contends that AES has not 'proven to have acquired the shares that allegedly give it a majority interest in the [operation] companies' because the evidence 'appear[s] exclusively on information issued by claimant' rather than being 'proven in a certifying way'. Respondent further stated that:

> 'Ownership of or control over national are merely claimed and appear exclusively on information issued by claimant. For the purpose of determining the jurisdiction, AES should have proven in a certifying way the above mentioned requirements.'[21]" |

[83] "It is consequently for the Tribunal to appreciate whether it is satisfied at this stage that the material and information provided by AES is accurate for evidencing its ownership and control of all the companies concerned. In this respect, the Tribunal notes that production of expert and witnesses reports is common practice in international arbitration. In consideration of

18 [43] Ch. Schreuer, The ICSID Convention: A Commentary, p.cit.supra, at 554-555, § 5.

19 [44] Ibid. at 267, § 430.

20 [45] AES' Request for Arbitration at § 2 and Exhibit B.

21 [46] Argentina's Reply on Jurisdiction, at 22-23, § 90.

this practice, the Tribunal itself, at its first session, had specifically requested that Claimant file such documentary evidence.[22] This is in conformity with Arbitration Rule 34, which states that the Tribunal shall be the judge of the 'admissibility of any evidence adduced and of its probative value.'[23]" | **[84]** "Without excluding the possibility of requiring Claimant, later in the course of proceedings, to produce further evidence of ownership and control of its subsidiaries in Argentina, pursuant to Rule 34 mentioned above as well as to Article 1 of the Protocol of the US-Argentina BIT, the Tribunal considers that it was so far sufficiently informed and has no reason to consider in essence the kind of material produced by AES in this respect to be inaccurate." | **[85]** "As a further related issue, the Tribunal wants to raise briefly the question of the actual protection of shareholders and that of their *jus standi* before an ICSID Tribunal." | **[86]** "Without any need to look at the actual evolution of general international law on this matter, which, as such, was convincingly analyzed by the Tribunal in *CMS*,[24] it suffice here to recall that the very terms in which the US-Argentina BIT defines an 'investment' provide a solid ground for recognizing AES' legal interest as a claimant for alleged losses suffered as a result of its investment in Argentina." | **[87]** "As stated in Article I(1)(a) of the BIT, a claim may be filed in relation to an 'investment'" as it consists in:

> '. . .every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party. . .'" |

[88] "This definition is a very wide one and it makes no doubt that AES' economic involvement in the concerned companies generating and distributing electricity in Argentina falls under the definition provided by this provision of the BIT. This involvement equally satisfies the requirements for recognizing an international investment. They realize contribution in capital over a reasonably lengthy period of time for the economic development of the host State, an operation AES has accepted to share the inherent risks which it presents." | **[89]** "The Tribunal meets the views expressed on the same basis by other ICSID tribunals dealing with the same BIT; in particular tribunals' decisions on jurisdiction, respectively, in the *Lanco*[25], the *CMS*[26] and the *Azurix* cases[27]. AES' *jus standi* in the present case is not subject to doubt, not only, as seen earlier, because AES has a legal dispute with the Argentine Republic but also because AES is the proper claimant."

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22 [52] Summary Minutes of the First Session of the Tribunal, Washington D.C, July 8, 2003.

23 [53] See ICSID Basic Documents, ICSID/15, January 1985 at 77.

24 [54] See *CMS* Decision on jurisdiction, at §§ 43-48, 49-56, 57-65.

25 [55] Lanco International, Inc. v. Argentine Republic, ICSID Case N° ARB/97/6, Preliminary Decision Jurisdiction of the Arbitral Tribunal, December 18, 1998, printed at 40 I.L.M. 457 at §10 (2001).

26 [56] *CMS* Decision on Jurisdiction at § 68.

27 [57] *Azurix* Decision on Jurisdiction at § 74.

[Paras. 77, 78, 79, 80, 81, 83, 84, 85, 86, 87, 88, 89]

II.4.95 FORUM SELECTION CLAUSE
See also I.2.041; I.2.05

E. Forum Selection Clause

[92] "[. . .] What is at stake is an alleged breach of Argentina's obligations in international law as set out in the US-Argentina BIT, of which AES, as a national company of the United States, may seek immediate reparation through the special ICSID system of settlement of disputes; this is in exception to the classical and ordinary means provided under general international law by the display of diplomatic protection exercise by the national State of the company alleging to have suffered damage." | **[93]** "As for them, the Entities concerned have consented to a forum selection clause electing Administrative Argentine law and exclusive jurisdiction of Argentine administrative tribunals in the concession contracts and related documents. But this exclusivity only plays within the Argentinean legal order, for matters in relation with the execution of these concession contracts. They do not preclude AES from exercising its rights as resulting, within the international legal order from two international treaties, namely the US-Argentina BIT and the ICSID Convention." | **[94]** "In other terms, the present Tribunal has jurisdiction over any alleged breach by Argentina of its obligations under the US-Argentina BIT. As such, it has no jurisdiction over any breach of the concession contracts binding upon the companies controlled by AES and the Argentine public authorities under administrative Argentine law, unless such breach would at the same time result in a violation by the host State of its obligations towards the US private investors under the BIT." | **[95]** "The Tribunal concurs with a position already adopted by previous tribunals confronted with the same argument raised by Argentina. In *CMS*, the Tribunal took note of the decisions already rendered in *Lanco, Vivendi I* and *Vivendi II,* which had rejected the very same argument. It said:

> 'The Tribunal shares the views expressed in those precedents. It therefore holds that the clauses in the License or its Terms referring certain kinds of disputes to the local courts of the Argentine Republic are not a bar to the assertion of jurisdiction by an ICSID tribunal under the [US-Argentina BIT], as the functions of these various instruments are different.'[28]" |

[96] "Further to this decision, the *Azurix* Tribunal maintained the same analysis. It also rejected the Argentinean argument in the following terms:

> 'The tribunals in the cases cited concluded that such forum selection clauses did not exclude their jurisdiction because the subject-matter of any proceeding before the domestic courts under the contractual agreements in question

28 [62] *CMS* Decision on Jurisdiction at § 76.

> and the dispute before the ICSID tribunal was different and therefore the forum selection clauses did not apply. This reasoning applies equally to the waiver of jurisdiction clause in this case.'[29]" |

[97] "The present Tribunal cannot but share the views already expressed by these tribunals, dealing with the same argument [. . .]. In particular, this Tribunal wants to stress that the comparison raised by Respondent in its Reply on Jurisdiction[30] between the waiver of jurisdiction met in this case and the famous 'Calvo Clause' is inaccurate." | **[98]** "This is so simply because this very clause only made sense by reference to the general international law rule of diplomatic protection; the 'Calvo Clause' was in essence a clause by which private persons mistakenly pretended to renounce to a right which in law did not belong to them but to their national State: the right for this State to exercise in favor of its nationals its diplomatic protection." | **[99]** "Since under the ICSID system of settlement of disputes, exercise of diplomatic protection is per *definition* put aside, it is irrelevant to compare it with a clause the rationale of which is inseparable from diplomatic protection. As a consequence, the Tribunal cannot but reject Argentina's fifth objection."

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

II.4.97 DECISION ON JURISDICTION

IV. DECISION

[100] "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 Tribunal has, accordingly, made the necessary Order for the continuation of the procedure pursuant to Arbitration Rule 41(4)."

[Para. 100]

29 [63] *Azurix* Decision on Jurisdiction at § 79.

30 [64] Argentina's Reply on Jurisdiction at § 144-155.

Sempra Energy International v. The Argentine Republic*, ARB/02/16, Decision on Jurisdiction, 11 May 2005

Original: English and Spanish

Present: Orrego Vicuña, *President of the Tribunal*
Lalonde P.C., O.C., Q.C., Morelli Rico, *Arbitrators*

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II.4.911 REQUEST FOR ARBITRATION
See also I.17.011

I. THE DISPUTE

[1] "On September 11, 2002, the International Centre for Settlement of Investment Disputes ('ICSID' or 'the Centre') received from Mr. R. Doak Bishop a Request for Arbitration under the Convention for the Settlement of Investment Disputes between States and Nationals of other States ('ICSID Convention' or 'the Convention') on behalf of Sempra Energy International ('Sempra') against the Argentine Republic. The request relates to disputes with the Argentine Republic regarding measures adopted by the Argentine authorities which, it is argued, have changed the general

* Summaries prepared by Christina Knahr, MPA, 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/sempra-en.pdf>.Original footnote numbers are indicated in brackets: [ ].

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

regulatory framework established for foreign investors in a way which the Claimant asserts severely affects Sempra's investment in two natural gas distribution companies which together serve seven Argentine provinces. In its request, Sempra invokes the provisions contained in the 1991 treaty between Argentina and the United States concerning the reciprocal encouragement and protection of investment (the 'Bilateral Investment Treaty' of the 'BIT').[1]" | **[18]** "The Claimant in this dispute [. . .] participated in a vast privatization program that the country embarked upon in 1989, which included the gas sector among others. The privatization of this sector was carried out by means of the Gas Law and related instruments.[2]" | **[19]** "Sempra owns 43.09% of the share capital of Sodigas Sur S.A. ('Sodigas Sur') and Sodigas Pampeana S.A. ('Sodigas Pampeana'). For its part, Camuzzi, the company which requested the concurrent arbitration proceedings mentioned above, owns 56.91% of Sodigas Sur and Sodigas Pampeana. The latter two Argentine companies, in turn, hold 90% and 86.09%, respectively, of the shares in Camuzzi Gas del Sur S.A. ('CGS') and Camuzzi Gas Pampeana S.A. ('CGP'), each of which, in its capacity as 'Licensee' is a natural gas distribution company. Both CGS and CGP each holds a license granted by the Argentine Republic to both supply and distribute natural gas in seven provinces of that country." | **[20]** "The dispute originated in the suspension of the licensee companies' tariff increases based on the U.S. producer price index and the subsequent pesification of these tariffs pursuant to Law No. 25561. In addition, the Claimant asserts that subsidies granted have not been reimbursed and that certain taxes and levies that have been introduced by some Argentine provinces, as well as other measures relating to the payment for services, labor restrictions, and the transfer of tax costs, are prejudicial to it. All the foregoing, in the Claimant's opinion, results in a breach of the guarantees granted by the Argentine Republic pursuant to law and the licenses, and in a violation of the measures of protection to foreign investments provided for under the Treaty."

[Paras. 1, 18, 19, 20]

II. OBJECTIONS TO JURISDICTION

II.4.922 JURISDICTION *RATIONE PERSONAE*
See also II.4.9223; II.4.9224

A. Non-controlling Shareholder

[38] "The objection to jurisdiction concerning control of a national company raised by the Argentine Republic involves two aspects. The first re-

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

2 [2] Law 24.076 of 1992 on the privatization of the gas sector and Decree 1738/92 of 1992 on application of the gas law.

lates to the scope of Article 25(2)(b) of the Convention and whether it establishes an autonomous jurisdiction requirement or one option additional to others. The second aspect, which is definitely a novel approach, refers to the modalities of exercise of control over a company and the alternative of control through a shareholders' agreement." | **[39]** "The said article envisages two different situations. The first sentence understands that 'National of another Contracting State' is 'any juridical person who . . . has the nationality of a contracting State different from the State that is a party in the dispute. . .' The second sentence refers to an additional situation: '. . . and the juridical persons who, having. . . the nationality of the State that is a party in the dispute, . . . and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for purposes of this Convention.'" | **[40]** "The structure of the provision leaves no room for doubt. The first situation is that of a company having the nationality of a contracting State different from the one that is a party to the dispute. To the extent that it meets the requirements of the Convention and of the respective Treaty, that company is eligible to resort to ICSID on the basis of its nationality." | **[41]** "The second situation is different. It relates to a company which has the nationality of the State that is a party to the dispute and which, for that reason, could be prevented from claiming against its own State; in such a case, the foreign control criterion enables it to complain as if it were a company of the nationality of the other contracting Party, insofar as this has been agreed between the States concerned. In addition to the substantive difference between these two situations, its supplementary nature, as the Claimant argues, is clearly marked by the word 'and' with which the second sentence of the article begins." | **[42]** "In the present case, the Claimant in fact had an option. It could claim as a national of the United States, the other contracting State, insofar as it meets the requirements laid down in the Convention and the Treaty. Whether or not the definition of investment considers the case of a minority shareholder or an indirect investment is a separate issue that is the subject of another objection to jurisdiction. Sodigas also had the option to complain as a company incorporated in Argentina, if it is established that this company is under foreign control and, through it, the licensee companies too. This option was the subject of an agreement between the parties contained in Article VII(8) of the Treaty. The existence of this possibility does not prevent the investor claiming as such under the terms of the first sentence, if that option is also available." | **[43]** "At the hearing on jurisdiction held in this case, the Argentine Republic raised the question of why Sempra had not claimed as an Argentine company—presumably Sodigas—if in fact it considered that it had control of that company and thereby met the requirements of Article 25(2)(b) of the Convention and of Article VII(8) of the Treaty. The Claimant explained that that option had in fact been considered but the alternative of claiming as a U.S. company was preferred as it would simplify the requirements for registration of the request for arbitra-

tion. By letter of February 10, 2005, the Argentine Republic asked the Secretary-General of ICSID to clarify this aspect in so far it concerns discussions allegedly held during the process of registration. After seeking the comments of the Claimant, which were submitted on February 16, 2005, ICSID informed the parties on February 23, 2005 that ICSID only provides general information to the parties and not advice as to the specific legal choices that may be available. The Tribunal finds in this respect that this is an aspect relating to the jurisdiction of the Centre that only the Tribunal can decide and is, consequently, entirely beyond the scope of the functions ICSID Secretary-General. This jurisdictional determination is what the Tribunal will do next." | **[44]** "At first sight, the Respondent notes, if an option such as the one discussed were to be permitted this would lead to a contradiction since a shareholder could always claim as such under the first sentence of the article, thus rendering the second sentence redundant. But in fact there is no such contradiction. It is conceivable that where various investor companies resort to arbitration, some can do so as shareholders and others as companies of the nationality of the State that is a party to the dispute, on the basis of the various corporate arrangements and control structures. Thus, for example, in the *Lucchetti* case,[3] Empresas Lucchetti, S.A., petitioned as a foreign investor, while Lucchetti Perú, S.A., did so as a company incorporated in Peru and controlled by the same foreign investor, a situation also envisaged in the pertinent treaty." | **[45]** "The Tribunal can then conclude that the option offered by the second sentence of Article 25(2)(b) of the Convention, as well as by Article VII(8) of the Treaty, provides an additional or different alternative which does not in this case prevent an investor from opting to act under the first sentence of the Convention article if it meets the pertinent requirements." | **[47]** "It is first necessary to establish that, from the standpoint of corporate law, it is quite normal that various shareholders might control the policies and operations of a company through a shareholders' agreement, the terms of which are as mandatory as a contract. In this respect, the formation of the corporate will follows the rules of that agreement." | **[48]** "This was specifically the situation taken into account in *Vacuum Salt*, when the tribunal held:

> 'Nowhere in these proceedings is it suggested that Mr. Panagiotopulos, as holder of 20 percent of Vacuum Salt's shares, either through an alliance with other shareholders, through securing a significant power of decision or managerial influence, or otherwise, was in a position to steer through either positive or negative action, the fortunes of Vacuum Salt.'[4]" |

3 [12] Lucchetti S.A. and Lucchetti Peru, S.A. v. Republic of Perú (ICSID Case No. ARB/03/4), Award of February 7, 2005, par. 15, http://www.worldbank.org/icsid/cases/lucchetti-award.pdf (hereinafter Lucchetti).

4 [13] Vacuum Salt, para. 53, as cited in the Reply on Jurisdiction of the Argentine Republic, para. 14 (hereinafter Reply on Jurisdiction).

[49] "The possibility of control through an agreement of shareholders or other means is there envisaged, while at the same time the alternative of a form of both positive and negative control is indicated. The arguments invoked in this connection by the Claimant in this case [. . .] do not appear to contradict what is stated in *Vacuum Salt*." | **[50]** "However, there is one aspect on which *Vacuum Salt* sheds no light whatsoever. In that case there was no bilateral treaty on protection of investments and the situation was governed entirely by the law of the host country to the investment. This therefore makes it necessary to examine the problem in the light of the existence of such a treaty, as is the case in the present dispute." | **[51]** "The pertinent question is whether a foreign investor can add to its own participation in a local company an additional percentage belonging to another foreign investor so that their combined weight will thereby achieve the necessary control. Of course, combination of the participation of a foreign investor with that of a local investor should be excluded, since in that case, although the combination could result in control, this would not be foreign control. There would not appear to be any problem if various foreign investors of the same nationality, acting under one and the same treaty, were to make their respective investments in the local company and then organize it by means of an agreement of shareholders." | **[52]** "The problem arises in the case of foreign investors of different nationalities acting, as in this case, under different treaties. The Argentine Republic is right when it argues that the consent is expressed in each treaty individually, with a different personal and normative import, in such a way that the combination of various participations could result in situations that that consent did not have in mind and might not have intended to include. In such an alternative the control could not be exercised jointly for the purposes of the Convention and of the Treaty and would have to be measured on the basis of the individual intents." | **[53]** "The assertion of the Claimant to the effect that the shareholders' nationality is not relevant inasmuch as they are nationals of a State that is a contracting party to the Convention is not convincing. It could, for instance, result in a shareholder protected by a treaty adding his participation to that of another shareholder who is a national of a State that is a party to the Convention but does not have a bilateral treaty with the host State that would protect him." | **[54]** "However, if the context of the initial investment or other subsequent acquisitions results in certain foreign investors operating jointly, it is then presumable that their participation has been viewed as a whole, even though they are of different nationalities and are protected by different treaties. In such a case, it would be perfectly feasible for these participations to be combined for purposes of control or to make the whole the beneficiary." | **[55]** "In the present dispute there are three elements that come together to demonstrate that joint participation was actually the case. Sempra's participation began in 1996, being added to that that Camuzzi started in 1992; the companies through which the investments were channeled progressively increased their

shareholdings in the licensees, both by purchases from other shareholders and from the Argentine government itself, which auctioned blocks of shares up to and including the year 2000; the agreement of shareholders and the companies' By-Laws reflect the understandings for the administration and management of the operating companies." | **[56]** "All of this was done jointly by Sempra and Camuzzi, in such a way that when the dispute arose it was already a reality that could not be ignored for jurisdictional purposes. An important evidence to this effect, invoked by the Claimant, is that the Office of the Secretary of Defense of Competition and of Consumers of the Ministry of Economy of the Argentine Republic approved the complex share transaction carried out in 2000 by Sempra and Camuzzi, noting that said transaction meant 'the assumption of control over the enterprises whose shares are being acquired.'[14] This was precisely a case of joint control." | **[57]** "[. . .] [I]t becomes somewhat academic in the light of the fact that the access to ICSID was made on the basis of the first sentence of Article 25(2)(b) of the Convention and not on the basis of the requirements concerning control envisaged in the second sentence."

[Paras. 38, 39, 40, 41, 42, 43, 44, 45, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57]

II.4.9214 DISPUTE ARISING DIRECTLY OUT OF AN INVESTMENT
See also II.4.9213

B. Indirect Losses

[67] "The foregoing discussion involves two main aspects: the existence of a legal dispute and whether, if there is one, it arises directly from the Claimant's investment." | **[68]** "The Tribunal has no difficulty in concluding that both elements are clearly present in this case. First, the record shows a marked difference between the parties concerning the nature and extent of their respective rights and expectations and their pretensions. This difference not only concerns the facts but mainly the law, as it is reflected in the Treaty. The actual claim submitted, as will be examined below, arises from the alleged violation of the rights and guarantees that the investor has in the light of the Treaty. The legal nature of this dispute is beyond any doubt." | **[69]** "Next, the dispute arises directly from the investment that the Claimant has made in the companies incorporated in the Argentine Republic for the purpose of channeling the investment to the licensees. In this connection, if one were to conclude anything different, one would be depriving the Treaty of any effect since it was signed with the precise intention of guaranteeing the investments that would be made in the privatization process, by means of the specific modality with which they were made." | **[70]** "[. . .] [T]his is the definition of investment that is included in the Treaty, a definition which the Tribunal cannot ignore since, as the tribunal noted in *Azurix*, it sought to facilitate agreement between the parties thereby preventing that the corporate personality of the

company might interfere with the protection of the real interests associated with the investment.[5]" | **[71]** "Whether the measures in dispute can have a general effect [. . .] or an effect that directly affects the investor [. . .] is an important distinction which flows in part from *CMS*, but which, in any case, is a determination that must be made in connection with the merits and not at the jurisdictional stage. The Tribunal shares the Respondent's opinion to the effect that setting the value of the currency is a sovereign right, citing in support of this view the decision in *Serbian Loans*,[6] but if this determination eventually affects a legally enforceable commitment it is not unrelated to the jurisdiction of an arbitration tribunal to which a dispute on the subject matter is brought. However, from there to argue, as the Respondent does, that hearing the dispute violates the principle of self-determination and a rule of *jus cogens*, as recognized in the *Western Sahara* case,[7] there is a considerable distance." | **[72]** "[. . .] [I]t is necessary to clearly state the Tribunal's understanding in two recent cases which have been the subject of intense debate by the parties [. . .]." | **[73]** "The first of these is the *Methanex case*. The Argentine Republic rightly argues that the views put forward by the parties in that case are very similar to those disputed here. The Claimant asserted that its rights had been affected by the measures taken, while the Respondent was of the view that measures that affected the company could not be actionable by the shareholders who had no more than a mere interest. However, it is also true that the tribunal sought to determine whether there was a significant connection between the measures and the investment." | **[74]** "That connection, it was concluded, was not there in the case of *Methanex* since the Claimant did not even produce the component that was regulated by the measures questioned. However, that connection does exist in the present case since the investment was made to carry out the specific economic activity involved in the privatization project, in addition to the fact that in doing so contracts leading to the issuance of a license were signed with the State." | **[75]** "The second case that the parties have discussed in this connection is *GAMI*. Here too, the parties disputed the right of action of a shareholder (GAMI) about a loss deriving from damage to the company in which it had invested (GAM). In this case the tribunal held:

> 'The fact that a host state does not explicitly interfere with share ownership is not decisive. The issue is rather whether a breach of NAFTA leads with sufficient directness to loss or damage in respect of a given investment.

5 [20] *Azurix*, para. 64.

6 [21] Permanent Court of International Justice, Serbian Loans, Series A. No. 20, 1929.

7 [22] International Court of Justice, Advisory Opinion Concerning Western Sahara, Reports, 1975, p. 12.

> Whether GAM can establish such a prejudice is a matter to be examined on the merits. Uncertainty in this regard is not an obstacle to jurisdiction.'[8]" |

[76] "This Tribunal shares that conclusion, particularly to the extent that the treaty on which the protection or guarantee claimed is based provides for the possibility of a shareholder to resort to arbitration concerning the investment made, which is precisely the case in the present dispute where direct or indirect ownership are considered and a broad definition of investment is adopted. The conclusion in the *Mondev* case,[9] where problems of action for derivative damages are also discussed, is based on the same concept.[10]" | **[77]** "The argument made by the Argentine Republic and which is also reflected in *Methanex*, to the effect that if the right of shareholders to claim when only their interests are affected is recognized it could lead to an unlimited chain of claims, is theoretically correct. However, in practice any claim for derivative damages will be limited by the arbitration clause. As noted in connection with this argument by the tribunal in *Enron*:

> '. . . 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.'[11]" |

[78] "Moreover, the fact must be noted that if the investor has rights protected under a treaty their violation will not result in merely affecting its interests but will affect a specific right of that protected investor." | **[79]** "The objection to jurisdiction made by the Argentine Republic on grounds of the indirect nature of the damage does not find support in the light of the facts of this case and of the applicable law. [. . .]"

[Paras. 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79]

II.4.9212 QUALIFICATION AS INVESTOR
See also I.17.011; II.4.9211

C. Lack of *Ius Standi*

[91] "[. . .] The essential issues the Tribunal must decide are, first, whether the provisions of the Treaty do or do not allow for the claim of an investor

8 [23] Gami, Final award of November 15, 2004, http://www.state.gov/documents/organization/38789.pdf para. 33.

9 [24] *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Final award of October 11, 202, 6 ICSID Rep. 192 (2004).

10 [25] *Enron Corporation y Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3), Decision on Jurisdiction (additional claim) of August 2, 2004, paras. 33-36 (hereinafter Enron II).

11 [26] *Enron* I, para. 52.

who is not a majority shareholder and, second, whether the cause of action lies in the Treaty, the contract, or both." | **[92]** "The relevant provision is that of Article I(1)(a) of the Treaty:

> '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;" |

[93] "There is no question that this is a broad definition, as its intent is to extend comprehensive protection to investors. Quite a few arbitration tribunals, acting under both the ICSID and the UNCITRAL rules, have recognized this import in the context of the same treaty and have concluded that, in the light of the very terms of the provision, it encompasses not only the majority shareholders but also the minority ones, whether they control the company or not. As the tribunal explained in the *Goetz* case, the authority to act granted to shareholders by the treaties on investments seeks protection for the real investors. In the *Enron* case the tribunal concluded that:

> 'The 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.'[12] " |

[94] "The same conclusion has been shared by the tribunals in *CMS* and *Enron (Additional Claim)*, among various others. This Tribunal has no reason not to concur with that conclusion, even though some of the elements of fact in each dispute may differ in some respects. If the purpose of the Treaty and the terms of its provisions have the scope the parties negotiated and accepted, they could not now, as has been noted, be ignored by the Tribunal since that would devoid the Treaty of all useful effect."

[Paras. 91, 92, 93, 94]

II.4.9215 CONTRACT CLAIMS—TREATY CLAIMS

[95] "The second aspect the Tribunal must clarify is whether the Claimant's plea is founded on a contract, in a treaty, or both. Since the time this distinction was made in the *Lanco* case, the discussion of the matter has been significantly advanced. A claim can have a purely contractual origin and refer to a right that does not qualify as an investment, in which case there will

12 [35] *Enron* I, para. 49.

be no jurisdiction, as was the case in *Joy*;[13] but it can also originate solely in the violation of a provision of the treaty independently from domestic law or, as is more frequently the case, originate in a violation of a contractual obligation that at the same time amounts to a violation of the guarantees of the treaty. In these other cases there will be no obstacle to the exercise of jurisdiction." | **[96]** "The latter is the criterion followed by several recent decisions on jurisdiction, particularly those on annulment in *Vivendi* and *Wena*[14] and the decision in *SGS v. Pakistan*. Another approach has been that of *SGS v. Philippines*,[15] in which it was considered necessary first to have a contract-related aspect of the claim heard by a national court and to retain ultimate jurisdiction over those aspects connected with the treaty." | **[97]** "This issue was well described by the Annulment Committee in *Vivendi* when it concluded:

> 'The claim was not simply reducible to so many civil or administrative law claims concerning so many individual acts alleged to violate the Concession Contract or the administrative law of Argentina. It was open to Claimants to claim, and they did claim, that these acts taken together, or some of them, amounted to a breach of articles 3 and/or 5 of the BIT.'[16] " |

[98] "On the basis of this criterion, the choice of a local forum for contractual purposes was also considered compatible with election of arbitration for purposes of the treaty[17] [. . .]." | **[99]** "[. . .] [T]he Tribunal sees no grounds to depart from this conceptual reasoning in that it arises from the very system of protection agreed to by the parties. The Tribunal must accordingly determine whether Sempra's claim belongs solely to the contract-related claim category [. . .] or is based additionally or exclusively on the provisions of the Treaty [. . .]." | **[100]** "While the specific nature of each claim can only be assessed by examining the merits of the dispute, the Tribunal notes at this stage that the dispute arises from how the violation of contractual commitments with the licensees, expressed in the license and other acts, impacts the rights the investor claims to have in the light of the provisions of the Treaty and the guarantees on the basis of which it made the protected investment." | **[101]** "The claim is accordingly founded on both the contract and the Treaty, independently of the fact that purely contractual questions having no effect on the provisions of the Treaty can be subject to legal action available under the domestic law of the Argentine Republic. Neither here does the Tribunal have any reason to depart from

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13 [36] *Joy Mining Machinery Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/03/11), Decision on jurisdiction of August 6, 2004, <http://www.asil.org/ilib/JoyMining Egypt.pdf>

14 [37] *Wena Hotels Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4) Decision of the Tribunal on Annulment of February 5, 2002, 6 ICSID Rep. 129 (2004) (hereinafter Wena).

15 [38] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (ICSID Case No. ARB/02/6), Decision on Objections to Jurisdiction of January 29, 2004, http://www.worldbank.org/icsid/cases/SGSvPhil-final.pdf (hereinafter SGS v. Philippines).

16 [39] *Aguas*, para. 112.

17 [40] *Wena*.

this approach. The fact that the Treaty also includes the specific guarantee of a general 'umbrella clause', such as that of Article II(2)(c), involving the obligation to observe contractual commitments concerning the investment, creates an even closer link between the contract, the context of the investment and the Treaty." | **[102]** "The Argentine Republic has rightly expressed its concern about the fact that this approach could lead to double recovery for the same harm, one as a result of domestic contract-based action and the other as the outcome of an international arbitral award. The Respondent also draws attention to the fact that in the *GAMI* case, in the light of the NAFTA provisions all compensation must benefit the company and not the shareholder. This is a real problem that needs to be discussed in due course, but again it is an issue belonging to the merits of the dispute. In any event, international law and decisions offer numerous mechanisms for preventing the possibility of double recovery."

[Paras. 95, 96, 97, 98, 99, 100, 101, 102]

II.4.95 FORUM SELECTION CLAUSE
See also II.4.9215

D. Dispute Submitted to National Courts

[120] "Discussion of the meaning of forum selection clauses in a contract is already a common feature of many disputes brought to arbitration. This is a direct consequence of the difference between a contract-based and a treaty-based claim [. . .]." | **[121]** "The conclusion reached in this respect by the Annulment Committee in *Vivendi* is meaningful:

> '[W]here 'the fundamental basis of a claim' is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard.'[18] " |

[122] "This Tribunal [. . .] sees no reason to conclude otherwise. Moreover, by admitting the distinction between a contract-based and a treaty-based claim, the choice of forum is, as noted, a consequence of it that as such cannot affect the essence of the distinction." | **[123]** "Just as a dispute that is purely contract-related will have to be brought before the forum envisaged in the contract, so too a dispute relating to the interpretation of a treaty can be submitted to the mechanisms of that treaty. If the contrary were true, the contract would nullify the provisions of the treaty. The Government of Chile, for example, refrained from putting forward objections to jurisdiction in the *MTD* case despite the fact that the contract specified the choice of a local forum, as it rightly understood that to the extent there was an al-

18 [48] *Aguas*, para. 101.

leged violation of the pertinent treaty that clause would not affect arbitral jurisdiction.[19]" | **[124]** "The parties have discussed in this case other recent arbitral decisions which have considered the distinction between a dispute originating in a contract and one arising from a treaty, and its connection with the choice of forum, in particular *SGS* v. *Pakistan*, *SGS* v. *Philippines* and *Generation Ukraine*.[20] [. . .] the Tribunal notes that none contradicts the basic principle that a dispute can originate in a contract and simultaneously have an effect on a treaty, or the principle that a contract-related dispute can be submitted to the local forum and one under the treaty to the arbitral tribunal." | **[125]** "In point of fact, in *SGS v. Pakistan* the dispute involved proceedings in various national courts and the arbitral forum specified in the treaty, with the tribunal concluding that it had jurisdiction over those contract-related aspects of the dispute that at the same time involved a violation of the treaty, but not over those that had no connection with the standards of protection set by the treaty in question.[21] Similarly, in *Generation Ukraine* the tribunal confirmed its competence to consider the claims that related to the treaty and noted that technical aspects of the dispute should be submitted to the national courts as provided in the contract; the latter could be eventually transformed into a treaty claim in case of denial of justice.[22]" | **[126]** "Even *SGS v Philippines*, which has prompted so much discussion, does not depart from the essential principle that those aspects of the dispute originating in the treaty can be submitted to the arbitral forum, even though the tribunal required that a contract-related component of that dispute concerning the precise amount of the amount due under the contract had to be resolved first by the domestic court.[23]" | **[127]** "The Tribunal also notes that in the present case submission of the dispute to a national court has not been established and, as far as a dispute under the Treaty is concerned, it has solely been submitted to this Tribunal. The principle *electa una via* does not show that an option in favor of local jurisdiction has been made; rather to the contrary, it shows opting for arbitral jurisdiction." | **[128]** "The Tribunal accordingly concludes that this objection cannot be retained."

[Paras. 120, 121, 122, 123, 124, 125, 126, 127, 128]

19 [49] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile* (ICSID Case No. ARB/01/7), Award of May 25, 2004, <http://www.asil.org/ilib/MTDvChile.pdf>, para. 90.

20 [50] *Generation Ukraine Inc. v. Ukraine* (ICSID Case No. ARB/00/9), Award of September 16, 2003, <http://www.asil.org/ilm/Ukraine.pdf> (hereinafter Generation Ukraine).

21 [51] *SGS v. Pakistan*, para. 162.

22 [52] *Generation Ukraine*, para.20.33.

23 [53] *SGS v. Philippines*, para. 128.

E. Meaning and Extent of International Law

II.4.93 CONSENT TO ICSID ARBITRATION

1. Consent to Arbitration

[139] "The Tribunal agrees with the Argentine Republic that the consent expressed in ratifying the Convention is not the consent required by the Convention for bringing a claim before ICSID; this indeed requires a separate declaration by means of a treaty or other acts making such consent unequivocally clear." | **[140]** "The Tribunal, however, cannot disregard the fact that the Argentine Republic signed the Treaty with the United States. This instrument embodies the expression of consent for resorting to arbitration should a dispute arise between the investor and the State with respect to the guarantees ensured under the Treaty. If what the Respondent is arguing is that an ad-hoc agreement between the investor and the State is needed to submit a specific dispute to arbitration, then this is a mistaken understanding. The Treaty is self-sufficient for this purpose and the option of resorting to dispute resolution is exercised by the investor by the simple fact of expressing its own consent. The concept of an arbitration clause ('compromis') additional to the agreement on arbitration, which was in favor at some point in private arbitration, is not envisaged in the Treaty and is no longer of great use."

[Paras. 139, 140]

I.1.16 TREATY INTERPRETATION
See also I.1

2. Treaty Interpretation

[141] "The Tribunal also agrees with the Respondent that the rules for a correct interpretation are those of the Vienna Convention, which are also those that were followed in customary international law.[24] The relevant provision is that of Article 31 of the Convention, providing 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.'[25]" | **[142]** "This being the principal means of interpretation, it is the one that must be applied by the Tribunal. It has already been noted that the terms of the Treaty opted for the alternatives discussed, making it unnecessary to resort to supplementary means. But even if that were necessary, the negotiating history of the Treaty does not show that the intention asserted today by the Argentine Republic was that this country and the United States had in signing the Treaty. Rather to the contrary,

24 [57] McNair: The Law of Treaties, 1961, 364-382.

25 [58] Ernesto de la Guardia: Derecho de los Tratados Internacionales, 1997, 216-230.

the clear intention was to provide full protection for investors. A sizeable number of treaties were concluded by the Argentine Republic with the specific intent of encouraging the interest of foreign investors in the privatization program. To this end is that the terms of the Treaty discussed above were included." | **[143]** "Article 31 also makes it possible, if necessary, to take into account subsequent agreements or practices followed by the parties to a treaty with respect to its interpretation or application. The parties to NAFTA are certainly not the same as those to the Treaty. This would make it difficult to extend the interpretation that one party makes of a treaty to that which another party makes of a different treaty." | **[144]** "Nevertheless, as the tribunal held in *Enron*,[26] it could be possible that the interpretation of a bilateral treaty between two parties in connection with the text of another treaty between different parties might be the same, unless a different intention is expressed. This was the approach followed by the tribunal in *Maffezini*, where for the correct interpretation of the treaty between the Argentine Republic and Spain the tribunal took into account the policy that the latter country had followed in concluding numerous bilateral treaties to protect Spanish investors abroad and the terms of those treaties." | **[145]** "What the United States has affirmed in the discussion of the NAFTA cases noted has a relative value, as in any event that interpretation would have to find some support in the context of the Treaty or its background. However [. . .] that background in this case points in a different direction, not allowing to identify the approach to interpretation of one ambit with that of the other. The fact that the competent tribunals have also rejected that interpretation is not irrelevant. Neither is the opinion of those who were responsible for the drafting and negotiation of a State's bilateral treaties irrelevant, in that it serves, precisely, to establish the original intention." | **[146]** "The fact that international law recognizes unilateral acts as a source of obligations is separate from the discussion in the matter of this dispute, since the essential requirement for that to happen is that there be the intention to create an obligation. The Tribunal cannot presume that intention if it is not expressly stated. Counsel representing the State in arbitration proceedings have the duty to put forward all the arguments they deem appropriate to defend their position, but a tribunal could not presume that each of those arguments constitutes the expression of a unilateral act that obligates the State. This intention was expressly stated, for example, in the case of the *Filetage a l'intérieur du Golfe de Saint-Laurent* and was recognized as such by the tribunal.[27]" | **[147]** "[. . .] [I]nterpretation is not the exclusive task of States. It is also the duty of tribunals called upon to settle a dispute, particularly when the question is to interpret the meaning of the terms used in a treaty. This is precisely the role of judicial decisions

26 [59] *Enron* I, para. 47.

27 [60] Differend Concernant le Filetage à l'intérieur du Golfe de Saint-Laurent (Canada-France), Award of July 17, 1986, Revue Générale de Droit International Public, 1986/3, 713-786, p. 756.

as a source of international law in Article 38(1) of the Statute of the International Court of Justice [. . .]."

[Paras. 141, 142, 143, 144, 145, 146, 147]

I.2.041 DIPLOMATIC PROTECTION

3. Diplomatic Protection

[150] "[. . .] The Tribunal agrees with the Argentine Republic that diplomatic protection involves concepts and mechanisms that are very different from those available in the system of international investment protection. The latter has devised a mechanism that is separate from the role of the State of the investor's nationality, but not from that of the State host to the investment, which will have to participate in cases where a dispute arises with the investor." | **[151]** "For the same reason that diplomatic protection is inappropriate under the bilateral treaty system, neither can this system rely on approaches arising from that traditional mechanism, in particular those of the *Barcelona Traction* case. As the tribunal points out in *GAMI*:

> 'The Tribunal however does not accept that *Barcelona Traction* established a rule that must be extended beyond the issue of the right of espousal by diplomatic protection. The ICJ itself accepted in *ELSI* that US shareholders of an Italian corporate entity could seise the international jurisdiction when seeking to hold Italy liable for alleged violation of a treaty by way of measures *imposed on that entity*.'[28]"

[Paras. 150, 151]

II.4.9212 QUALIFICATION AS INVESTOR

4. Qualification as Investor

[152] "[. . .] [I]t could not be asserted in the light of the evolution of international law, that shareholders that qualify as protected investors within the scope of the system for protecting foreign investors are prevented from claiming their rights, even when the harm has been inflicted on the company in which they participate. The International Court of Justice itself did not fail to consider this point in *Barcelona Traction* in the light of what was then the emerging system for protecting investors under the Convention." | **[153]** "As the tribunal in *LG&E* also noted, whatever may have been the merits of *Barcelona Traction*, that case was concerned solely with the diplomatic protection of nationals by their State, while the case here disputed concerns the contemporary concept of direct access for investors to dispute

28 [61] Gami, para. 30, emphases in original, notes omitted.

resolution by means of arbitration between investors and the State.[29]" | **[154]** "The fact that [. . .] in *ELSI* the shareholders held 100 percent of the shares and total control of the company, in addition to the fact that a bankruptcy situation was involved, neither of which apply in this case, does not change the principle at issue which is that shareholders can claim on their own. If, moreover, the treaties provide similar rights to shareholders having indirect ownership or control, or who are not majority shareholders, this does not alter that principle either. This was also the criterion applied by the tribunal in *LG&E*.[30]" | **[155]** "[. . .] [T]he parties have also discussed the importance of *Vacuum Salt* in this context because the investor in that case did not have control of the company and could not therefore claim under the Convention. However, as the tribunal in *Enron* noted, in *Vacuum Salt* there were two situations entirely different from those of *Enron* and this case: the company was entirely subject to Ghanaian legislation, without there being even a foreign-investment contract, and, even more important, there was no bilateral treaty to protect the investment.[31] The latter is precisely what makes the difference in this case."

[Paras. 152, 153, 154, 155]

II.4.97 DECISION ON JURISDICTION

III. DECISION

"For the reasons set forth above, the Tribunal hereby decides that this dispute falls within the jurisdiction of the Centre and the competence of the Tribunal. The Tribunal has accordingly issued the Order necessary for continuation of the proceedings, in accordance with Arbitration Rule 41(4)."

29 [62] LG&E Corp., LG&E Capital Corp. y LG&E International Inc. v. República Argentina (ICSID Case No. ARB/02/1), para. 52 (hereinafter LG&E).

30 [63] LG&E, para. 50.

31 [64] Enron II, paras. 43-45.

Camuzzi International S.A. v. The Argentine Republic*, ARB/03/2, Decision on Jurisdiction, 11 May 2005

Original: Spanish

Present: Orrego Vicuña, *President of the Tribunal*
Lalonde P.C., O.C., Q.C., Morelli Rico, *Arbitrators*

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II.4.911 REQUEST FOR ARBITRATION
See also I.17.011

I. THE DISPUTE

[1] "On November 8, 2002, the International Centre for Settlement of Investment Disputes ('ICSID' or 'the Centre') received from Mr. R. Doak Bishop a Request for Arbitration under the Convention on the Settlement

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* Summaries prepared by Christina Knahr, MPA, 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/camuzzi-en.pdf>. Original footnote numbers are indicated in brackets: [ ]. There are significant overlaps between this Decision and the Decision on Jurisdiction rendered on the same date by the tribunal in *Sempra Energy International v. The Argentine Republic*, which was also composed of the same arbitrators. This summary will therefore, where applicable, make reference to the identical paragraphs in *Sempra*.

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

of Investment Disputes between States and Nationals of Other States ('ICSID Convention' or 'Convention') on behalf of Camuzzi International S.A. ('Camuzzi') against the Argentine Republic. The request relates to disputes with the Argentine Republic regarding measures adopted by the Argentine authorities which, it is argued, have changed the general regulatory framework established for foreign investors in a way which the Claimant asserts severely affects Camuzzi's investment in two natural gas distribution companies which together serve seven Argentine provinces. In its request, Camuzzi cites the provisions of the Treaty for the Promotion and Reciprocal Protection of Investments between Argentina and the Belgo-Luxembourg Economic Unit [sic] of 1990 (the 'Bilateral Agreement on Investments' or 'Treaty').[1]" | **[8]** "The Claimant in this dispute [. . .] participated in a vast privatization program that the country embarked upon in 1989, which included the gas sector among others. The privatization of this sector was carried out by means of the Gas Law and related instruments.[2]" | **[9]** "Camuzzi owns 56.91% of the share capital of Sodigas Sur S.A. ('Sodigas Sur') and Sodigas Pampeana S.A. ('Sodigas Pampeana'). In its turn, Sempra, the company which requested the concurrent arbitration proceedings mentioned above, owns 43.09% of Sodigas Sur and Sodigas Pampeana. The latter two Argentine companies, in turn, hold 90% and 86.09%, respectively, of the shares in Camuzzi Gas del Sur S.A. ('CGS') and Camuzzi Gas Pampeana S.A. ('CGP'), each of which, in its capacity as a 'Licensee', is a natural gas distribution company. Both CGS and CGP each holds a license granted by the Argentine Republic to both supply and distribute natural gas in seven provinces of that country." | **[10]** "The dispute originated in the suspension of the licensee companies' tariff increases based on the U.S. producer price index and the subsequent pesification of these tariffs pursuant to Law No. 25561. In addition, the Claimant asserts that subsidies granted have not been reimbursed and that certain taxes and levies that have been introduced by some Argentine provinces, as well as other measures relating to the payment for services, labor restrictions, and the transfer of tax costs, are prejudicial to it. All the foregoing, in the Claimant's opinion, results in a breach of the guarantees granted by the Argentine Republic pursuant to law and the licenses, and in a violation of the measures of protection to foreign investments provided for under the Treaty."

[Paras. 1, 8, 9, 10]

1 [1] Treaty between the Argentine Republic and the Belgo-Luxembourg Economic Unit [sic] on the Promotion and Reciprocal Protection of Investments of June 28, 1990, in force as from August 26, 1992.

2 [2] Law 24.076 of 1992 on the privatization of the gas sector and Decree 1738/92 of 1992 on application of the gas law.

II.4.94 APPLICABLE LAW

II. APPLICABLE LAW

[17] "The Tribunal shares the conclusion reached in *Azurix* to the effect that Article 42(1) applies to the merits of the dispute and that to reach a determination on jurisdiction only Article 25 of the Convention and the terms of the Treaty must be applied.[3] "

[Para. 17]

III. OBJECTIONS TO JURISDICTION

II.4.9223 NATIONAL OF ANOTHER CONTRACTING STATE
See also II.1.211; II.4.92232; II.4.9224

A. Nationality of the Investor

[28] "The objection to jurisdiction concerning control of a national company raised by the Argentine Republic involves two aspects. The first relates to the scope of Article 25(2)(b) of the Convention and whether it establishes an autonomous jurisdiction requirement or one option additional to others. The second aspect, which is definitely a novel approach, refers to the modalities of exercise of control over a company and the alternative of control through a shareholders' agreement." | **[29]** "The said article envisages two different situations. The first sentence understands that 'National of another Contracting State' is 'any juridical person who . . . has the nationality of a contracting State different from the State that is a party in the dispute. . .' The second sentence refers to an additional situation: '. . . and the juridical persons who, having. . .the nationality of the State that is a party in the dispute, . . . and who, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for purposes of this Convention.'" | **[30]** "The structure of the provision leaves no room for doubt. The first situation is that of a company having the nationality of a contracting State different from the one that is a party to the dispute. To the extent that it meets the requirements of the Convention and of the respective Treaty, that company is eligible to petition ICSID on the basis of its nationality." | **[31]** "The second situation is different. It relates to a company which has the nationality of the State that is a party to the dispute and which, for that reason, could be prevented from claiming against its own State; in such a case, the foreign control criterion enables it to complain as if it were a company of the nationality of the other contracting Party, insofar as this has been agreed between the States concerned. In addition to the substantive difference between these two situations, its

3 [3] Azurix Corp. v. the Argentine Republic (ICSID Case No. ARB/01/12), Decision on jurisdiction of December 8, 2003, paras. 48-50, 43 ILM 262 (2004) (hereinafter Azurix).

supplementary nature, as the Claimant argues, is clearly marked by the word 'and' with which the second sentence of the article begins." | **[32]** "In the present case [. . .] there was no agreement in the Treaty relating to application of Article 25(2)(b), but this does not mean that the investor of Luxembourg nationality is precluded from lodging a claim in the light of the first sentence of the article. The case does in fact relate to a national of Luxembourg who made an investment by purchasing shares in a national company of the Argentine Republic which is lodging a claim on its own behalf under the definition of investment adopted by the Treaty. In addition, the fact that the Treaty refers expressly to minority or indirect shareholders is intended to ensure that even an investor who does not exercise control over the company may exercise its right to claim. The considerations relating to the options that an investor and a local company have to bring a claim, made by the Tribunal in the decision on Sempra, are applicable *mutatis mutandis* to the extent they are relevant to this case (Sempra, Decision on Jurisdiction, paras. 38-45)." | **[33]** "But even when the Treaty is interpreted as requiring the investor to have control over the company, a condition to which it would be difficult to object given that the shareholder has a 56.91% interest in it, the question still arises as to the second aspect indicated concerning the possibility of joint control among the various claimants and partners." | **[34]** "It is first necessary to establish that, from the standpoint of corporate law, it is quite normal that various shareholders might control the policies and operations of a company through a shareholders' agreement, the terms of which are as mandatory as a contract. In this respect, the formation of the corporate will follows the rules of that agreement." | **[35]** "This was specifically the situation taken into account in Vacuum Salt, when the tribunal held:

> 'Nowhere in these proceedings it is suggested that Mr. Panagiotopulos, as holder of 20 percent of Vacuum Salt's shares, either through an alliance with other shareholders, through securing a significant power of decision or managerial influence, or otherwise, was in a position to steer through either positive or negative action, the fortunes of Vacuum Salt'.[4]" |

[36] "The possibility of control through an agreement of shareholders or other means is there envisaged, while at the same time the alternative of a form of both positive and negative control is indicated. The arguments invoked in this connection by the Claimant in this case concerning the existence of an agreement of shareholders and the consequent control of the company, positive for Camuzzi and negative through the exercise of the veto for Sempra, do not appear to contradict what is stated in Vacuum Salt." | **[37]** "However, there is one aspect on which Vacuum Salt sheds no light whatsoever. In that case there was no bilateral treaty on protection of investments and the situation was governed entirely by the law of the host

4 [12] Vacuum Salt, para. 53, as cited in the Reply on Jurisdiction of the Argentine Republic, para. 14 (hereinafter Reply on Jurisdiction).

country to the investment. This therefore makes it necessary to examine the problem in the light of the existence of such a treaty, as is the case in the present dispute." | **[38]** "The pertinent question is whether a foreign investor can add to its own participation in a local company an additional percentage belonging to another foreign investor so that their combined weight will thereby achieve the necessary control. Of course, combination of the participation of a foreign investor with that of a local investor should be excluded, since in that case, although the combination could result in control, this would not be foreign control. There would not appear to be any problem if various foreign investors of the same nationality, acting under one and the same treaty, were to make their respective investments in the local company and then organize it by means of an alliance of shareholders." | **[39]** "The problem arises in the case of foreign investors of different nationalities acting, as in this case, under different treaties. The Argentine Republic is right when it argues that the consent is expressed in each treaty individually, with a different personal and normative import, in such a way that the combining of various participations could result in situations that that consent did not have in mind and might not have intended to include. In such an alternative the control could not be exercised jointly for the purposes of the Convention and the Treaty and would have to be measured on the basis of the individual intents." | **[40]** "The assertion of the Claimant to the effect that the shareholders' nationality is not relevant inasmuch as they are nationals of a State that is a contracting party to the Convention is not convincing. It could, for instance, result in a shareholder protected by a treaty adding his participation to that of another shareholder who is a national of a State that is a party to the Convention but does not have a bilateral treaty with the host State that would protect him." | **[41]** "However, if the context of the initial investment or other subsequent acquisitions results in certain foreign investors operating jointly, it is then presumable that their participation has been viewed as a whole, even though they are of different nationalities and are protected by different treaties. In such a case, it would be perfectly feasible for these participations to be combined for purposes of control or to make the whole the beneficiary." | **[42]** "In this dispute, there are three elements that come together to demonstrate that joint participation was actually the case. Camuzzi's participation began in 1992, with that of Sempra added in 1996; the companies through which the investments were channeled progressively increased their shareholdings in the licensees, both by purchases from other shareholders and from the Argentine government itself, which auctioned blocks of shares up to and including the year 2000; the agreement of shareholders and the companies' By-Laws reflect the understandings for the administration and management of the operating companies." | **[43]** "All of this was done jointly by Sempra and Camuzzi, in such a way that when the dispute arose it was already a reality that could not be ignored for jurisdictional purposes. An important evidence to this effect, in-

voked by the Claimant, is that the Office of the Secretary of Defense of Competition and of Consumers of the Ministry of Economy of the Argentine Republic approved the complex share transaction carried out in 2000 by Sempra and Camuzzi, noting that said transaction meant 'the assumption of control over the enterprises whose shares are being acquired.'[5] This was precisely a case of joint control."

[Paras. 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43]

II.4.9213 LEGAL DISPUTE
See also II.4.9214

B. Legal Dispute

[54] "The foregoing discussion involves two main aspects: the existence of a legal dispute and whether, if there is one, it arises directly from the Claimant's investment." | **[55]** "The Tribunal has no difficulty in concluding that both elements are clearly present in this case. First, the record shows a marked difference between the parties concerning the nature and extent of their respective rights and expectations and their pretensions. This difference not only concerns the facts but mainly the law, as it is reflected in the Treaty. The actual claim submitted, as will be examined below, arises from the alleged violation of the rights and guarantees that the investor has in the light of the Treaty. The legal nature of this dispute is beyond any doubt."

[Paras. 54, 55; see Paras. 67-68 in Sempra v. Argentina]

II.4.9214 DISPUTE ARISING DIRECTLY OUT OF AN INVESTMENT
See also I.1.16; II.4.9211

C. Dispute Arising Directly out of an Investment

[56] "Next, the dispute arises directly from the investment that the Claimant has made in the companies incorporated in the Argentine Republic for the purpose of channeling the investment to the licensees. In this connection, if one were to conclude anything different, one would be depriving the Treaty of any effect since it was signed with the precise intention of guaranteeing the investments that would be made in the privatization process, by means of the specific modality with which they were made." | **[57]** "Even though particular aspects relating to the meaning and scope of the rights relating to the assets are governed by the law and regulations of the Argentine Republic, it must be borne in mind [. . .] that as regards jurisdiction the applicable law is that of the Convention and the Treaty. Moreover, the Treaty tself provides in Article 9 that when 'a matter related to invest-

5 [13] Ministry of Economy, Office of the Secretary for Defense of Competition and the Consumer, Resolution No. 196, September 20, 2000, and Annexed Opinion of the Commission on the Defense of Competition; Exhibit No.2 to the Claimant's Rejoinder on Jurisdiction.

ments is governed at the same time by this Agreement and by the national legislation of one of the Contracting Parties. . .the investors of the other Contracting Party may invoke the provisions which are most favorable to them.'" | **[58]** "The Tribunal cannot ignore the definition of investment included in the Treaty because, as the tribunal indicated in *Azurix*, broad definitions of this kind are intended to facilitate agreement between the parties so as to prevent the corporate personality from interfering with the protection of the real interests associated with the investment.[6] Here again, providing for a situation that benefits a minority or indirect investor as the Treaty does, reinforces this conclusion."| **[59]** "Whether the measures in dispute can have a general effect, as the Argentine Republic affirms, or an effect that directly affects the investor, as Camuzzi argues, is an important distinction which flows in part from CMS, but which, in any case, is a determination that must be made in connection with the merits and not in the jurisdictional stage. The Tribunal shares the Respondent's opinion to the effect that setting the value of the currency is a sovereign right, citing in support of this view the decision in *Serbian Loans*[7], but if this determination eventually affects a legally enforceable commitment it is not unrelated to the jurisdiction of an arbitration tribunal to which a dispute on the subject matter is brought. However, from there to argue, as the Respondent does, that hearing the dispute violates the principle of self-determination and a rule of *jus cogens*, as recognized in the *Western Sahara* case[8], there is a considerable distance." | **[60]** "Notwithstanding that some of the cases cited by the parties will be discussed when considering certain meanings of international law that have been disputed, it is necessary to clearly state the Tribunal's understanding in two recent cases which have been the subject of intense debate by the parties, both in their written presentations and at the hearing." | **[61]** "The first of these is the *Methanex case*. The Argentine Republic rightly argues that the views put forward by the parties in that case are very similar to those disputed here. The Claimant asserted that its rights had been affected by the measures taken, while the Respondent was of the view that measures that affected the company could not be actionable by the shareholders who had no more than a mere interest. However, it is also true that the tribunal sought to determine whether there was a significant connection between the measures and the investment." | **[62]** "That connection, it was concluded, was not there in the case of *Methanex* since the Claimant did not even produce the component that was regulated by the measures questioned. However, that connection does exist in the present case since the investment was made to carry out the specific economic activity involved in the privatization project, in addition to the fact that in doing so contracts leading to the issuance of a license were

6 [19] Azurix, para. 64.

7 [20] Permanent International Court of Justice, Serbian Loans, Series A, No. 20, 1929.

8 [21] International Court of Justice, Advisory Opinion Concerning Western Sahara, Reports, 1975, p. 12.

signed with the State." | **[63]** "The second case that the parties have discussed in this connection is GAMI. Here too, the parties disputed the right of action of a shareholder (GAMI) about a loss deriving from damage to the company in which it had invested (GAM). In this case the tribunal held:

> 'The fact that a host state does not explicitly interfere with share ownership is not decisive. The issue is rather whether a breach of NAFTA leads with sufficient directness to loss or damage in respect of a given investment. Whether GAM can establish such a prejudice is a matter to be examined on the merits. Uncertainty in this regard is not an obstacle to jurisdiction.'[9]" |

[64] "This Tribunal shares that conclusion, particularly to the extent that the treaty on which the protection or guarantee claimed is based provides for the possibility of a shareholder to resort to arbitration concerning the investment made, which is precisely the case in the present dispute where direct or indirect ownership are considered and a broad definition of investment is adopted. The conclusion in the *Mondev* case[10], where problems of action for derivative damages are also discussed, is based on the same concept.[11]" | **[65]** "The argument made by the Argentine Republic and which is also reflected in *Methanex*, to the effect that if the right of shareholders to claim when only their interests are affected is recognized it could lead to an unlimited chain of claims, is theoretically correct. However, in practice any claim for derivative damages will be limited by the arbitration clause. As noted in connection with this argument by the tribunal in *Enron*:

> '. . . 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.'[12]" |

[66] "Moreover, the fact must be noted that if the investor has rights protected under a treaty their violation will not result in merely affecting its interests but will affect a specific right of that protected investor." | **[67]** "The objection to jurisdiction made by the Argentine Republic on grounds of the indirect nature of the damage does not find support in the light of the facts of this case and of the applicable law. However, the objection concerning the *jus standi* of the Claimant must still be examined."

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9 [22] GAMI, Final award of November 15, 2004, http://www.state.gov/documents/organization/38789.pdf para. 33.

10 [23] Mondev International Ltd. v. United States of America (ICSID Case No. ARB(AF)/99/2), Final award of October 11, 2002, 6 ICSID Rep. 192 (2004).

11 [24] Enron Corporation y Ponderosa Assets, L.P. v. Argentine Republic (ICSID Case No. ARB/01/3), Decision on Jurisdiction (additional claim) of August 2, 2004, paras. 33-36 (hereinafter Enron II).

12 [25] Enron I, para. 52.

[Paras. 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67]

II.4.9211 QUALIFICATION AS INVESTMENT
See also II.4.9212

D. Standing of the Claimant

[79] "[. . .] The essential issues the Tribunal must decide are, first, whether the provisions of the Treaty do or do not allow for the claim of an investor who is not a majority shareholder and, second, whether the cause of action lies in the Treaty, the contract, or both." | **[80]** "The relevant provision is that of Article 1(2)(b) of the Treaty: 'The term 'investments' means any element of assets and any direct or indirect money contribution in money, in kind or in services, invested or reinvested in any sector of the economic activity. . . According to this Agreement, the following are deemed investments, in particular, but without limitation thereto: . . . (b) shares, stocks and any other form of holding, including minority or indirect holdings, in the companies constituted in the territory of one of the Contracting Parties.'" | **[81]** "There is no question that this is a broad definition, as its intent is to extend comprehensive protection to investors. It not only includes majority shareholders, but also minority or indirect shareholders, whether or not the latter control the company. Moreover [. . .] in this case there is a control element that cannot be ignored, to wit a shareholder participation of over 50 percent in the companies receiving the capital intended for the investment. As the tribunal explained in the *Goetz* case, the authority to bring action granted to shareholders by the treaties on investments seeks protection for the real investors." | **[82]** "The same conclusion has been shared by the tribunals in *CMS* and *Enron (Additional Claim)*, among various others. This Tribunal has no reason not to concur with that conclusion, even though some of the elements of fact in each dispute may differ in some respects. If the purpose of the Treaty and the terms of its provisions have the scope the parties negotiated and accepted, they could not now, as has been noted, be ignored by the Tribunal since that would devoid the Treaty of all useful effect."

[Paras. 79, 80, 81, 82]

II.4.9215 CONTRACT CLAIMS—TREATY CLAIMS
See also I.17.4

E. Contract Claims—Treaty Claims

[83] "The second aspect the Tribunal must clarify is whether the Claimant's plea is founded on a contract, in a treaty, or both. Since the time this distinction was made in the *Lanco* case, the discussion of the matter has been significantly advanced. A claim can have a purely contractual origin and refer to a right that does not qualify as an investment, in which case there will

be no jurisdiction, as was the case in *Joy*;[13] but it can also originate solely in the violation of a provision of the treaty independently from domestic law or, as is more frequently the case, originate in a violation of a contractual obligation that at the same time amounts to a violation of the guarantees of the treaty. In these other cases there will be no obstacle to the exercise of jurisdiction." | **[84]** "The latter is the criterion followed by several recent decisions on jurisdiction, particularly those on annulment in *Vivendi* and *Wena*[14] and the decision in *SGS v. Pakistan*. Another approach has been that of *SGS v. Philippines*,[15] in which it was considered necessary first to have a contract-related aspect of the claim heard by a national court and to retain ultimate jurisdiction over those aspects connected with the treaty." | **[85]** "This issue was well described by the Annulment Committee in *Vivendi* when it concluded:

> 'The claim was not simply reducible to so many civil or administrative law claims concerning so many individual acts alleged to violate the Concession Contract or the administrative law of Argentina. It was open to Claimants to claim, and they did claim, that these acts taken together, or some of them, amounted to a breach of articles 3 and/or 5 of the BIT.'[16]" |

[86] "On the basis of this criterion, the choice of a local forum for contractual purposes was also considered compatible with election of arbitration for purposes of the treaty,[17] as will be discussed further below." | **[87]** "Notwithstanding the differences of fact that distinguish these cases from others, the Tribunal sees no grounds to depart from this conceptual reasoning in that it arises from the very system of protection agreed to by the parties. The Tribunal must accordingly determine whether Camuzzi's claim belongs solely to the contract-related claim category, as the Argentine Republic asserts, or is based additionally or exclusively on the provisions of the Treaty, as the Claimant argues." | **[88]** "While the specific nature of each claim can only be assessed by examining the merits of the dispute, the Tribunal notes at this stage that the dispute arises from how the violation of contractual commitments with the licensees, expressed in the license and other acts, impacts the rights the investor claims to have in the light of the provisions of the Treaty and the guarantees on the basis of which it made the protected investment." | **[89]** "The claim is accordingly founded on both the contract and the Treaty, independently of the fact that purely contractual questions having no effect on the provisions of the Treaty can be

13 [34] Joy Mining Machinery Limited v. Arab Republic of Egypt (ICSID Case No. ARB/03/11), Decision on jurisdiction of August 6, 2004, <http://www.asil.org/ilib/JoyMining Egypt.pdf>

14 [35] Wena Hotels Limited v. Arab Republic of Egypt (ICSID Case No. ARB/98/4) Decision of the Tribunal on Annulment of February 5, 2002, 6 ICSID Rep. 129 (2004) (hereinafter Wena).

15 [36] SGS Société Générale de Surveillance S.A. v. Republic of the Philippines (ICSID Case No. ARB/02/6), Decision on Objections to Jurisdiction of January 29, 2004, http://www.worldbank.org/icsid/cases/SGSvPhil-final.pdf (hereinafter SGS v. Philippines).

16 [37] Aguas, para. 112.

17 [38] Wena.

subject to legal action available under the domestic law of the Argentine Republic. Neither here does the Tribunal have any reason to depart from this approach." | **[90]** "The fact that the Treaty also includes the specific guarantee of a general 'umbrella clause', such as that of Article 10(2), involving the obligation to observe contractual commitments concerning the investment, creates an even closer link between the contract, the context of the investment and the Treaty." | **[91]** "The Argentine Republic has rightly expressed its concern about the fact that this approach could lead to double recovery for the same harm, one as a result of domestic contract-based action and the other as the outcome of an international arbitral award. The Respondent also draws attention to the fact that in the *GAMI* case, in the light of the NAFTA provisions all compensation must benefit the company and not the shareholder. This is a real problem that needs to be discussed in due course, but again it is an issue belonging to the merits of the dispute. In any event, international law and decisions offer numerous mechanisms for preventing the possibility of double recovery."

[Paras. 83, 84, 85, 86, 87, 88, 89, 90, 91; *see* Paras. 95-102 in *Sempra* v. *Argentina*]

II.4.95 FORUM SELECTION CLAUSE
See also II.4.9215; II.4.96

F. Dispute Submitted to National Courts

[109] "Discussion of the meaning of forum selection clauses in a contract is already a common feature of many disputes brought to arbitration. This is a direct consequence of the difference between a contract-based and a treaty-based claim, as noted." | **[110]** "The conclusion reached in this respect by the Annulment Committee in *Vivendi* is meaningful:

> '[W]here 'the fundamental basis of a claim' is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard.'[18]" |

[111] "This Tribunal, like others that have considered this issue before, sees no reason to conclude otherwise. Moreover, by admitting the distinction between a contract-based and a treaty-based claim, the choice of forum is, as noted, a consequence of it that as such cannot affect the essence of the distinction." | **[112]** "Just as a dispute that is purely contract-related will have to be brought before the forum envisaged in the contract, so too a dispute relating to the interpretation of a treaty can be submitted to the mechanisms of that treaty. If the contrary were true, the contract would nullify the provisions of the treaty. The Government of Chile, for example, refrained from

18 [46] Aguas, para. 101.

putting forward objections to jurisdiction in the *MTD* case despite the fact that the contract specified the choice of a local forum, as it rightly understood that to the extent there was an alleged violation of the pertinent treaty that clause would not affect arbitral jurisdiction.[19]" | **[113]** "The parties have discussed in this case other recent arbitral decisions which have considered the distinction between a dispute originating in a contract and one arising from a treaty, and its connection with the choice of forum, in particular *SGS v. Pakistan*, *SGS v. Philippines* and *Generation Ukraine*.[20] Notwithstanding the different meaning that each party attributes to those decisions, the Tribunal notes that none contradicts the basic principle that a dispute can originate in a contract and simultaneously have an effect on a treaty, or the principle that a contract-related dispute can be submitted to the local forum and one under the treaty to the arbitral tribunal." | **[114]** "In point of fact, in *SGS v. Pakistan* the dispute involved proceedings in various national courts and the arbitral forum specified in the treaty, with the tribunal concluding that it had jurisdiction over those contract-related aspects of the dispute that at the same time involved a violation of the treaty, but not over those that had no connection with the standards of protection set by the treaty in question.[21] Similarly, in *Generation Ukraine* the tribunal confirmed its competence to consider the claims that related to the treaty and noted that technical aspects of the dispute should be submitted to the national courts as provided in the contract; the latter could be eventually transformed into a treaty claim in case of denial of justice.[22]" | **[115]** "Even *SGS v Philippines*, which has prompted so much discussion, does not depart from the essential principle that those aspects of the dispute originating in the treaty can be submitted to the arbitral forum, even though the tribunal required that a contract-related component of that dispute concerning the precise amount of the amount due under the contract had to be resolved first by the domestic court.[23]" | **[116]** "The Tribunal also notes that in the present case submission of the dispute to a national court has not been established and, as far as a dispute under the Treaty is concerned, it has solely been submitted to this Tribunal." | **[117]** "It also bears noting that, in this case, the Treaty does not strictly provide for the 'fork-in-the-road' concept. On the one hand, it does provide for the possibility of recourse to local jurisdiction, but if the dispute is not resolved within 18 months the path toward arbitration is opened automatically. On the other hand, it provides that upon initiating international arbitration each Party shall take 'the measures required for discontinuing the court action in progress' (Article 12(4))." | **[118]** "It may thus be concluded from the foregoing that, after having submitted the dispute to local jurisdiction, as it was not re-

19 [47] MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile (ICSID Case No. ARB/01/7), Award of May 25, 2004, <http://www.asil.org/ilib/MTDvChile.pdf>, para. 90.

20 [48] Generation Ukraine Inc. v. Ukraine (ICSID Case No. ARB/00/9), Award of September 16, 2003, <http://www.asil.org/ilm/Ukraine.pdf> (hereinafter Generation Ukraine).

21 [49] SGS v. Pakistan, para. 162.

22 [50] Generation Ukraine, para. 20.33.

23 [51] SGS v. Philippines, para. 128.

solved within the period indicated the appellant may submit it to arbitration, which also requires discontinuing any national court action which may be in progress. If the fork-in-the-road principle were applicable, it would not reflect the exercise of an option in favor of the local jurisdiction; to the contrary, it reflects the option in favor of arbitral jurisdiction." | **[119]** "The Tribunal accordingly concludes that this objection cannot be retained."

[Paras. 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119; see Paras. 120-128 in Sempra v. Argentina]

G. The Meaning and Extent of International Law

II.4.93 CONSENT TO ICSID ARBITRATION
See also I.1.16

1. Consent to Arbitration

[130] "The Tribunal agrees with the Argentine Republic in that the consent expressed in ratifying the Convention is not the consent required by the Convention for bringing a claim before ICSID; this indeed requires a separate declaration by means of a treaty or other acts making such consent unequivocally clear." | **[131]** "The Tribunal cannot, however, disregard the fact that the Argentine Republic signed the Treaty with the Belgo-Luxembourg Economic Union. This instrument embodies the expression of consent for resorting to arbitration should a dispute arise between the investor and the State with respect to the guarantees ensured under the Treaty. If what the Respondent is arguing is that an ad-hoc agreement between the investor and the State is needed to submit a specific dispute to arbitration, then this is a mistaken understanding." | **[132]** "The Treaty is self-sufficient for this purpose and the option of resorting to dispute resolution is exercised by the investor by the simple fact of expressing its own consent. The concept of an arbitration clause ('compromis') additional to the agreement on arbitration, which was in favor at some point in private arbitration, is not envisaged in the Treaty and is no longer of great use. Moreover, the Treaty expressly provides that the consent granted by the Parties to submit the dispute to arbitration is 'anticipated and irrevocable' (Article 12(3))." | **[133]** "The Tribunal also agrees with the Respondent that the rules for a correct interpretation are those of the Vienna Convention, which are also those that were followed in customary international law.[24] The relevant provision is that of Article 31 of the Convention, providing 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.'[25]" | **[134]** "This being the principal means of interpretation, it is the one that must be applied by the Tribunal. It has already been noted that the terms of the Treaty opted for the alternatives discussed,

24 [54] McNair: The Law of Treaties, 1961, 364-382.

25 [55] Ernesto de la Guardia: Derecho de los Tratados Internacionales, 1997, 216-230.

making it unnecessary to resort to supplementary means. But even if that were necessary, the negotiating history of the Treaty does not show that the intention asserted today by the Argentine Republic was that the other party had in signing the Treaty. Rather to the contrary, the clear intention was to provide full protection for investors. A sizeable number of treaties were concluded by the Argentine Republic with the specific intent of encouraging the interest of foreign investors in the privatization program. It is to this end that the terms of the Treaty discussed above were included." | **[135]** "[. . .] [I]nterpretation is not the exclusive task of States. It is also the duty of tribunals called to settle a dispute, particularly when the question is to interpret the meaning of the terms used in a treaty. This is precisely the role of judicial decisions as a source of international law in Article 38(1) of the Statute of the International Court of Justice, to which the Respondent refers." | **[136]** "It is not the task of this Tribunal to consider the criticism of decisions of other tribunals [. . .] but it is necessary to discuss some aspects of that criticism which have a bearing on this case."

[Paras. 130, 131, 132, 133, 134, 135, 136]

I.2.041 DIPLOMATIC PROTECTION

2. Diplomatic Protection

[138] "[. . .] The Tribunal agrees with the Argentine Republic that diplomatic protection involves concepts and mechanisms that are very different from those available in the system of international investment protection. The latter has devised a mechanism that is separate from the role of the State of the investor's nationality, but not from that of the State host to the investment, which will have to participate in cases where a dispute arises with the investor." | **[139]** "For the same reason that diplomatic protection is inappropriate under the bilateral treaty system, neither can this system rely on approaches arising from that traditional mechanism, in particular those of the *Barcelona Traction* case. As the tribunal points out in *GAMI*: 'The Tribunal however does not accept that *Barcelona Traction* established a rule that must be extended beyond the issue of the right of espousal by diplomatic protection. The ICJ itself accepted in *ELSI* that US shareholders of an Italian corporate entity could seise the international jurisdiction when seeking to hold Italy liable for alleged violation of a treaty by way of measures *imposed on that entity*.'[26]" | **[140]** "This is the reason why today it could not be asserted in the light of the evolution of international law, that shareholders that qualify as protected investors within the scope of the system for protecting foreign investors are prevented from claiming their rights, even when the harm has been inflicted on the company in which they participate. The International Court of Justice itself did not fail to consider this point in *Barcelona Traction* in the light of what was then the emerging sys-

26 [56] GAMI, para. 30, emphasis in original, notes omitted.

tem for protecting investors under the Convention." | **[141]** "As the tribunal in *LG&E* also noted, whatever may have been the merits of *Barcelona Traction*, that case was concerned solely with the diplomatic protection of nationals by their State, while the case here disputed concerns the contemporary concept of direct access for investors to dispute resolution by means of arbitration between investors and the State.[27]"

[Paras. 138, 139, 140, 141]

II.4.9211 QUALIFICATION AS INVESTOR
See also II.4.9224

3. Shareholder's Rights

[142] "The fact that, as the Respondent notes, in *ELSI* the shareholders held 100 percent of the shares and total control of the company, in addition to the fact that a bankruptcy situation was involved, neither of which apply in this case, does not change the principle at issue which is that shareholders can claim on their own. If, moreover, the treaties provide similar rights to shareholders having indirect ownership or control, or who are not majority shareholders, this does not alter that principle either. This was also the criterion applied by the tribunal in *LG&E*.[28]" | **[143]** "As noted, the parties have also discussed the importance of *Vacuum Salt* in this context because the investor in that case did not have control of the company and could not therefore claim under the Convention. However, as the tribunal in *Enron* noted, in *Vacuum Salt* there were two situations entirely different from those of *Enron* and this case: the company was entirely subject to Ghanaian legislation, without there being even a foreign-investment contract, and, what was more important, there was no bilateral treaty to protect the investment.[29] The latter is precisely what makes the difference in this case."

[Paras. 142, 143; see Paras. 154-155 in Sempra v. Argentina]

II.4.97 DECISION ON JURISDICTION

IV. DECISION

"For the reasons set forth above, the Tribunal hereby decides that this dispute falls within the jurisdiction of the Centre and the competence of the Tribunal. The Tribunal has accordingly issued the Order necessary for continuation of the proceedings, in accordance with Arbitration Rule 41(4)."

27 [57] LG&E Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic (ICSID Case No. ARB/02/1), para. 52, (hereinafter LG&E).

28 [58] *LG&E*, para. 50.

29 [59] *Enron II*, paras. 43-45.

CMS Gas Transmission Company v. The Argentine Republic, ARB/01/8, Award, 12 May 2005*

Original: English and Spanish

Present: Orrego Vicuña, *President of the Tribunal*
Lalonde P.C., O.C., Q.C., Rezek, *Arbitrators*

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* Summaries prepared by Christina Knahr, MPA, 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 1205 (2005) and also available online at <http://www.worldbank.org/icsid/cases/CMS_Award.pdf>. Original footnote numbers are indicated in brackets: [ ].

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

II.4.911 REQUEST FOR ARBITRATION
See also I.17.011

I. THE DISPUTE

[4] "On July 26, 2001, the International Centre for Settlement of Investment Disputes (ICSID or the Centre) received from CMS Gas Transmission Company (CMS), an entity incorporated in the United States of America, a Request for Arbitration against the Argentine Republic (Argentina). The request concerned the alleged suspension by Argentina of a tariff adjustment formula for gas transportation applicable to an enterprise in which CMS had an investment. In its request, the Claimant invoked the provisions of the 1991 'Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment.' (The Argentina—U.S. Bilateral Investment Treaty or BIT or the Treaty).[1]"

[Para. 4]

II. CONSIDERATIONS OF THE TRIBUNAL

I.17.12 INDIRECT EXPROPRIATION

A. Expropriation

[260] "[. . .] The issue for the Tribunal to determine is [. . .] whether the measures adopted constitute an indirect or regulatory expropriation. The answer is of course not quite simple for indeed the measures have had an important effect on the business of the Claimant." | **[261]** "The Tribunal in the *Lauder* case rightly explained that

> 'The concept of indirect (or '*de facto*', or '*creeping*') expropriation is not clearly defined. Indirect expropriation or nationalization is a measure that does not involve an overt taking, but that effectively neutralized the enjoyment of the property.'[2]" |

[262] "The essential question is therefore to establish whether the enjoyment of the property has been effectively neutralized. The standard that a number of tribunals have applied in recent cases where indirect expropriation has been contended is that of substantial deprivation. In the *Metalclad* case the tribunal held that this kind of expropriation relates to 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 reasonable-to-be-expected economic benefit of property even if not necessarily to the obvi-

1 [1] Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, November 14, 1991, in force from October 20, 1994. Hereafter cited as the U.S.-Argentina BIT or the Treaty.

2 [129] *Lauder,* <http://www.mfcr.cz/static/Arbitraz/en/FinalAward.doc> para. 200.

ous benefit of the host State.'[3] Similarly, the Iran—United States Claims Tribunal has held that deprivation must affect 'fundamental rights of ownership,'[4] a criteria reaffirmed in the *CME v. Czech Republic* case.[5] The test of interference with present uses and prevention of the realization of a reasonable return on investments has also been discussed by the Respondent in this context.[6]" | **[263]** "Substantial deprivation was addressed in detail by the tribunal in the *Pope* & *Talbot* case.[7] The Government of Argentina has convincingly argued that the list of issues to be taken into account for reaching a determination on substantial deprivation, as discussed in that case, is not present in the instant dispute. In fact, the Respondent has explained, the investor is in control of the investment; the Government does not manage the day-to-day operations of the company; and the investor has full ownership and control of the investment." | **[264]** "The Tribunal is persuaded that this is indeed the case in this dispute and holds therefore that the Government of Argentina has not breached the standard of protection laid down in Article IV(l) of the Treaty."

[Paras. 260, 261, 262, 263, 264]

I.17.24 FAIR AND EQUITABLE TREATMENT

B. Fair and Equitable Treatment

[273] "The key issue that the Tribunal has to decide is whether the measures adopted in 2000—2002 breached the standard of protection afforded by Argentina's undertaking to provide fair and equitable treatment. The Treaty [. . .] does not define the standard of fair and equitable treatment and to this extent Argentina's concern about it being somewhat vague is not entirely without merit." | **[274]** "The Treaty Preamble makes it clear, however, that one principal objective of the protection envisaged is that fair and equitable treatment is desirable 'to maintain a stable framework for investments and maximum effective use of economic resources.' There can be no doubt, therefore, that a stable legal and business environment is an essential element of fair and equitable treatment." | **[275]** "The measures that are complained of did in fact entirely transform and alter the legal and business environment under which the investment was decided and made. The discussion above, about the tariff regime and its relationship with a dollar standard and adjustment mechanisms unequivocally shows

3 [130] *Metalclad,* 40 *ILM* 55 (2001), para. 103.

4 [131] *Tippetts, Abbett, McCarthy, Stratton* v. *TAMS-AFFA Consulting Engineers of Iran,* 6 CTR 219 (1984-II), at 225; see also *Phelps Dodge Corp v Islamic Republic of Iran,* 10 CTR 121 (1986-I).

5 [132] *CME,* <http://www.mfcr.cz/static/Arbitraz/en/PartialAward.pdf>, para. 688.

6 [133] 33 U.S. Supreme Court, *Penn Central Transportation Co.* v. *New York City,* 438 U.S. 104 (1978); Argentina Rejoinder, at 182.

7 [134] *Pope* & *Talbot,* <http://www.appletonlaw.com/cases/P&T-INTERIM%20AWARD.PDF>, paras. 96, 102.

that these elements are no longer present in the regime governing the business operations of the Claimant. It has also been established that the guarantees given in this connection under the legal framework and its various components were crucial for the investment decision." | **[276]** "In addition to the specific terms of the Treaty, the significant number of treaties, both bilateral and multilateral, that have dealt with this standard also unequivocally shows that fair and equitable treatment is inseparable from stability and predictability. Many arbitral decisions and scholarly writings point in the same direction.[8]" | **[277]** "It is not a question of whether the legal framework might need to be frozen as it can always evolve and be adapted to changing circumstances, but neither is it a question of whether the framework can be dispensed with altogether when specific commitments to the contrary have been made. The law of foreign investment and its protection has been developed with the specific objective of avoiding such adverse legal effects." | **[278]** "It was held by the Tribunal in the *Metalclad* case that Mexico had in several ways failed to provide a

> '. . . predictable framework for Metalclad's business planning and investment. The totality of these circumstances demonstrate a lack of orderly process and timely disposition in relation to an investor of a Party acting in the expectation that it would be treated fairly and justly . . . '[9]" |

[279] "So too the Tribunal in the *Tecnicas Medioambientales* case has held in this respect:

> '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 . . . '[10]" |

[280] "The Tribunal believes this is an objective requirement unrelated to whether the Respondent has had any deliberate intention or bad faith in adopting the measures in question. Of course, such intention and bad faith can aggravate the situation but are not an essential element of the standard." | **[281]** "The Tribunal, therefore, concludes against the background of the present dispute that the measures adopted resulted in the objective breach of the standard laid down in Article II(2)(a) of the Treaty." | **[282]** "There is one additional aspect the Tribunal must examine having heard the arguments of the parties. That is whether the standard of fair and equitable treatment is separate and more expansive than that of customary in-

8 [139] *Alex Genin and others* v. *Republic of Estonia* (Case No. ARB/99/2) *(Genin),* Award of June 25, 2001, 17 *ICSID Rev.-FILJ* 395 (2002); P. Juillard: "L'evolution des sources du droit des investissements", Recueil des Cours de I' Academie de Droit International, Vol. 250, 1994.

9 [140] *Metalclad,* 40 *ILM* 55 (2001), para. 99.

10 [141] *Tecmed,* <http://www.worldbank.org/icsid/cases/laudo-051903%20-English.pdf>; 43 *ILM* 133 (2004), para. 154.

ternational law, as held by the tribunal in *Pope and Talbot,* or whether it is identical with the customary international law minimum standard, as argued by Argentina." | **[283]** "The Tribunal is mindful of the discussion prompted by these arguments, particularly with reference to the NAFTA Free Trade Commission's Note of Interpretation identifying the fair and equitable treatment standard with that of customary international law.[11] This development has led to further treaty clarifications as in the Chile—United States Free Trade Agreement.[12]" | **[284]** "While the choice between requiring a higher treaty standard and that of equating it with the international minimum standard might have relevance in the context of some disputes, the Tribunal is not persuaded that it is relevant in this case. In fact, the Treaty standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment, founded on solemn legal and contractual commitments, is not different from the international law minimum standard and its evolution under customary law."

[Paras. 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284]

I.17.26 UNREASONABLE AND DISCRIMINATORY MEASURES

C. Arbitrary or Discriminatory Measures

[290] "The standard of protection against arbitrariness and discrimination is related to that of fair and equitable treatment. Any measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment. The standard is next related to impairment: the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of the investment must be impaired by the measures adopted." | **[291]** "In the *Lauder* case, an equivalent provision of the pertinent investment treaty was explained in accordance with the definition of 'arbitrary' in Black's Law Dictionary, which states that an arbitrary decision is one 'depending on individual discretion; . . . founded on prejudice or preference rather than on reason or fact.'[13]" | **[292]** "This Tribunal is not persuaded by the Claimant's view about arbitrariness because there has been no impairment, for example, in respect of the management and operation of the investment. Admittedly, some adverse effects can be noted in respect of other matters, such as the use, expansion or disposal of the investment, which since the measures were adopted have been greatly limited. To the extent that such effects might endure, the test applied in the Lauder case

11 [142] NAFTA Free Trade Commission, Interpretation of NAFTA Article 1105(1), July 21, 2001, http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp> .

12 [143] Chile-United States Free Trade Agreement of June 6, 2003, <http://www.ustr.gov/assets/Trade _Agreements/Bilateral/Chile _FT A/Final_ Texts/asset_upload _file 1_ 4004.pdf >, Article 10.4.2.

13 [149] *Lauder,* para. 221.

becomes relevant and could result in a factor reinforcing the related finding of a breach of fair and equitable treatment." | **[293]** "The situation in respect of discrimination is somewhat similar. The Respondent's argument about discrimination existing only in similarly situated groups or categories of people is correct, and no discrimination can be discerned in this respect. Admittedly, it is quite difficult to establish whether that similarity exists only in the context of the gas transportation and distribution industry or extends to other utilities as well." | **[294]** "Be that as it may, the fact is that to the extent that the measures persisted beyond the crisis, the differentiation between various categories or groups of businesses becomes more difficult to explain. Indeed, the Government of Argentina has successfully concluded renegotiations and other arrangements with a number of industries and businesses equally protected by guarantees of investment treaties. This includes the gas producers, but not the transportation and distribution side of the industry. The gas producers have been allowed to proceed to a gradual tariff adjustment to be completed by mid-2005.[14] The longer the differentiation is kept the more evident the issue becomes, thus eventually again reinforcing the related finding about the breach of fair and equitable treatment." | **[295]** "The Tribunal, therefore, cannot hold that arbitrariness and discrimination are present in the context of the crisis noted, and to the extent that some effects become evident they will relate rather to the breach of fair and equitable treatment than to the breach of separate standards under the Treaty."

[Paras. 290, 291, 292, 293, 294, 295]

I.17.4 UMBRELLA CLAUSES
See also II.4.9215

D. Umbrella Clause

[299] "[. . .] [T]he Tribunal believes the Respondent is correct in arguing that not all contract breaches result in breaches of the Treaty. The standard of protection of the treaty will be engaged only when there is a specific breach of treaty rights and obligations or a violation of contract rights protected under the treaty. Purely commercial aspects of a contract might not be protected by the treaty in some situations, but the protection is likely to be available when there is significant interference by governments or public agencies with the rights of the investor." | **[300]** "This discussion has been, to an important extent, clarified in recent decisions of arbitral tribunals having to deal with the issue of contract and treaty claims. This is particularly so in the *Lauder* v. *Czech Republic, Genin* v. *Estonia*, *Aguas*

14 [150] Witness Statement of Dr. Christian Folgar, August 12, 2004, Hearing, Vol. 4, at 765-769; Witness Statement of Dr. Bernardo Velar de Irigoyen, August 11, 2004, Hearing, Vol. 3, at 524-525.

del Aconquija v. *Argentina,*[15] *Azurix* v. *Argentina,*[16] *SGS* v. *Pakistan, SGS* v. *Philippines*[17] and *Joy Mining* v. *Egypt* cases,[18] among others. In these decisions, commercial disputes arising from a contract have been distinguished from disputes arising from the breach of treaty standards and their respective causes of action." | **[301]** "None of the measures complained of in this case can be described as a commercial question as they are all related to government decisions that have resulted in the interferences and breaches noted." | **[302]** "While many, if not all, such interferences are closely related to other standards of protection under the Treaty, there are in particular two stabilization clauses contained in the License that have significant effect when it comes to the protection extended to them under the umbrella clause. The first is the obligation undertaken not to freeze the tariff regime or subject it to price controls.[19] The second is the obligation not to alter the basic rules governing the License without TGN's written consent.[20]" | **[303]** "The Tribunal must therefore conclude that the obligation under the umbrella clause of Article II(2)(c) of the Treaty has not been observed by the Respondent to the extent that legal and contractual obligations pertinent to the investment have been breached and have resulted in the violation of the standards of protection under the Treaty. "

[Paras. 299, 300, 301, 302, 303]

I.11.0 STATE RESPONSIBILITY
See also I.1.01

E. State of Necessity

[315] "The Tribunal [. . .] considers that Article 25 of the Articles on State Responsibility adequately reflect the state of customary international law on the question of necessity. This Article, in turn, is based on a number of relevant historical cases discussed in the Commentary,[21] with particular

15 [154] *Companiia de Aguas del Aconquija SA. and Vivendi Universal* v. *Argentine Republic* (ICSID Case No. ARB/97/3), Award of November 21, 2000, 16 ICSID Review-FILJ 641 (2001),641.

16 [155] *Azurix Corp.* v. *Argentine Republic* (Case No. ARB/0l/12), Decision on Jurisdiction of December 8, 2003, 43 ILM 262 (2004).

17 [156] *SGS Societe Generale de Surveillance SA.* v. *Republic of the Philippines* (Case No. ARB/02/6) *(SGS* v. *Phillipines),* Decision of the Tribunal on Objections to Jurisdiction, January 29, 2004, <http://www.worldbank.org/icsid/cases/SGSvPhil-final.pdf>.

18 [157] *Joy Mining Machinery Limited v. Arab Republic of Egypt* (Case No. ARB/03/l1) *(Joy Mining),* Award on Jurisdiction, August 6, 2004,<http://www.asil.org/ilib/JoyMining_Egypt.pdf>.

19 [158] License, Clause 9.8.

20 [159] License, Clause 18.2.

21 [166] James Crawford: The International Law Commission's Articles on State Responsibility, 2002, at 178 et seq.

reference to the *Caroline,*[22] the *Russian Indemnity,*[23] *Societe Commerciale de Belgique,*[24] the *Torrey Canyon*[25] and the *Gabcikovo-Nagymaros* cases." | **[316]** "Article 25 reads as follows:

> '1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
>
> (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
>
> (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole;
>
> 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
>
> (a) the international obligation III question excludes the possibility of invoking necessity; or
>
> (b) the State has contributed to the situation of necessity.'" |

[317] "While the existence of necessity as a ground for precluding wrongfulness under international law is no longer disputed, there is also consensus to the effect that this ground is an exceptional one and has to be addressed in a prudent manner to avoid abuse. The very opening of the Article to the effect that necessity 'may not be invoked' unless strict conditions are met, is indicative of this restrictive approach of international law. Case law, state practice and scholarly writings amply support this restrictive approach to the operation of necessity.[26] The reason is not difficult to understand. If strict and demanding conditions are not required or are loosely applied, any State could invoke necessity to elude its international obligations. This would certainly be contrary to the stability and predictability of the law." | **[318]** "The Tribunal must now undertake the very difficult task of finding whether the Argentine crisis meets the requirements of Article 25 [. . .]. Again here the Tribunal is not called upon to pass judgment on the measures adopted in that connection but simply to establish whether the breach of the Treaty provisions discussed is devoid of legal consequences by the preclusion of wrongfulness." | **[319]** "A first question the Tribunal must address is whether an essential interest of the State was involved in the matter. Again here the issue is to determine the gravity of the crisis. The need to prevent a major breakdown, with all its social and

22 [167] The *Caroline* incident of 1837 and related diplomatic correspondence of 1842, as discussed in Crawford, at 179-180.

23 [168] *Russian Indemnity* case, UNRIAA, Vol. XI, 431 (1912).

24 [169] Permanent Court of International Justice, *Societe Commerciale de Belgique,* 1939, Series A/B, No. 78.

25 [170] The *Torrey Canyon,* Cmnd. 3246, 1967.

26 [171] Eric Wyler: L'Illicite et la Condition des Persones Privees, 1995, at 192 et seq.

political implications, might have entailed an essential interest of the State in which case the operation of the state of necessity might have been triggered. In addition, the plea must under the specific circumstances of each case meet the legal requirements set out by customary international law." | **[320]** "[. . .] The Tribunal is convinced that the crisis was indeed severe and the argument that nothing important happened is not tenable. However, neither could it be held that wrongfulness should be precluded as a matter of course under the circumstances. As is many times the case in international affairs and international law, situations of this kind are not given in black and white but in many shades of grey." | **[321]** "It follows that the relative effect that can be reasonably attributed to the crisis does not allow for a finding on preclusion of wrongfulness. The Respondent's perception of extreme adverse effects, however, is understandable, and in that light the plea of necessity or emergency cannot be considered as an abuse of rights as the Claimant has argued." | **[322]** "The Tribunal turns next to the question whether there was in this case a grave and imminent peril. Here again the Tribunal is persuaded that the situation was difficult enough to justify the government taking action to prevent a worsening of the situation and the danger of total economic collapse. But neither does the relative effect of the crisis allow here for a finding in terms of preclusion of wrongfulness." | **[323]** "A different issue, however, is whether the measures adopted were the 'only way' for the State to safeguard its interests. This is indeed debatable. The views of the parties and distinguished economists are wide apart on this matter, ranging from the support of those measures to the discussion of a variety of alternatives, including dollarization of the economy, granting of direct subsidies to the affected population or industries and many others. Which of these policy alternatives would have been better is a decision beyond the scope of the Tribunal's task, which is to establish whether there was only one way or various ways and thus whether the requirements for the preclusion of wrongfulness have or have not been met." | **[324]** "The International Law Commission's comment to the effect that the plea of necessity is 'excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient', is persuasive in assisting this Tribunal in concluding that the measures adopted were not the only steps available.[27]" | **[325]** "A different condition for the admission of necessity relates to the requirement that the measures adopted do not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. As the specific obligations towards another State are embodied in the Treaty, this question will be examined in the context of the applicable treaty provisions. It does not appear, however, that the essential interest of the international community as a whole was affected in any relevant way, nor that a peremptory norm of international law might have been compro-

27 [172] Crawford, at 184.

mised, a situation governed by Article 26 of the Articles." | **[326]** "In addition to the basic conditions set out under paragraph 1 of Article 25, there are two other limits to the operation of necessity arising from paragraph 2. As noted in the Commentary, the use of the expression 'in any case' in the opening of the text means that each of these limits must be considered over and above the conditions of paragraph 1.[28]" | **[327]** "The first such limit arises when the international obligation excludes necessity, a matter which again will be considered in the context of the Treaty." | **[328]** "The second limit is the requirement for the State not to have contributed to the situation of necessity. The Commentary clarifies that this contribution must be 'sufficiently substantial and not merely incidental or peripheral'. In spite of the view of the parties claiming that all factors contributing to the crisis were either endogenous or exogenous, the Tribunal is again persuaded that similar to what is the case in most crises of this kind the roots extend both ways and include a number of domestic as well as international dimensions. This is the unavoidable consequence of the operation of a global economy where domestic and international factors interact." | **[329]** "The issue, however, is whether the contribution to the crisis by Argentina has or has not been sufficiently substantial. The Tribunal, when reviewing the circumstances of the present dispute, must conclude that this was the case. The crisis was not of the making of one particular administration and found its roots in the earlier crisis of the 1980s and evolving governmental policies of the 1990s that reached a zenith in 2002 and thereafter. Therefore, the Tribunal observes that government policies and their shortcomings significantly contributed to the crisis and the emergency and while exogenous factors did fuel additional difficulties they do not exempt the Respondent from its responsibility in the matter." | **[330]** "There is yet another important element which the Tribunal must take into account. The International Court of Justice has in the *Gabcikovo-Nagymaros* case convincingly referred to the International Law Commission's view that all the conditions governing necessity must be 'cumulatively' satisfied.[29]" | **[331]** "In the present case there are, as concluded, elements of necessity partially present here and there but when the various elements, conditions and limits are examined as a whole it cannot be concluded that all such elements meet the cumulative test. This in itself leads to the inevitable conclusion that the requirements of necessity under customary international law have not been fully met so as to preclude the wrongfulness of the acts."

[Paras. 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331]

28 [173] Crawford, at 185.

29 [174] *Gabcikovo-Nagymaros Project.* pars. 51-52.

I.1.16 TREATY INTERPRETATION
See also I.2.213; I.11.0; I.17.22; II.4.0

1. Emergency Clause in the Treaty

[353] "The first issue the Tribunal must determine is whether the object and purpose of the Treaty exclude necessity. There are of course treaties designed to be applied precisely in the case of necessity or emergency, such as those setting out humanitarian rules for situations of armed conflict. In those cases, as rightly explained in the Commentary to Article 25 of the Articles on State Responsibility, the plea of necessity is excluded by the very object and purpose of the treaty.[30]" | **[354]** "The Treaty in this case is clearly designed to protect investments at a time of economic difficulties or other circumstances leading to the adoption of adverse measures by the Government. The question is, however, how grave these economic difficulties might be. A severe crisis cannot necessarily be equated with a situation of total collapse. And in the absence of such profoundly serious conditions it is plainly clear that the Treaty will prevail over any plea of necessity. However, if such difficulties, without being catastrophic in and of themselves, nevertheless invite catastrophic conditions in terms of disruption and disintegration of society, or are likely to lead to a total breakdown of the economy, emergency and necessity might acquire a different meaning." | **[355]** "[. . .] [T]he Tribunal is convinced that the Argentine crisis was severe but did not result in total economic and social collapse. When the Argentine crisis is compared to other contemporary crises affecting countries in different regions of the world it may be noted that such other crises have not led to the derogation of international contractual or treaty obligations. Renegotiation, adaptation and postponement have occurred but the essence of the international obligations has been kept intact." | **[356]** "[. . .] [W]hile the crisis in and of itself might not be characterized as catastrophic and while there was therefore not a situation of *force majeure* that left no other option open, neither can it be held that the crisis was of no consequence and that business could have continued as usual[.]. [. . .] [T]here were certain consequences stemming from the crisis. And while not excusing liability or precluding wrongfulness from the legal point of view they ought nevertheless to be considered by the Tribunal when determining compensation." | **[357]** "A second issue the Tribunal must determine is whether [. . .] the act in question does not seriously impair an essential interest of the State or States towards which the obligation exists. If the Treaty was made to protect investors it must be assumed that this is an important interest of the States parties. Whether it is an essential interest is difficult to say, particularly at a time when this interest appears occasionally to be dwindling." | **[358]** "However [. . .] the fact is that this particular kind of treaty is also of interest to investors as they are specific beneficiaries and for investors the matter is

30 [184] Crawford, at 185.

indeed essential. For the purpose of this case, and looking at the Treaty just in the context of its States parties, the Tribunal concludes that it does not appear that an essential interest of the State to which the obligation exists has been impaired, nor have those of the international community as a whole. Accordingly, the plea of necessity would not be precluded on this count." | **[359]** "The third issue the Tribunal must determine is whether Article XI of the Treaty can be interpreted in such a way as to provide that it includes economic emergency as an essential security interest. While the text of the Article does not refer to economic crises or difficulties of that particular kind [. . .] there is nothing in the context of customary international law or the object and purpose of the Treaty that could on its own exclude major economic crises from the scope of Article XI." | **[360]** "It must also be kept in mind that the scope of a given bilateral treaty, such as this, should normally be understood and interpreted as attending to the concerns of both parties. If the concept of essential security interests were to be limited to immediate political and national security concerns, particularly of an international character, and were to exclude other interests, for example, major economic emergencies, it could well result in an unbalanced understanding of Article XI. Such an approach would not be entirely consistent with the rules governing the interpretation of treaties." | **[361]** "Again, the issue is then to establish how grave an economic crisis must be so as to qualify as an essential security interest, a matter discussed above." | **[362]** "It is true that Paragraph 6 of the Protocol attached to the Treaty qualifies the reference to maintenance or restoration of international peace and security as related to obligations under the Charter of the United Nations. Similarly, the letter of submission of the Treaty to Congress in Argentina and the Report of the pertinent Congressional Committee, refer in particular to situations of war, armed conflict or disturbance.[31] However, this cannot be read as excluding altogether other qualifying situations." | **[363]** "Since the Security Council assumes to be many times the law unto itself,[32] and since there is no specific mechanism for judicial review under the Charter, it is not inconceivable that in some circumstances this body might wish to qualify a situation of economic crisis as a threat to international peace and security and adopt appropriate measures to deal with a given situation. This would indeed allow for a broad interpretation of Article XI." | **[364]** "As explained by Professor Alvarez, in practice the Security Council has, to a limited extent, adopted decisions connecting economic measures with security matters, for example, in the formulation of the sanctions pro-

31 [185] Letter from the President of Argentina to Congress submitting the text of the Treaty, January 24, 1992, in Camara de Diputados, Reunion *No.* 70, April 30, 1992, at 6722-6723; Report of the Committees of Foreign Affairs and Worship and Economy, ibid.

32 [186] As discussed by an experienced diplomat, "With no higher authority to gainsay it, threats to international peace and security are what the Security Council says they are"; Gareth Evans: "When is it Right to Fight?", Survival, Vol. 46 (3), 2004, 59-82, at 69.

gram enacted as a consequence of the 1991 Gulf War and other instances.[33] In such cases, it is explained, there could be a treaty breach under the authority of the Security Council. However, this sort of situation does not have to do with the present case." | **[365]** "It is also important to note that in Dean Slaughter's understanding of the reference to the United Nations in the Treaty Protocol, such clause should not be considered as self-judging to the extent that the issue relates to the maintenance or restoration of international peace and security, involving a broader understanding of the concept as opposed to a nation's own security interest. The latter would in her view allow for self-judging insofar as the security interest is not a part of the maintenance or restoration of international peace and security.[34] The question of the self-judging character of these provisions will be discussed next." | **[366]** "The fourth issue the Tribunal must determine is whether the rule of Article XI of the Treaty is self-judging, that is if the State adopting the measures in question is the sole arbiter of the scope and application of that rule, or whether the invocation of necessity, emergency or other essential security interests is subject to some form of judicial review." | **[367]** "As discussed above, three positions have emerged in this context. There is first that of the Claimant, supporting the argument that such a clause cannot be self-judging. There is next that of the Respondent, who believes that it is free to determine when and to what extent necessity, emergency or the threat to its security interests need the adoption of extraordinary measures. And third, there is the position expressed by Dean Slaughter to the effect that the Tribunal must determine whether Article XI is applicable particularly with a view to establishing whether this has been done in good faith.[35]" | **[368]** "The Tribunal notes in this connection that, as explained by Dean Slaughter, the position of the United States has been evolving towards the support of self-judging clauses insofar as security interests are affected. This policy emerged after the *Nicaragua* decision, which will be discussed below, and was expressly included in the U.S.—Russia bilateral investment treaty, which has incidentally not been ratified. With some changes it was also included in the U.S.—Bahrain investment treaty, the precise meaning of which is debated by the experts. The GATT self-judging clause was also mentioned above. Other treaties have not included a self-judging clause but this again is debated by the experts, and in any event such policy would also be reflected in the 2004 U.S. Model bilateral investment treaty." | **[369]** "The discussion of these treaties in the U.S. Congress allows for a variety of interpretations but does not clearly support the conclusion that all such clauses are self-judging. The record shows that during the discussion of the first round of bilateral investment treaties in 1986 a proposal to allow for the termination of treaties in light of security

33 [187] Statement by Professor Jose E. Alvarez, Hearing, Vol. 7, August 17, 2004, at 1633-1637.

34 [188] Statement by Professor Anne Marie Slaughter, Hearing, Vol. 8, August 18, 2004, at 1947-1949.

35 [189] Statement by Professor Anne Marie Slaughter, Hearing, Vol. 8, August 18, 2004, at 1844.

needs was not accepted, although this discussion apparently did not address specifically the question of self-judging clauses. The expert discussion of the Exon-Florio law has also generated much debate on its meaning.[36]" | **[370]** "The Tribunal is convinced that when States intend to create for themselves a right to determine unilaterally the legitimacy of extraordinary measures importing non-compliance with obligations assumed in a treaty, they do so expressly. The examples of the GATT and bilateral investment treaty provisions offered above are eloquent examples of this approach. The first does not preclude measures adopted by a party 'which it considers necessary' for the protection of its security interests. So too, the U.S.—Russia treaty expressly confirms in a Protocol that the non-precluded measures clause is self-judging." | **[371]** "The International Court of Justice has also taken a clear stand in respect of this issue, twice in connection with the *Nicaragua* case and again in the *Oil Platforms* case noted above. Referring to the 1956 Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua, the Court held:

> 'Article XXI defines the instances in which the Treaty itself provides for exceptions to the generality of its other provisions, but it by no means removes the interpretation and application of that article from the jurisdiction of the Court . . . The text of Article XXI of the Treaty does not employ the wording which was already to be found in Article XXI of the General Agreement on Tariffs and Trade. This provision of GATT, contemplating exceptions to the normal implementation of the General Agreement, stipulates that the Agreement is not to be construed to prevent any contracting party from taking any action 'which it considers necessary for the protection of its essential security interests', in such fields as nuclear fission, arms, etc. The 1956 Treaty, on the contrary, speaks simply of 'necessary' measures, not of those considered by a party to be such.'[37]" |

[372] "As explained above, in the *Gabcikovo-Nagymaros* case the International Court of Justice, referring to the work and views of the International Law Commission, notes the strict and cumulative conditions of necessity under international law and that 'the State concerned is not the sole judge of whether those conditions have been met.'[38]" | **[373]** "[. . .] [T]he Tribunal concludes first that the clause of Article XI of the Treaty is not a self-judging clause. Quite evidently, in the context of what a State believes to be an emergency, it will most certainly adopt the measures it considers appropriate without requesting the views of any court.[193] However, if the legitimacy

36 [190] Exon-Florio Amendment to the 1988 Trade Act, 50 USC app. para. 2170, (Supp. 1989). See generally the discussion in Hearing, Vol. 7, August 17, 2004, and Hearing, Vol. 8, August 18, 2004, with particular reference to the discussion by the parties and experts of Jose E. Alvarez: "Political Protectionism and United States International Investment Obligations in Conflict: The Hazards of Exon-Florio", Virginia Journal of International Law, Vol. 30, 1989, 1.

37 [191] *Nicaragua,* 1986, para. 222.

38 [192] *Gabcikovo-Nagymaros,* pars. 51-52. The reference to the International Law Commission's work IS to International Law Commission, Yearbook, 1980, Vol. II (Part Two), at 34-52, para. 36.

of such measures is challenged before an international tribunal, it is not for the State in question but for the international jurisdiction to determine whether the plea of necessity may exclude wrongfulness. It must also be noted that clauses dealing with investments and commerce do not generally affect security as much as military events do and, therefore, would normally fall outside the scope of such dramatic events." | **[374]** "The Tribunal must conclude next that this judicial review is not limited to an examination of whether the plea has been invoked or the measures have been taken in good faith. It is a substantive review that must examine whether the state of necessity or emergency meets the conditions laid down by customary international law and the treaty provisions and whether it thus is or is not able to preclude wrongfulness." | **[375]** "The Tribunal must still consider the question of the meaning and extent of Treaty Article IV(3) in light of the discussion noted above. The plain meaning of the Article is to provide a floor treatment for the investor in the context of the measures adopted in respect of the losses suffered in the emergency, not different from that applied to nationals or other foreign investors. The Article does not derogate from the Treaty rights but rather ensures that any measures directed at offsetting or minimizing losses will be applied in a non-discriminatory manner." | **[376]** "[. . .] [T]he Tribunal is satisfied that the measures adopted by the Respondent have not adversely discriminated against the Claimant." | **[377]** "Although the MFNC contained in the Treaty has also been invoked by the Claimant because other treaties done by Argentina do not contain a provision similar to that of Article XI, the Tribunal is not convinced that the clause has any role to play in this case. Thus, had other Article XI type clauses envisioned in those treaties a treatment more favorable to the investor, the argument about the operation of the MFNC might have been made. However, the mere absence of such provision in other treaties does not lend support to this argument, which would in any event fail under the *ejusdem generis* rule, as rightly argued by the Respondent." | **[378]** "The Tribunal must finally conclude in this section that the umbrella clauses invoked by the Claimant do not add anything different to the overall Treaty obligations which the Respondent must meet if the plea of necessity fails."

[Paras. 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378]

2. Necessity and Compensation

[383] "Article 27 also expressly provides that any circumstance precluding wrongfulness is without prejudice to '(b) the question of compensation for any material loss caused by the act in question'. Again this conclusion finds support in the *Gabcikovo-Nagymaros* case, where the Court noted that 'Hun-

gary expressly acknowledged that, in any event, such a state of necessity would not exempt it from its duty to compensate its partner.'[39]" | **[390]** "The Tribunal is satisfied that Article 27 establishes the appropriate rule of international law on this issue. The Respondent's argument is tantamount to the assertion that a Party to this kind of treaty, or its subjects, are supposed to bear entirely the cost of the plea of the essential interests of the other Party. This is, however, not the meaning of international law or the principles governing most domestic legal systems." | **[391]** "The Tribunal's conclusion is further reaffirmed by the record. At the hearing the Tribunal put the question whether there are any circumstances in which an investor would be entitled to compensation in spite of the eventual application of Article XI and the plea of necessity.[40]" | **[392]** "The answer to this question by the Respondent's expert clarifies the issue from the point of view of both its temporary nature and the duty to provide compensation: while it is difficult to reach a determination as long as the crisis is unfolding, it is possible to envisage a situation in which the investor would have a claim against the government for the compliance with its obligations once the crisis was over; thereby concluding that any suspension of the right to compensation is strictly temporary, and that this right is not extinguished by the crisis events.[41]" | **[393]** "The Tribunal also notes that, as in the *Gaz de Bordeaux* case, the International Law Commission's Commentary to Article 27 suggests that the States concerned should agree on the possibility and extent of compensation payable in a given case.[42]" | **[394]** "It is quite evident then that in the absence of agreement between the parties the duty of the Tribunal in these circumstances is to determine the compensation due. [. . .]"

[Paras. 383, 390, 391, 392, 393, 394]

F. Remedies

I.11.035 REPARATION/COMPENSATION/SATISFACTION

1. Standards of Reparation under International Law

[399] "It is broadly accepted in international law that there are three main standards of reparation for injury: restitution, compensation and satisfaction.[43] As this is not a case of reparation due to an injured State, satisfaction can be ruled out at the outset." | **[400]** "Restitution is the standard used to reestablish the situation which existed before the wrongful act was com-

39 [197] *Gabcikovo-Nagymaros,* paras. 152-153; Crawford, at 190.

40 [206] Hearing, August 18, 2004, Vol. 8, at 1940-1941.

41 [207] Hearing, August 18, 2004, Vol. 8, at 1941-1942.

42 [208] Crawford, at 190.

43 [211] Responsibility of States for Internationally Wrongful Acts, UNGA Resolution 56/83, January 28, 2002, Article 34.

mitted,[44] provided this is not materially impossible and does not result in a burden out of proportion as compared to compensation. The Permanent Court of International Justice concluded in the landmark *Chorzow Factory* case that

> 'restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it-such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.'[45]" |

[401] "Compensation is designed to cover any 'financially assessable damage including loss of profits insofar as it is established.'[46] Quite naturally compensation is only called for when the damage is not made good by restitution.[47] The decision in *Lusitania,* another landmark case, held that 'the fundamental concept of 'damages' is . . . reparation for a *loss* suffered; a judicially ascertained *compensation* for wrong. The remedy should be commensurate with the loss so that the injured party may be made whole.'[48]" | **[402]** "The loss suffered by the claimant is the general standard commonly used in international law in respect of injury to property, including often capital value, loss of profits and expenses.[49] The methods to provide compensation [. . .] are not unknown in international law. Depending on the circumstances, various methods have been used by tribunals to determine the compensation which should be paid but the general concept upon which commercial valuation of assets is based is that of 'fair market value'. That concept has an internationally recognized definition which reads as follows:

> 'the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arms length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.'[50]" |

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44 [212] Responsibility of States for Internationally Wrongful Acts, UNGA Resolution 56/83, January 28, 2002, Article 35.

45 [213] Permanent Court of International Justice, *Chorzow Factory* case, Merits, 1928, Series A No. 17, at 47; and comments by F. V. Garcia-Amador: The Changing Law of International Claims, Vol. II, 1984, at 578-580.

46 [214] Responsibility of States for Internationally Wrongful Acts, UNGA Resolution 56/83, January 28, 2002, Article 36.2.

47 [215] Responsibility of States for Internationally Wrongful Acts, UNGA Resolution 56/83, January 28, 2002, Article 36.1.

48 [216] *Lusitania,* RIAA, Vol. VII, 1923, p. 32, at 39, emphasis in original; and comments by James Crawford: The International Law Commission's Articles on State Responsibility, 2002, at 178 et seq.

49 [217] James Crawford: The International Law Commission's Articles on State Responsibility, 2002, at 225, para. 21.

50 [218] International Glossary of Business Valuation Terms. American Society of Appraisers. ASA website. June 6. 2001, p.4

[403] "In the case of a business asset which is quoted on a public market, that process can be a fairly easy one, since the price of the shares is determined under conditions meeting the above mentioned definition. However, it happens frequently that the assets in question are not publicly traded and it is then necessary to find other methods to establish fair market value. Four ways have generally been relied upon to arrive at such value. (1) The 'asset value' or the 'replacement cost' approach which evaluates the assets on the basis of their 'break-up' or their replacement cost; (2) the 'comparable transaction' approach which reviews comparable transactions in similar circumstances; (3) the 'option' approach which studies the alternative uses which could be made of the assets in question, and their costs and benefits; (4) the 'discounted cash flow' ('DCF') approach under which the valuation of the assets is arrived at by determining the present value of future predicted cash flows, discounted at a rate which reflects various categories of risk and uncertainty.[51] The Tribunal will determine later which method it has chosen and why." | **[404]** "Decisions concerning interest also cover a broad spectrum of alternatives, provided it is strictly related to reparation and not used as a tool to award punitive damages or to achieve other ends.[52]" | **[405]** "The Tribunal will now consider these various options in the light of the present dispute."

[Paras. 399, 400, 401, 402, 403, 404, 405]

2. Restitution

[406] "Restitution is by far the most reliable choice to make the injured party whole as it aims at the reestablishment of the situation existing prior to the wrongful act. In a situation such as that characterizing this dispute and the complex issues associated with the crisis in Argentina, it would be utterly unrealistic for the Tribunal to order the Respondent to turn back to the regulatory framework existing before the emergency measures were adopted, nor has this been requested. However [. . .] the crisis cannot be ignored and it has specific consequences on the question of reparation." | **[407]** "Just as an acceptable rebalancing of the contracts has been achieved by means of negotiation between the interested parties in other sectors of the Argentine economy, the parties are free to further pursue the possibility of reaching an agreement in the context of this dispute. As long as the parties were to agree to new terms governing their relations, this would be considered as a form of restitution as both sides to the equation would have accepted that a rebalancing had been achieved. This was in fact the first major step for the settlement of the dispute in the *Gaz de Bordeaux* case."

[Paras. 406, 407]

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51 [219] Damodaran, "Investment Valuation", John Wilev & Sons, New York, 2002, pp. 946-949.

52 [220] Responsibility of States for Internationally Wrongful Acts, UNGA Resolution 56/83, January 28, 2002, Article 38.

3. Compensation

[409] "A first question the Tribunal needs to address is that of the standard of compensation applicable in the circumstances of this dispute. As was the situation in the *Feldman v. Mexico* case,[53] the Tribunal is faced with a situation where, absent expropriation under Article IV, the Treaty offers no guidance as to the appropriate measure of damages or compensation relating to fair and equitable treatment and other breaches of the standards laid down in Article II. This is a problem common to most bilateral investment treaties and other agreements such as NAFTA. The Tribunal must accordingly exercise its discretion to identify the standard best attending to the nature of the breaches found." | **[410]** "Unlike the circumstances in the *Feldman* case, however, the Tribunal is persuaded that the cumulative nature of the breaches discussed here is best dealt with by resorting to the standard of fair market value. While this standard figures prominently in respect of expropriation, it is not excluded that it might also be appropriate for breaches different from expropriation if their effect results in important long-term losses. Moreover, precisely because this is not a case of expropriation, the Claimant has offered to transfer its shares in TGN to the Argentine Republic, and the Tribunal will address this question in due course." | **[411]** "The Tribunal has concluded that the discounted cash flow method it the one that should be retained in the present instance." | **[412]** "First of all, the shares of TGN are not publicly traded on a stock exchange or any other public market. The Respondent has argued that, in order to estimate the value of TGN, reference should have been made to TGS, another natural gas transporter, and three other natural gas distributors which were listed on the Argentine stock exchange. However, as noted by Mr. Bello, '(. . .) market capitalization in illiquid markets as Argentina is not the most adequate method to value companies (. . .).'[54] Moreover, as noted also by Mr. Bello, there were significant differences between TGN and those companies regarding asset levels, business segments, financing policy, and other issues. In the circumstances, the Tribunal has come to the conclusion that this approach would not be appropriate." | **[413]** "As to the asset value approach, it would be inappropriate in the present circumstances. CMS is a minority shareholder in TGN which is an ongoing company with a record showing profits." | **[414]** "As to the comparable transaction approach, the Tribunal has not been provided with any significant evidence of such transactions and it would be a most speculative enterprise to try and determine the compensation due to CMS on that basis." | **[415]** "As to the option valuation method, it does not appear to be of any help in this case. TGN is a gas transportation company and it is very difficult to imagine what uses or

53 [221] *Marvin Feldman v. Mexico,* Award of December 16, 2002, 18 *ICSID Review-FILJ* 488 (2003), par. 194.

54 [222] Expert Report of Dr. Fabian Bello, June 11, 2004, at 24.

options there could be for gas transmission lines other than to transport gas." | **[416]** "This leaves the Tribunal with the DCF method and it has no hesitation in endorsing it as the one which is the most appropriate in this case. TGN was and is a going concern; DCF techniques have been universally adopted, including by numerous arbitral tribunals, as an appropriate method for valuing business assets; as a matter of fact, it was used by ENARGAS in its 1996/7 tariff review. Finally, there is adequate data to make a rational DCF valuation of TGN." | **[417]** "The Tribunal also notes that in spite of the disagreement between the parties as to the appropriate application of the valuation method, experts from both sides have shared the view that DCF was the proper method in this case for determining losses that extend through a prolonged period of time.[55]" | **[421]** "As already stated, all the experts consulted on this matter agree that the best methodology to be used in a case like the one before the Tribunal is the discounted cash flow methodology and the Tribunal shares that conclusion."

[Paras. 409, 410, 411, 412, 413, 414, 415, 416, 417, 421]

4. Evaluation of Damages

[434] "[. . .] [T]he Tribunal is of the view that the general approach of Mr. Wood-Collins to the evaluation of damages suffered by the Claimant remains a valid one. However, as will be seen, the Tribunal will apply a number of changes to his assumptions." | **[435]** "Since the Tribunal was not provided with the algorithms sustaining the figures contained in the TGN forecast prepared in 2000, the Tribunal, with the help of its experts, has built its own model; it then tested its model by applying the same hypotheses as the ones embedded in Mr. Wood-Collins' forecasts of equity cash flows. The Tribunal obtained essentially the same results as Mr. Wood-Collins would have obtained, had he applied the direct equity valuation method to his own data." | **[436]** "From that model, the Tribunal tested a number of scenarios by changing different variables; the Tribunal focused on the most important determinants of value (as well as the main sources of uncertainty). Not surprisingly, depending on the choices of variables to which changes were made and the size of such changes, significantly disparate results were reached. Some, like a reduction of the discount rate under the 'with pesification' scenario, produced a rather small decrease in value loss, if Mr. Wood-Collins' revenue forecast were maintained at the

55 [224] Mr. John Wood-Collins states: "DCF valuation, by contrast, is an appropriate and practical approach for the valuation of CMS's interest in TGN", Valuation Report of 17 June 2002, p.5; Dr. Fabian Bello also states: "In order to value a company, there's different mechanisms that can be used. I consider that the most adequate ones are those that use the cash flow method, which is the method used by Mr. Wood-Collins because that method is the most effective one, the discounted method", 19 August, 2004, Hearing, Vol. 9, at 1969. Dr. Bello, however, questions the way Mr. Wood-Collins has proceeded in applying the DCF method; expert report of Dr. Fabian Bello, June 11, 2004, par. 94.

pessimistic level he has selected. However, as soon as modest rates of sales growth and an upward tariff revision every five years were assumed, the value loss was significantly decreased." | **[437]** "However, all other things being equal, assumptions about ENARGAS' tariff decisions and about additional investments and operations and maintenance costs under the 'no pesification' case have an even larger impact." | **[438]** "Under the 'no pesification' case, the crucial factors would have been ENARGAS' decisions about tariff revisions and investments. Under that scenario, the question is: 'Would ENARGAS have lowered tariffs to keep the rate of return on equity within reasonable bounds?' In contrast, in the 'pesification' case, the question is: 'Would ENARGAS raise tariffs to provide shareholders with a positive return?' To a large extent, the estimate of value loss depends on the answer to these two questions."

[Paras. 434, 435, 436, 437, 438]

5. Amount of Compensation

[468] "After the modifications mentioned above, the Tribunal arrives at a DCF loss valuation of US$133.2 million for the Claimant, on August 17, 2000, representing the compensation owed in that regard by the Respondent to the Claimant at that date." | **[469]** "Moreover, the Tribunal concludes that the Claimant must transfer to the Respondent the ownership of its shares in TGN, upon payment by the Respondent of the additional sum of US$2,148,100. Additional amounts, if any, to the US$5,295,600 already received by CMS as dividends, which would have been received by it in its capacity of shareholder should be deducted from the price to be paid by Argentina, when it exercises its right to buy those shares. On the other hand, the Tribunal does not consider that it would be appropriate to leave that option open-ended; it therefore rules that the Government of Argentina will have a time limit of one year from the date of this Award to purchase CMS' shares in TGN."

[Paras. 468, 469]

6. Interest

[471] "The Tribunal is of the opinion that the U.S. Treasury Bills rate is more appropriate under the circumstances and that the interest should be simple for the period extending from August 18, 2000, to 60 days after the date of this decision or the date of effective payment if before. For this period the interest rate shall be 2.51 % which corresponds to the annualized average rate for the U.S. Treasury Bills as reported by the Federal Reserve Bank of St. Louis.[56] Thereafter, the interest shall be the arithmetic average of the six-month U.S. Treasury Bills' rates observed on the afore-mentioned

56 [231] Federal Reserve Bank of St. Louis, Series "6 month t. Bill, Secondary Market Rates, Weekly."

date and every six months thereafter, compounded semi-annually. That amount shall be calculated from the same source as the one mentioned above. Interest shall apply to both the value loss suffered by CMS and the residual value of its shares."

[Para. 471]

II.1.9 COSTS OF JUDICIAL AND ARBITRAL PROCEEDINGS

G. Costs

[472] "Each party shall bear the expenses incurred by it in connection with the present arbitration. The arbitration costs, including the fees of the members of the Tribunal, shall be borne in equal shares by the parties."

[Para. 472]

II.4.98 AWARD

III. AWARD

"1. The Respondent breached its obligations to accord the investor the fair and equitable treatment guaranteed in Article II (2) (a) of the Treaty and to observe the obligations entered into with regard to the investment guaranteed in Article II (2) (c) of the Treaty.

2. The Respondent shall pay the Claimant compensation in the amount of US$133.2 million.

3. Upon payment of the compensation decided in this Award, the Claimant shall transfer to the Respondent the ownership of its shares in TGN upon payment by the Respondent of the additional sum of US$2,148,100. The Respondent shall have up to one year after the date this Award is dispatched to the parties to accept such transfer.

4. The Respondent shall pay the Claimant simple interest at the annualized average rate of 2.51 % of the United States Treasury Bills for the period August 18, 2000 to 60 days after the date of this Award, or the date of effective payment if before, applicable to both the value loss suffered by the Claimant and the residual value of its shares established in 2 and 3 above. However, the interest on the residual value of the shares shall cease to run upon written notice by Argentina to the Claimant that it will not exercise its option to buy the Claimant's shares in TGN. After the date indicated above, the rate shall be the arithmetic average of the six-month U.S. Treasury Bills rates observed on the afore-mentioned date and every six months thereafter, compounded semi-annually.

5. Each party shall pay one half of the arbitration costs and bear its own legal costs.

6. All other claims are herewith dismissed."

Gas Natural SDG, S.A. v. The Argentine Republic, ARB/03/10, Decision on Jurisdiction, 17 June 2005*

Original: English and Spanish

Present: Lowenfeld, *President of the Tribunal*
Álvarez, Nikken, *Arbitrators*

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II.4.911 REQUEST FOR ARBITRATION
See also I.17.011

I. THE DISPUTE

[1] "[. . .] In the present case, the claimant, Gas Natural SDG S.A. (hereafter 'Gas Natural' or 'Claimant'), is a corporation organized and existing under the laws of the Kingdom of Spain, and the BIT in question is the Agreement on the Promotion and Reciprocal Protection of Investments between the Kingdom of Spain and the Argentine Republic signed in Buenos Aires on October 3, 1991 and in force since September 28, 1992 (hereafter 'the BIT'). [. . .]" | **[2]** "On April 7, 2003, Claimant submitted a request for arbitration under the ICSID Convention to the International Centre for Settlement of Investment Disputes (ICSID or the Centre), alleging breaches of the Bilateral Investment Treaty between the Kingdom of Spain and the Argentine Republic. [. . .]." | **[9]** "Gas Natural is a corporation organized and existing under the laws of Spain, with principal place of business in Barcelona. In

* Summaries prepared by Christina Knahr, MPA, 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/GasNaturalSDG-DecisiononPreliminaryQuestionsonJurisdiction.pdf>. Original footnote numbers are indicated in brackets: [ ].

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

1992, shortly after the effective date of the BIT between Spain and Argentina, Gas Natural took part in a tender offer by the government of Argentina as part of its program to privatize state-owned enterprises and attract foreign investment. [. . .] Gas Natural participated in a consortium that purchased seventy percent (70%) of the shares of Gas Natural BAN, S.A. (hereafter 'BAN, S.A.'), a corporation organized pursuant to Argentine law which had succeeded to facilities previously owned by Gas del Estado, an Argentine state corporation dedicated to the production and distribution of natural gas for the northern parts of the Province of Buenos Aires ('Buenos Aires Norte')." | **[10]** "[. . .] [T]he members of the consortium formed an Argentine company, Invergas S.A., to hold the 70% of the shares of BAN, S.A. they had acquired pursuant to the public tender. The remaining 30% of the shares in BAN, S.A. were held by the Argentine Government, which distributed 10% pursuant to an employee share participation program. Subsequently, through a restructuring of shareholdings, Invergas S.A. held 51% of BAN, S.A.'s shares, and Gas Natural S.D.G. Argentina S.A. held a further 19%. The balance of the shares, originally held by the Argentine Government, is held by individual investors. Claimant states that it has invested US$ 136 million, and owns indirectly through subsidiary corporations, including Invergas S.A., 50.4% of the shares of BAN, S.A."

[Paras. 1, 2, 9, 10]

II. CONSIDERATIONS OF THE TRIBUNAL

II.4.9213 LEGAL DISPUTE
See also II.4.92; II.4.9214

A. Legal Dispute

[20] "[. . .] It is clear [. . .] that the Convention was not intended to provide a forum for purely political disputes. The dispute must meet two criteria to fall within the jurisdiction of the Centre *ratione materiae*: (i) it must be a *legal* dispute; and (ii) it must arise directly out of an *investment*. Neither italicized term is defined in the Convention itself, but the intent of the Convention is plain. As the Report of the World Bank's Executive Directors, which was submitted to governments along with the Convention, states: 'The expression 'legal dispute' has been used to make clear that while conflicts of rights are within the jurisdiction of the Centre, mere conflicts of interests are not. The dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation.[1]'" | **[22]** "[. . .] Clearly, a dispute about the meaning of dispositive provisions in an international treaty constitutes a legal dispute,

1 [1] Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals

capable of being submitted to international arbitration if the parties have consented thereto." | **[23]** "The Tribunal does not at this stage express any opinion concerning the existence of the obligations on which Claimant relies, or on construction of Articles III, IV, and V of the BIT as applied to the facts of this case. The Tribunal is clear, however, that a dispute about the existence of these obligations or the meaning and scope of these provisions is a legal dispute, and that the dispute arises directly out of an investment. Accordingly, the challenge to jurisdiction of the Centre and the competence of the Tribunal under Article 25(1) of the ICSID Convention is rejected."

[Paras. 20, 22, 23]

I.17.011 BILATERAL INVESTMENT TREATIES
See also I.2.0411; I.17.22

B. Dispute Settlement Provisions in the BIT

[29] "[. . .] [T]he Tribunal considers that the critical issue is whether or not the dispute settlement provisions of bilateral investment treaties constitute part of the bundle of protections granted to foreign investors by host states. As the Tribunal sees the history, first of the ICSID Convention, which created the institution of investor-state arbitration, and subsequently of the wave of bilateral investment treaties between developed and developing countries (and in some instances between developing countries *inter se*), a crucial element—indeed perhaps the most crucial element—has been the provision for independent international arbitration of disputes between investors and host states. The creation of ICSID and the adoption of bilateral investment treaties offered to investors assurances that disputes that might flow from their investments would not be subject to the perceived hazards of delays and political pressures of adjudication in national courts.[2] Correspondingly, the prospect of international arbitration was designed to offer to host states freedom from political pressures by governments of the state of which the investor is a national.[3] The vast majority of bilateral investment treaties, and nearly all the recent ones, provide for independent in-

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of Other States, para. 26 (1965); See also Aron Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Hague Academy of International Law, Recueil des Cours 1972-II, pp. 361-64.

2 [5] For development of this point by a member of this Tribunal, see Andreas F. Lowenfeld, *International Economic Law*, Ch 15, esp. pp. 456-61 (ICSID), 473-88 (BITs) (2002). See also, e.g., Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties*, (1995); Teresa McGhie, "Bilateral and Multilateral Investment Treaties," in Daniel D. Bradlow and Alfred Escher, ed. *Legal Aspects of Foreign Direct Investment pp. 107-35 (1999).*

3 [6] See, e.g. Article 27 of the ICSID Convention, which provides as follows:

"(1) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such

ternational arbitration of investor-state disputes, whether pursuant to the ICSID Convention, the ICSID Additional Facility, the UNCITRAL Arbitration Rules, or comparable arrangements, and such provisions are universally regarded—by opponents as well as by proponents—as essential to a regime of protection of foreign direct investment." | **[30]** "The Tribunal notes that the introductory phrase in Article IV(2) of the BIT speaks of '*all* matters governed by the present Agreement. . .'. Certain matters are expressly excluded, but there is no exclusion for resolution of disputes. The Tribunal notes further that it does not find the public policy argument raised by Argentina to be persuasive, particularly in view of the many BITs concluded by Argentina (in addition to the United States-Argentina BIT) that do not require resort to national jurisdiction prior to access to international arbitration. As to the contention that the 18-month period provided for in Article X(3) of the BIT constitutes a requirement of exhaustion of local remedies from which no derogation is permitted, the Tribunal observes that under that provision it would be possible to have recourse to arbitration even if there were a decision in the case by the national courts, and *a fortiori* if no final decision had been rendered in the national courts. Accordingly, the 18-month provision does not come within the concept of prior exhaustion of local remedies as understood in international law. Furthermore, Article 26 of the ICSID Convention provides expressly that a state may require the exhaustion of local administrative or judicial remedies as a condition of consent to arbitration under the Convention, and this condition is not expressed in the BIT."

[Paras. 29, 30]

I.17.22 MFN-TREATMENT
See also I.17.011

C. MFN-Clause

[31] "The Tribunal holds that provision for international investor-state arbitration in bilateral investment treaties is a significant substantive incentive and protection for foreign investors; further, that access to such arbitration only after resort to national courts and an eighteen-month waiting period is a less favorable degree of protection than access to arbitration immediately upon expiration of the negotiation period. Accordingly, Claimant is entitled to avail itself of the dispute settlement provision in the United States-Argentina BIT in reliance on Article IV(2) of the Bilateral Investment Treaty between Spain and Argentina."

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other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

(2) Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute."

[Para. 31]

II.4.9211 QUALIFICATION AS INVESTMENT
See also I.17.011

D. Standing of the Claimant

[33] "The Tribunal notes that while the ICSID Convention does not define the term 'investment', the BIT clearly does so in an inclusive way. Article I(2) of the BIT reads in pertinent part as follows:

> 'The term 'investment' shall mean every kind of asset, including property and rights of any kind acquired or effected in accordance with the laws of the receiving state, including, although not exclusively:
>
> – shares and other kinds of interest in companies;
>
> – rights derived from any kind of contribution made with the purpose of creating economic value, including loans directly linked to a specific investment, whether or not capitalized;
>
> – movable and immovable property as well as any other property rights, such as mortgage, lien, pledge, usufruct and similar rights;
>
> – any type of right in the field of intellectual property, including patents, trade marks as well as manufacturing licenses and 'know how';
>
> – business concessions conferred by law, administrative decisions or contracts, including concessions to search for, cultivate, extract or exploit natural resources.
>
> The meaning and scope of the assets above mentioned shall be determined by the laws and regulations of the Party in whose territory the investment was made. No alteration of the legal form under which the assets have been invested or reinvested shall affect their qualification as investments according to this Agreement.'" |

[34] "This definition follows the almost universal practice of BITs to define the subject of the Treaty as comprehensively as possible.[4] The Tribunal has no doubt that shares of an Argentine corporation—here BAN, S.A.—come within the quoted definition. The rights appertaining to shareholders under the law pursuant to which the corporation is organized are, as the second paragraph of Article I(2) states, subject to the law of Argentina. That law would determine, for example, how shareholders' meetings are convened, how directors are elected, what accounts must be maintained, etc. But the shares themselves, when held by a national of a party to the Treaty, clearly constitute an 'investment' as defined in the Treaty. Indeed, the standard mode of foreign direct investment, followed in the present case and in the vast majority of transnational transfers of private capital, is that a corporation is established pursuant to the laws of the host country and the

4 [7] See Dolzer and Stevens, pp. 25-31.

shares of that corporation are purchased by the foreign investor, or alternatively, that the shares of an existing corporation established pursuant to the laws of the host country are acquired by the foreign investor. The scheme of both the ICSID Convention and the bilateral investment treaties is that in this circumstance, the foreign investor acquires rights under the Convention and Treaty, including in particular the standing to initiate international arbitration." | **[35]** "It follows from the above, that a claim asserting the impairment of the value of the shares held by Claimant as a result of measures taken by the host government gives rise to an investment dispute within the meaning of Article X of the BIT, and that the investor (if it meets the other requirements of the Treaty) has standing to bring that claim before an arbitral tribunal. The Tribunal holds that Claimant Gas Natural SDG, S.A. has standing to bring its claim before the Tribunal pursuant to the ICSID Arbitration Rules and the Bilateral Investment Treaty between the Kingdom of Spain and the Argentine Republic."

[Paras. 33, 34, 35]

II.1.71 EFFECTS OF JUDGMENT

E. Reference to Previous Decisions of ICSID Tribunals

[36] "The Tribunal wishes to emphasize that it has rendered its decision independently, without considering itself bound by any other judgments or arbitral awards. Having reached its conclusions, however, the Tribunal thought it useful to compare its conclusion with the conclusions reached in other recent arbitrations conducted pursuant to the ICSID Arbitration Rules and arising out of claims under contemporary bilateral investment treaties. We summarize a few of these decisions here, and confirm that we have not found or been referred to any decisions or awards reaching a contrary conclusion." | **[37]** "*CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/08, Decision on Jurisdiction of July 17, 2003 8, like the instant case, involved a claim by a gas transmission company alleging breach by the Argentine Republic of a tariff adjustment formula applicable to an Argentine entity (TGN) in which the claimant had an investment. Claimant, a corporation incorporated in the United States, invoked the provisions of the 1991 Bilateral Investment Treaty between Argentina and the United States, both for purposes of jurisdiction of ICSID and the Tribunal established in accordance with the Centre's rules, and for purposes of defining the substantive rules governing its claim." | **[38]** "Since *CMS* is a corporation incorporated in the United States, the applicability of the Argentina-United States treaty by virtue of a most-favored-nation clause [. . .] was not at issue. However, as in the present case, Argentina pleaded inadmissibility of the claim on the basis that the measures alleged to have violated Claimant's rights under the Treaty were not directed specifically to Claimant, but were measures of general application designed to

respond to the economic crisis that confronted Argentina in the period December 2001-January 2002 and thereafter, as described in paragraphs 14-15 above. As in the instant case, Claimant did not deny that Argentina found itself in a fiscal and foreign exchange crisis and that the measures it took to end the equivalence of the Argentine peso and the U.S. dollar, and to suspend previously agreed tariff adjustment formulas, affected other enterprises as well, but it contended that this fact could not deprive it of the protection and remedies to which it was entitled under the BIT." | **[39]** "The Tribunal in the *CMS* case, like the Tribunal in this case, held that questions of general economic policy do not come within the jurisdiction of the Centre, which is limited by Article 25 of the ICSID Convention to legal disputes related to an investment. It further held, as we do here, that the Centre does have jurisdiction to determine whether measures of general economic policy violate specific legally binding commitments given to an investor covered by the Treaty. (See *CMS* Decision on Jurisdiction paragraph 33)." | **[40]** "The Tribunal in the *CMS* case also stated, as we do here (paragraph 21), that whether the challenged measures in fact violate specific commitments given to claimant would be a major element in the plenary proceedings addressed to the merits."

[Paras. 36, 37, 38, 39, 40]

I.17.22 MFN-TREATMENT

[41] "*Siemens A.G. v. The Argentine Republic,* ICSID Case No. ARB/02/8, Decision on Jurisdiction of August 3, 2004,[5] concerned a contract between a wholly owned subsidiary of Siemens and the government of Argentina for establishment and maintenance of a system of migration control and personal identification. Siemens, a company incorporated in Germany, claimed that the government of Argentina, acting pursuant to the Emergency Law of January 2002 [. . .], had wrongfully terminated the contract, and claimed breach of the Bilateral Investment Treaty between Germany and Argentina of April 9, 1991. Siemens gave notice of the existence of a dispute as required by the BIT, and following unsuccessful negotiations and expiration of the six-month negotiation period it initiated an arbitration in accordance with the ICSID Arbitration Rules." | **[42]** "The Germany-Argentina BIT contains a requirement for prior resort to the national courts of Argentina and an 18-month waiting period, substantially identical to Article X of the Argentina-Spain BIT. As in the present case, however, Siemens did not invoke the national jurisdiction of Argentina, relying, as it contended, on the most favored nation provisions in the Germany-Argentina BIT and the BIT between Chile and Argentina, which does not contain any provision for first resort to the local courts or an 18-month waiting period." | **[43]** "The Germany-Argentina BIT contains three most-favored-nation provi-

5 [9] Available at http://www.asil.org/ilib/Siemens_Argentina.pdf.

sions, all reading (with slight variation) in terms of 'treatment'. Article 3(1) speaks of [. . .] treatment granted . . . to the investment of nationals or companies of third states; Article 3(2) speaks of 'treatment of activities related to investments . . . granted to the nationals and companies of third states'; and Article 4(4) speaks of 'treatment of the most favored nation in all matters covered in this Article'.[6] In its challenge to the jurisdiction of the Centre, Argentina asserted *inter alia* that the most-favored-nation provisions in the Germany-Argentina BIT were not applicable to dispute settlement, since they only applied to 'substantive' matters. Further, Argentina contended that the most-favored-nation provision in Article 4 of the Germany-Argentina BIT—'treatment. . . in all matters covered in this Article' could not cover dispute settlement since that subject was addressed in another article of the Treaty." | **[44]** "After reviewing various marginally relevant cases that have come before the International Court of Justice well before the advent of BITs, the Tribunal in *Siemens* concluded that the term 'treatment' in all three clauses and the phrase 'activities related to the investments' are sufficiently wide to include settlement of disputes. (*Siemens* Decision on Jurisdiction paragraph 103)." | **[45]** "*Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction of January 25, 2000,[7] involved the same Spain-Argentina BIT that is at issue in the present arbitration, but with an Argentine national as foreign private investor/claimant and the Kingdom of Spain as respondent. As in the present case, the claimant gave notice of a dispute under the Treaty, negotiations took place over a six-month period, and thereafter the claimant initiated the arbitration under the ICSID Arbitration Rules without invoking the national jurisdiction of Spain or waiting 18 months. The claimant relied on the BIT between Chile and Spain, which does not contain these requirements. Spain made the same argument made by Argentina in the present case, i.e. that Article IV(2) of the Spain-Argentina treaty referring to 'all matters' ('*todas las materias*') can only be understood to refer to substantive matters or material aspects of the treatment granted to investors and not to procedural or jurisdictional questions. (Decision paragraph 41.)" | **[46]** "The Tribunal responded as follows:

> 'Notwithstanding the fact that the basic treaty containing the clause does not refer expressly to dispute settlement as covered by the most favored nation clause, the Tribunal considers that there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce. Consular jurisdiction in the past, like other forms of extraterritorial jurisdiction, were considered essential for the protection of rights of traders and, hence, were regarded not merely as procedural devices but as arrangements designed to better protect

6 [10] Article 3 is addressed to terms of admission, Article 4 to protection of investments.

7 [11] 16 *ICSID Rev.—FILJ* 212 (2001).

the rights of such persons abroad. It follows that such arrangements, even if not strictly a part of the material aspect of the trade and investment policy pursued by treaties of commerce and navigation, were essential for the adequate protection of the rights they sought to guarantee.

International arbitration and other dispute settlement arrangements have replaced these older and frequently abusive practices of the past. These modern developments are essential, however, to the protection of the rights envisaged under the pertinent treaties; they are also closely linked to the material aspects of the treatment accorded. Traders and investors, like their States of nationality, have traditionally felt that their rights and interests are better protected by recourse to international arbitration than by submission of disputes to domestic courts, while the host governments have traditionally felt that the protection of domestic courts is to be preferred. The drafting history of the ICSID Convention provides ample evidence of the conflicting views of those favoring arbitration and those supporting policies akin to different versions of the Calvo Clause.

From the above considerations it can be concluded that if a third-party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause as they are fully compatible with the *ejusdem generis* principle. Of course, the third-party treaty has to relate to the same subject matter as the basic treaty, be it the protection of foreign investments or the promotion of trade, since the dispute settlement provisions will operate in the context of these matters; otherwise there would be a contravention of that principle. This operation of the most favored nation clause does, however, have some important limits arising from public policy considerations that will be discussed further below.

. . .

In light of the above considerations, the Tribunal is satisfied that the Claimant has convincingly demonstrated that the most favored nation clause included in the Argentine-Spain BIT embraces the dispute settlement provisions of this treaty. Therefore, relying on the more favorable arrangements contained in the Chile-Spain BIT and the legal policy adopted by Spain with regard to the treatment of its own investors abroad, the Tribunal concludes that Claimant had the right to submit the instant dispute to arbitration without first accessing the Spanish courts. In the Tribunal's view, the requirement for the prior resort to domestic courts spelled out in the Argentine-Spain BIT does not reflect a fundamental question of public policy considered in the context of the treaty, the negotiations relating to it, the other legal arrangements or the subsequent practice of the parties. Accordingly, the Tribunal affirms the jurisdiction of the Centre and its own competence in this case in respect of this aspect of the challenge made by the Kingdom of Spain.' (Decision on Jurisdiction, paragraphs 54-56, 64)" |

[47] "It is plain that the reasoning and conclusion of the tribunal in the *Maffezini* case, which were in turn relied on by the tribunal in the *Siemens* case are in substantial agreement with the reasoning and conclusion of the

present Tribunal.[8]" | **[48]** "Reference was made in the oral hearing of January 10, 2005 to *Salini Costruttori S.p.A. and Italstrade v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction of November 29, 2004, which was published well after the written pleadings in the instant arbitration were submitted. In that case, which grew out of a dispute between two Italian construction companies and the Kingdom of Jordan over claims under a construction contract, the tribunal drew a distinction between contractual claims and treaty claims, pointing to a detailed dispute settlement clause in the investment agreement and the general conditions of the construction contract. The tribunal held that only the treaty claims were governed by the consent to ICSID arbitration in the Bilateral Investment Treaty between Italy and Jordan, and that accordingly it did not have jurisdiction over the contract claims. The claimants argued that the distinction between contractual and contract claims was superseded by the most favored nation provision in the BIT, and urged the tribunal to apply the precedent of the *Maffezini* case, but the tribunal rejected this argument. Distinguishing the *Maffezini* case, the tribunal in *Salini* pointed out that in the case before it there was no provision in the most favored nation article referring to 'all matters governed by the agreement', and there was strong indication that the parties intended to exclude contractual disputes from ICSID arbitration. (*Salini* decision paragraphs 118, 119)." | **[49]** "This Tribunal understands that the issue of applying a general most-favored-nation clause to the dispute resolution provisions of bilateral investment treaties is not free from doubt, and that different tribunals faced with different facts and negotiating background may reach different results. The Tribunal is satisfied, however, that the terms of the BIT between Spain and Argentina show that dispute resolution was included within the scope of most-favored-nation treatment, and that our analysis set out in paragraphs 28-30 above is consistent with the current thinking as expressed in other recent arbitral awards. We remain persuaded that assurance of independent international arbitration is an important—perhaps the most important—element in investor protection. Unless it appears clearly that the state parties to a BIT or the parties to a particular investment agreement settled on a different method for resolution of disputes that may arise, most-favored-nation provisions in BITs should be understood to be applicable to dispute settlement."

[Paras. 41, 42, 43, 44, 45, 46, 47, 48, 49]

8 [12] The Tribunal notes Argentina's argument that Spain's position in the *Maffezini* case reflects understanding of the Spain-Argentina BIT consistent with that of Argentina in this case. We do not believe, however, that an argument made by a party in the context of an arbitration reflects practice establishing agreement between the parties to a treaty within the meaning of Article 31(3)(b) of the Vienna Convention on the Law of Treaties.

II.4.9212 QUALIFICATION AS INVESTOR

[50] "The assertion that a claimant under a bilateral investment treaty lacked standing because it was only an indirect investor in the enterprise that had a contract with or a franchise from the state party to the BIT has been made numerous times, never, so far as the Tribunal has been made aware, with success. The tribunal in the *CMS* case [. . .] distinguished between the claim of TGN, a direct licensee under the Argentine privatization program, and the United States-based claimant, which had invested in shares of TGN. The tribunal's analysis was very close to the analysis of the present Tribunal:

> Because [. . .] 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. (Decision on Jurisdiction, pararaph 68)." |

[51] "Similarly, in *Azurix Corporation v. Argentine Republic,* ICSID Case No. ARB/01/12, Decision on Jurisdiction of December 8, 2003,[9] the claimant Azurix, a United States-based company, asserted a claim under the United States-Argentina BIT based on a concession granted by the government to a subsidiary incorporated in Argentina. The Tribunal wrote:

> The Tribunal is satisfied that the investment described by Claimant in its Rejoinder on Jurisdiction is an investment protected under the terms of the BIT and the Convention: (a) Azurix indirectly owns 90% of the shareholding in ABA, (b) Azurix indirectly controls ABA, and (c) ABA is party to the Concession Agreement and was established for the specific purpose of signing the Concession Agreement as required by the Bidding Terms.
>
> Having determined that the Claimant's investment is an investment protected by the BIT, the Tribunal concludes that the dispute as presented by the Claimant is a dispute arising directly from that investment. (Decision on Jurisdiction, paragraphs 65-66)." |

[52] "In sum, the Tribunal is satisfied that its analyses and decisions, independently arrived at, are consistent with the conclusions of other arbitral tribunals faced with similar issues. It does not follow that the ultimate decisions of this Tribunal on the merits will be wholly consistent with those of other arbitral tribunals, because different claims have been based on different treaties and different factual situations. The Tribunal is confident, however, that an affirmative answer is called for to each of the questions presented in Procedural Order No. 1 and reproduced in paragraph 6 of this Decision. We repeat that in accordance with Article 41(1) of the ICSID Arbi-

9 [13] Available at http://www.asil.org/ilib/azurix.pdf.

tration Rules the Respondent is not precluded from raising other challenges to the jurisdiction of the Centre or the competence of the Tribunal not addressed in this Decision."

[Paras. 50, 51, 52]

II.4.97 DECISION ON JURISDICTION

III. DECISION

[53] "For the reasons stated herein, the Tribunal decides to proceed to the next step in this arbitration, that is, to summon the parties to submit their Memorial and Counter-Memorial on the Merits, together with supporting evidence, in accordance with a Procedural Order that will follow this Decision."

[Para. 53]

Noble Ventures, Inc. v. Romania, ARB/01/11, Award, 12 October 2005*

Original: English

Present: Böckstiegel, *President of the Tribunal*
Lever, KCMG, QC, Dupuy, *Arbitrators*

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II.4.911 REQUEST FOR ARBITRATION
See also I.17.011

I. THE DISPUTE

[2] "The present case concerns a dispute between, on the one hand, an American company, Noble Ventures, Inc. (Noble Ventures), a juridical entity incorporated under the laws of the State of Maryland, USA in 1992, and, on the other hand, Romania. Noble Ventures' field of business activity consisted primarily of business consulting services for steel companies in Eastern Europe. The dispute arises out of a privatization agreement concerning the acquisition, management, operation and disposition of a substantial steel mill with associated and other assets, Combinatul Siderurgic Resita (CSR), located in Resita, Romania. The agreement was made between Noble Ventures and the Romanian State Ownership Fund (SOF).

* Summaries prepared by Christina Knahr, MPA, 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/Noble.pdf>.Original footnote numbers are indicated in brackets: [ ].

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

SOF was a Romanian 'institution of public interest' which [. . .] had as a function the privatization of Romanian State-owned enterprises. The privatization agreement included a collateral agreements [sic] and a Share Purchase Agreement dated June 5, 2000 (SPA) which entered into force on June 8, 2000 and which, in what follows, are collectively referred to as the 'Privatization Agreement'. Completion of the agreement took place on August 16, 2000 when Noble Ventures paid SOF the initial installment of the purchase price and SOF transferred to Noble Ventures its shareholding in CSR which comprised almost CSR's entire equity share capital." | **[3]** "CSR is a company with a rich history of steel operations. [. . .] It was nationalized in 1948 and operated by the Romanian government throughout the Communist period. After the fall of the Communist regime in Romania, the company's status reverted to that of a joint-stock company, named Combinatul Siderurgic Resita S.A. Before the privatization of CSR in 2000, the Romanian Government controlled approximately 95% of CSR's shares. [. . .] [A]t the time of its acquisition by Noble Ventures, CSR had a significant amount of debt owing to other governmental entities. Some of the creditors possessed liens on accounts of CSR." | **[4]** "The dispute arises against the background of a bilateral investment treaty (BIT) between Romania and the USA of May 28, 1992, which entered into force on January 15, 1994. The Treaty provides in particular for the promotion and protection of investments of nationals or companies of one Party in the territory of the other Party. [. . .]" | **[5]** "[. . .] Romania and the Government of Prime Minister Isarescu, at that time in power in Romania, strongly supported the privatization process of State-owned enterprises. For this purpose there existed the SOF, a public institution with legal personality, subordinated to the Government, which was in charge of negotiating privatization agreements with investors. It was SOF that concluded the Privatization Agreement concerning CSR with Noble Ventures." | **[6]** "Six months after the privatization took place political control changed to an opposition party, led by Prime Minister Nastase. The change of government was reflected by the replacement of SOF by the Authority for the Privatization and Management of the State Ownership (APAPS)." | **[7]** "After the acquisition of CSR by Noble Ventures a number of problems arose. [. . .]" | **[12]** "Arbitral Proceedings against the Respondent commenced with the Request for Arbitration sent by the Claimant to ICSID on August 21, 2001 (C 0). In the request, the Claimant invoked Romania's consent to ICSID arbitration provided in the 1992 Treaty between the Government of the United States of America and the Government of Romania Concerning the Reciprocal Encouragement and Protection of Investment."

[Paras. 2, 3, 4, 5, 6, 7, 12]

II. CONSIDERATIONS OF THE TRIBUNAL

I.17.4 UMBRELLA CLAUSES
See also II.4.9215

A. Umbrella Clause

[46] "[. . .] [T]he question for the Tribunal is whether Art. II (2)(c) BIT is an 'umbrella clause' that transforms contractual undertakings into international law obligations and accordingly makes it a breach of the BIT by the Respondent if it breaches a contractual obligation that it has entered into with the Claimant. Art. II (2)(c) reads as follows: '*Each Party shall observe any obligation it may have entered into with regard to investments.*'" | **[47]** "[. . .] [A]n important case to address the problem was *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13; *SGS v. Pakistan*) [. . .]. The Tribunal was there concerned with Article 11 of an Agreement between the Swiss Confederation and the Islamic Republic of Pakistan on the Promotion and Reciprocal Protection of Investments (*Swiss-Pakistan BIT*) which reads as follows: '*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*'. The Tribunal found that '*(T)he text itself of Art. 11 does not purport to state that breaches of contract alleged by an investor in relation to a contract it has concluded with a State (widely considered to be a matter of municipal rather than international law) are automatically 'elevated' to the level of breaches of international treaty law. Considering the widely accepted principle with which we started, namely, that under general international law, a violation of a contract entered into by a State with an investor of another State, is not, by itself, a violation of international law, and considering further that the legal consequences that the Claimant would have us attribute to Art. 11 of the BIT are so far-reaching in scope, and so automatic and unqualified and sweeping in their operation, so burdensome in their potential impact upon a Contracting Party, we believe that clear and convincing evidence must be adduced by the Claimant that such was indeed the shared intent of the Contracting Parties to the Swiss-Pakistan Investment Protection Treaty in incorporating Article 11 in the BIT. We do not find such evidence in the text itself of Article 11. We have not been pointed to any other evidence of the putative common intent of the Contracting Parties by the Claimant*' (see paras. 166 and 167 of the Decision). Consequently, the Tribunal declined to regard Art. 11 as an umbrella clause." | **[48]** "Another important case to address the 'umbrella clause' problem was *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (ICSID Case No. ARB/02/6; SGS v. Philippines). [. . .]. The relevant clause in that case (Art. X (2) of the Agreement between the Swiss Confederation and the Republic of the Philippines on the Promotion and Reciprocal Protection of Investments) reads as follows: '*Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its ter-*

ritory by investors of the other Contracting Party'. The Tribunal interpreted the clause by reference to its wording and the object and purpose of the bilateral investment treaty so as to apply it to inter alia contractual obligations (paras. 115 and 116) and accordingly found that the contractual commitment was incorporated and brought within the framework of the bilateral investment treaty by Article X (2): '*To summarize, for present purposes Article X(2) includes commitments or obligations arising under contracts entered into by the host State*' (para. 127)." | **[49]** "A third case concerned with a clause regarded by one of the parties to the dispute as an umbrella clause is *Salini Costruttori S.p.A. v. The Hashemite Kingdom of Jordan* (No. ARB/02/13; Salini v. Jordan). […]. In *Salini v. Jordan* the Tribunal was concerned with a clause in the bilateral investment treaty between Italy and Jordan which read as follows (Art. 2(4)): '*Each Contracting Party shall create and maintain in its territory a legal framework apt to guarantee the investors the continuity of legal treatment, including compliance, in good faith, of all undertakings assumed with regard to each specific investor*'. Regarding the terms of Art. 2(4) to be appreciably different from the provisions in *SGS v. Pakistan* and *SGS v. Philippines* the Tribunal found that '*(U)nder Art. 2(4), each contracting Party committed itself to create and maintain in its territory a 'legal framework' favorable 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 the investor of the other party as did the Philippines. It did not even guarantee the observance of commitments it had entered into with respect to investments of the investors of the other Contracting Party 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*'."

[Paras. 46, 47, 48, 49]

I.1.16 TREATY INTERPRETATION
See also I.17.02

[50] "With regard to Art. II (2)(c) of the bilateral investment treaty which is of relevance in the present case, it has to be observed that there are differences between the wording of the clause and the clauses in the other cases. Therefore, it is necessary, first, to interpret Art. II (2)(c) regardless of the other cases. In doing so, reference has to be made to Arts. 31 et seq. of the Vienna Convention on the Law of Treaties which reflect the customary international law concerning treaty interpretation. Accordingly, treaties have to 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 the object and purpose of the Treaty, while recourse may be had to supplemen-

tary means of interpretation, including the preparatory work and the circumstances of its conclusion, only in order to confirm the meaning resulting from the application of the aforementioned methods of interpretation. Reference should also be made to the principle of effectiveness (effet utile), which, too plays an important role in interpreting treaties." | **[51]** "Considering that Art. II (2)(c) BIT uses the term 'shall' and that it forms part of the Article which provides for the major substantial obligations undertaken by the parties, there can be no doubt that the Article was intended to create obligations, and obviously obligations beyond those specified in other provisions of the BIT itself. Since States usually do not conclude, with reference to specific investments, special international agreements in addition to existing bilateral investment treaties, it is difficult to understand the notion 'obligation' as referring to obligations undertaken under other 'international' agreements. And given that such agreements, if concluded, would also be subject to the general principle of pacta sunt servanda, there would certainly be no need for a clause of that kind. By contrast, in addition to the BIT, what are often concluded concerning investments are so-called investment contracts between investors and the host State. Such agreements describe specific rights and duties of the parties concerning a specific investment. Against this background, and considering the wording of Art. II (2)(c) which speaks of 'any obligation [a party] may have entered into with regard to investments', it is difficult not to regard this as a clear reference to investment contracts. In fact, one may ask what other obligations can the parties have had in mind as having been 'entered into' by a host State with regard to an investment. The employment of the notion 'entered into' indicates that specific commitments are referred to and not general commitments, for example by way of legislative acts. This is also the reason why Art. II (2)(c) would be very much an empty base unless understood as referring to contracts. Accordingly, the wording of Article II(2)(c) provides substantial support for an interpretation of Art. II (2)(c) as a real umbrella clause." | **[52]** "The object and purpose rule also supports such an interpretation. While it is not permissible, as is too often done regarding BITs, to interpret clauses exclusively in favour of investors, here such an interpretation is justified. Considering [. . .] that any other interpretation would deprive Art. II (2)(c) of practical content, reference has necessarily to be made to the principle of effectiveness, also applied by other Tribunals in interpreting BIT provisions (see *SGS v. Philippines*, para. 116 and *Salini v. Jordan*, para. 95). An interpretation to the contrary would deprive the investor of any internationally secured legal remedy in respect of investment contracts that it has entered into with the host State. While it is not the purpose of investment treaties *per se* to remedy such problems, a clause that is readily capable of being interpreted in this way and which would otherwise be deprived of practical applicability is naturally to be understood as protecting investors also with regard to contracts with the host

State generally in so far as the contract was entered into with regard to an investment."

[Paras. 50, 51, 52]

I.17.4 UMBRELLA CLAUSES
See also I.1.16; I.11.0; I.17.3

[53] "An umbrella clause is usually seen as transforming municipal law obligations into obligations directly cognizable in international law. The Tribunal recalls the well established rule of general international law that in normal circumstances *per se* a breach of a contract by the State does not give rise to direct international responsibility on the part of the State. This derives from the clear distinction between municipal law on the one hand and international law on the other, two separate legal systems (or orders) the second of which treats the rules contained in the first as facts, as is reflected in *inter* alia Article Three of the International Law Commission's Articles on State Responsibility adopted in 2001. As stated by Judge Schwebel, former President of the International Court of Justice, 'it is generally accepted that, so long as it affords remedies in its Courts, a State is only directly responsible, on the international plane, for acts involving breaches of contract, where the breach is not a simple breach. . . but involves an obviously arbitrary or tortious element. . .' (in *International Arbitration*: *Three Salient Problems* (1987), at 111). It may be further added that, inasmuch as a breach of contract at the municipal level creates at the same time the violation of one of the principles existing either in customary international law or in treaty law applicable between the host State and the State of the nationality of the investor, it will give rise to the international responsibility of the host State. But that responsibility will co-exist with the responsibility created in municipal law and each of them will remain valid independently of the other, a situation that further reflects the respective autonomy of the two legal systems (municipal and international) each one with regard to the other." | **[54]** "That being said, none of the above mentioned general rules is peremptory in nature. This means that, when negotiating a bilateral investment treaty, two States may create within the scope of their mutual agreement an exception to the rules deriving from the autonomy of municipal law, on the one hand and public international law, on the other hand. In other words, two States may include in a bilateral investment treaty a provision to the effect that, in the interest of achieving the objects and goals of the treaty, the host State may incur international responsibility by reason of a breach of its contractual obligations towards the private investor of the other Party, the breach of contract being thus 'internationalized', i.e. assimilated to a breach of the treaty. In such a case, an international tribunal will be bound to seek to give useful effect to the provision that the parties have adopted." | **[55]** "Thus, an umbrella clause, when included in a bilateral investment treaty, introduces an exception to the general separation of States

obligations under municipal and under international law. In consequence, as with any other exception to established general rules of law, the identification of a provision as an 'umbrella clause' can as a consequence proceed only from a strict, if not indeed restrictive, interpretation of its terms and, more generally, in accordance with the well known customary rules codified under Article 31 of the Vienna Convention of the Law of Treaties (1969). As was stated by the International Court of Justice in the *ELSI* Case:

> 'an important principle of international law should not be held to have been tacitly dispensed with by international agreement, in the absence of words making clear an intention to do so': *Elettronica Sicula Spa—ELSI—United States v. Italy*, 1989, ICJ 15 at 42)." |

[56] "In the present case, in order to identify the intention of the United States and Romania when they negotiated Art. II(2)(c) of the BIT, a key element is provided by the exact formulation of that provision. Indeed, it is the differences in the wording of Art. II(2)(c) of the BIT and of provisions in other bilateral investment treaties that have been relied on as umbrella clauses in other ICSID cases that go far to explain the different positions taken by different ICSID tribunals that have in recent times had to consider such clauses." | **[57]** "In *Salini v. Jordan*, *supra*, it is evident that the obligation laid down at Art. 2(4) of the bilateral investment treaty between Italy and Jordan plainly justifies the conclusion reached by the Tribunal. A provision creating and maintaining a 'legal framework' favourable to investment deals only with the setting of norms and establishment of institutions aimed at facilitating investment by investors of the other Party; it does not entail that each Party becomes responsible under international law for the breach of any of its contractual obligations *vis-à-vis* the private investors of the other Party." | **[58]** "In *SGS v. Pakistan*, *supra*, the relevant provision of the bilateral investment treaty (Art. 11) does not simply speak of a 'legal framework'; and the provision could be interpreted as laying down a kind of general obligation for the host State as a public authority to facilitate foreign investment, namely an obligation to 'guarantee' the observance of the commitments that the host State has entered into towards investors of the other Party, being an obligation to be implemented by, in particular, the adoption of steps and measures under its own municipal law to safeguard the guarantee. In other words, the formulation of Art. 11 of the bilateral investment treaty in *SGS v. Pakistan*, *supra*, may be interpreted as implicitly setting an international obligation of result for each Party to be fulfilled through appropriate means at the municipal level but without necessarily elevating municipal law obligations to international ones." | **[59]** "By contrast, in *SGS v. Philippines, supra*, the treaty clause was formulated so as to assimilate the host State's contractual obligations to its treaty obligations under the bilateral investment treaty by saying that each Party 'shall observe any obligation it has assumed' with regard to investments made by the investors of the other Party. It is then understandable that, without nec-

essarily having recourse to completely different reasoning, the Tribunal in that case reached a position different from that adopted in *SGS v. Pakistan, supra*." | **[60]** "In the present case, the formulation adopted at Art. II(2)(c), which is even more general and straightforward than that in the bilateral investment treaty that fell to be considered in *SGS v. Philippines*, clearly falls into the category of the most general and direct formulations tending to an assimilation of contractual obligations to treaty ones; not only does it use the term 'shall observe' but it refers in the most general terms to 'any' obligations that either Party may have entered into 'with regard to investments'." | **[61]** "However, it is unnecessary for the Tribunal to express any definitive conclusion as to whether therefore, despite the consequences of the exceptional nature of umbrella clauses [. . .] Art. II(2)(c) of the BIT perfectly assimilates to breach of the BIT *any* breach by the host State of *any* contractual obligation as determined by its municipal law *or* whether the expression 'any obligation', despite its apparent breadth, must be understood to be subject to some limitation in the light of the nature and objects of the BIT. Since, on the facts of the present case [. . .] the Tribunal's ultimate conclusions would not be affected one way or the other by the resolution of that question, the Tribunal proceeds on the basis that, in including Art. II(2)(c) in the BIT, the Parties had as their aim to equate contractual obligations governed by municipal law to international treaty obligations as established in the BIT." | **[62]** "By reason therefore of the inclusion of Art. II(2)(c) in the BIT, the Tribunal therefore considers the Claimant's claims of breach of contract on the basis that any such breach constitutes a breach of the BIT."

[Paras. 53, 54, 55, 56, 57, 58, 59, 60, 61, 62]

I.11.0 STATE RESPONSIBILITY
See also I.2.06

B. The Question of Attribution

[68] "The question of attribution is of relevance in the present case in two respects. First, there is the question whether the acts of SOF and later APAPS which are alleged to have constituted violations of the BIT can be attributed to the Respondent. And secondly, as already indicated above, there is the more specific question as to whether one can regard the Respondent as having entered into the SPA (as well as other contractual agreements which have allegedly been breached), breach of which could consequently, by reason of the umbrella clause, be regarded as a violation of the BIT. [. . .]" | **[69]** "As States are juridical persons, one always has to raise the question whether acts committed by natural persons who are allegedly in violation of international law are attributable to a State. The BIT does not provide any answer to this question. The rules of attribution can only be found in general international law which supplements the BIT in

this respect. Regarding general international law on international responsibility, reference can be made to the Draft Articles on State Responsibility as adopted on second reading 2001 by the International Law Commission and as commended to the attention of Governments by the UN General Assembly in Res. 56/83 of 12 December 2001 (the Draft Articles will hereafter be referred to as 2001 ILC Draft). While those Draft Articles are not binding, they are widely regarded as a codification of customary international law. The 2001 ILC Draft provides a whole set of rules concerning attribution. Art. 4 2001 ILC Draft lays down the well-established rule that the conduct of any State organ, being understood as including any person or entity which has that status in accordance with the internal law of the State, shall be considered an act of that State under international law. This rule concerns attribution of acts of so-called *de jure* organs which have been expressly entitled to act for the State within the limits of their competence. Since SOF and APAPS were legal entities separate from the Respondent, it is not possible to regard them as *de jure* organs." | **[70]** "The 2001 Draft Articles go on to attribute to a State the conduct of a person or entity which is not a *de jure* organ but which is empowered by the law of that State to exercise elements of governmental authority provided that person or entity is acting in that capacity in the particular instance. This rule is equally well established in customary international law as reflected by Art. 5 2001 ILC Draft. While not being *de jure* organs, SOF as well as APAPS were at all relevant times acting on the basis of Romanian law which defined their competence." | **[79]** "The Tribunal deduces from the foregoing that it was not only within the competence of SOF—and APAPS which replaced SOF at the end of 2000—when acting as the empowered public institution under the Privatization Law, to conclude agreements with investors but also, acting as a *governmental agency,* to manage the whole legal relationship with them, including all acts concerned with the implementation of a specific investment. In the judgment of the Tribunal, no relevant legal distinction is to be drawn between SOF/APAPS, on the one hand, and a government ministry, on the other hand, when the one or the other acted as the empowered public institution under the Privatization Law." | **[80]** "All the acts allegedly committed by SOF/APAPS were related to the investment of the Claimant. There is no indication from the parties, and there is no reason to believe, that any act by these institutions was outside the scope of their mandate. Consequently, the Tribunal concludes that SOF and APAPS were entitled by law to represent the Respondent and did so in all of their actions as well as omissions. The acts allegedly in violation of the BIT are therefore attributable to the Respondent for the purposes of assessment under the BIT." | **[81]** "Even if one were to regard some of the acts of SOF or APAPS as being *ultra vires*, the result would be the same. This is because of the generally recognized rule recorded in Art. 7 2001 ILC Draft according to which the conduct of an organ of a State or of a person or entity empowered to exercise elements of governmental authority shall be considered an act of the

State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions. Since, from the Claimant's perspective, SOF and APAPS always acted as if they were entities entitled by the Respondent to do so, their acts would still have to be attributed to the Respondent, even if an excess of competence had been shown." | **[82]** "With regard to the argument of the Respondent that a distinction has to be drawn between attribution of governmental and commercial conduct, the latter not being attributable, the following has to be said. The distinction plays an important role in the field of sovereign immunity when one comes to the question of whether a State can claim immunity before the courts of another State. However, in the context of responsibility, it is difficult to see why commercial acts, so called *acta iure gestionis*, should by definition not be attributable while governmental acts, so called *acta iure imperii*, should be attributable. The ILC-Draft does not maintain or support such a distinction. Apart from the fact that there is no reason why one should not regard commercial acts as being in principle also attributable, it is difficult to define whether a particular act is governmental. There is a widespread consensus in international law, as in particular expressed in the discussions in the ILC regarding attribution, that there is no common understanding in international law of what constitutes a governmental or public act. Otherwise there would not be a need for specified rules such as those enunciated by the ILC in its Draft Articles, according to which, in principle, a certain factual link between the State and the actor is required in order to attribute to the State acts of that actor." | **[83]** "Accordingly, the Tribunal concludes that the acts of SOF and APAPS which were of relevance in the present case are attributable to the Respondent for the purposes of assessment under the BIT." | **[84]** "The Tribunal has not overlooked the fact that international law prescribes restrictive rules with regard to representation when one is concerned with arrangements between States if they are to produce effects in international law. However, in the judgment of the Tribunal the Respondent rightly has not contended that such rules are applicable in considering whether, by reason of the attribution to the State of the acts of a governmental agency in a case such as the present, a State is to be treated as having entered into an obligation with regard to an investment." | **[85]** "The Tribunal is willing to assume that the Respondent is correct in contending that the principle of international law that *pacta sunt servanda* does not entail the consequence that a breach by a State of a contract that the State has entered into with an investor is in itself necessarily a breach of international law—and this is so even if the restrictive rules regarding representation of the State referred to in the last preceding paragraph are satisfied, so that indisputably the State is itself the contracting party and has committed a breach of the contract. But that does not mean that breaches of contract cannot, under certain conditions, give rise to liability on the part of a State. On the contrary, where the acts of a governmental agency are to be attributed to the State for the

purposes of applying an umbrella clause, such as Art. II(2)(c) of the BIT, breaches of a contract into which the State has entered are capable of constituting a breach of international law *by virtue of the breach of the umbrella clause*." | **[86]** "In the judgment of the Tribunal, that is the position here. Both SOF and APAPS were responsible, as a matter of Romanian law, for the transfer of publicly owned assets to private investors. Both entities were clearly charged with representing the Respondent in the process of privatizing State-owned companies and, for that purpose, entering into privatization agreements and related contracts on behalf of the Respondent. Therefore, this Tribunal cannot do otherwise than conclude that the respective contracts, in particular the SPA, were concluded on behalf of the Respondent and are therefore attributable to the Respondent for the purposes of Art. II(2)(c)BIT."

[Paras. 68, 69, 70, 79, 80, 81, 82, 83, 84, 85, 86]

C. Treatment Obligations

I.17.25 FULL AND CONSTANT PROTECTION AND SECURITY

1. Full Protection and Security

[164] "With regard to the Claimant's argument that the Respondent breached Art. II (2)(a) of the BIT which stipulates that the '*Investment shall . . . enjoy full protection and security*', the Tribunal notes: that it seems doubtful whether that provision can be understood as being wider in scope than the general duty to provide for protection and security of foreign nationals found in the customary international law of aliens. The latter is not a strict standard, but one requiring due diligence to be exercised by the State. Questions concerning the content of the standards of protection have already been discussed to some extent by *inter alia* ICSID Tribunals in *Asian Agricultural Products Limited v. Republic of Sri Lanka* (Case No. ARB/87/3, Award of 27 June 1990, ICSID Reports IV, p. 250 and at pp. 278 *et seq*.) and in *American Manufacturing & Trading, Inc. v. Republic of Zaire* (Case No. ARB/93/1, Award of 21 February 1997, ICSID Reports V, p. 14, at p. 30) although the facts in those cases were quite different from those in the present case." | **[165]** "However, in its *ELSI* judgment (ICJ Reports 1989, p. 15 et seq.), the ICJ had to deal with a situation not so different from that in the present case. In *ELSI* the Court was concerned with the occupation of a plant by its employees and with an alleged breach of a protection standard provided for in a Treaty of Friendship, Commerce and Navigation concluded between the United States and Italy in 1948. The Court found that the protection provided by Italy could not be regarded as falling below the full protection and security required by international law which, considering the facts of that case, indicates that violations of protection standards are not easily to be established. Comparing the facts of the *ELSI* case with

the situation in the present case, it is difficult to see in what respect the conduct of the Respondent in the present case was more harmful than that of Italy in the *ELSI* case, so as to justify a different result." | **[166]** "However, it does not seem to be necessary to enter into a detailed examination with regard to the claimed violation of Art. II (2)(a) of the BIT. Even assuming the correctness of the Claimant's factual allegations, it is difficult to identify any specific failure by the Respondent to exercise due diligence in protecting the Claimant. And even if one concluded that there was a certain failure on the side of the Respondent sufficiently grave to regard it as a violation, it has not been established that non-compliance with the obligation prejudiced the Claimant, to a material degree. The Claimant has failed to prove that its alleged injuries and losses could have been prevented had the Respondent exercised due diligence in this regard, nor has it established any specific value of the losses." | **[167]** "Accordingly the claim has to be dismissed."

[Paras. 164, 165, 166, 167]

I.17.26 UNREASONABLE AND DISCRIMINATORY MEASURES

2. Unreasonable and Discriminatory Measures

[175] "The question for the Tribunal is whether Art. II(2)(a) and/or (b) have been breached. Art. II (2)(a) requires from the Parties to the BIT to accord '*fair and equitable treatment*' and Art. II(2)(b) that '*Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment . . . of investments*.'" | **[176]** "The Tribunal will first turn to the question of a breach of Art. II(2)(b) BIT by way of arbitrary and discriminatory measures. The BIT gives no definition of either the notion 'arbitrary' or 'discriminatory'. Regarding arbitrariness, reference can again be made to the decision of the ICJ in the *ELSI* case. The Court defined it as '*not so much something opposed to a rule of law, as something opposed to the rule of law. This idea was expressed by the Court in the Asylum case, when it spoke of 'arbitrary action' being 'substituted for the rule of law' (Asylum, Judgment, ICJ Reports 1950, p. 284). It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety' (ELSI, ICJ Reports 1989, para. 128).*" | **[177]** "Considering the facts of the present case, it is difficult to regard either the initiation or the conduct of the judicial proceedings as arbitrary. The parties disagree on the reasons for the grave economic situation of CSR at the time of the initiation of the judicial proceedings, but not on the factual insolvency of CSR at the time. Nor is the difficult situation of the approximately 4,000 employees denied. Considering that there was neither a prospect of the budgetary creditors rescheduling debts on a short time basis, nor that of the Claimant making further investments in CSR and that the situation for the employees as well as for the whole region was desperate, there are sufficient grounds not to regard the proceedings as arbitrary.

Their initiation can neither be regarded as shocking nor surprising in the sense understood by the ICJ in ELSI. On the contrary, one may well conclude that the proceedings were at that time the only short term solution of the 'social crisis' that had engulfed Resita as a result of the Claimant's inability to pay CSR's workforce and therefore equally reasonable as well-founded." | **[178]** "Such proceedings are provided for in all legal systems and for much the same reasons. One therefore can not say that they were 'opposed to the rule of law'. Moreover, they were initiated and conducted according to the law and not against it. CSR was in a situation that would have justified the initiation of comparable proceedings in most other countries. Arbitrariness is therefore excluded." | **[179]** "In this context it is obviously of major importance that this Tribunal—as discussed above—did not conclude that the situation of CSR at the time of initiation of the proceedings was caused by violation by SOF/APAPS of their obligations under the SPA with regard to debt rescheduling or failure to provide protection and security. Obviously, the answer to the question of arbitrariness might have been different had the Tribunal concluded that the Respondent was responsible under international law for the economic situation of CSR. Since that is not the case the Tribunal concludes that neither the initiation nor the conduct of the judicial proceedings was arbitrary." | **[180]** "The Tribunal now turns to the question of whether the proceedings were discriminatory. The parties have not provided the Tribunal with any information that comparable proceedings have been initiated against investors from other countries or in particular against US investors. But that in itself does not exclude the possibility that the proceedings constituted a discriminatory measure because it is possible for a single measure to be discriminatory if proof to that effect is given. As one cannot rely on objective criteria in such situations, the Claimant has to demonstrate that a certain measure was directed specifically against a certain investor by reason of his, her or its nationality. As demonstrated above, the judicial proceedings against CSR were in no way arbitrary but on the contrary were well founded. And there was no indication whatsoever that the measure was specifically directed against the Claimant as a U.S. company. Furthermore, the Claimant failed to prove that other investors with debt problems not being subjected to judicial proceedings were in fact in a situation as grave as that of CSR. Equally the Claimant did not demonstrate that other investors were left unaffected by judicial proceedings although they were in similar situations. The Tribunal accordingly concludes that the measure was not discriminatory and that therefore no violation of Art. II(2)(b) has been established."

[Paras. 175, 176, 177, 178, 179, 180]

I.17.24 FAIR AND EQUITABLE TREATMENT

3. Fair and Equitable Treatment

[181] "The Tribunal will now address the question whether the Respondent complied with the duty to accord fair and equitable treatment to the Claimant. Here the Tribunal is confronted with two notions which are particularly difficult to define. Although in this respect Art. II(2)(a) mirrors standard clauses in BITs and other international instruments and courts and tribunals have been concerned with violations of fair and equitable treatment standards, the question whether those standards have been violated has to be considered in the light of the circumstances of each case." | **[182]** "Considering the place of the fair and equitable treatment standard at the very beginning of Art. II(2), one can consider this to be a more general standard which finds its specific application in *inter alia* the duty to provide full protection and security, the prohibition of arbitrary and discriminatory measures and the obligation to observe contractual obligations towards the investor. As demonstrated above, none of those obligations or standards has been breached. While this in itself cannot lead to the conclusion that the more general fair and equitable treatment standard has not been breached, it remains difficult to see how the judicial proceedings can be regarded as a violation of Art. II(2)(a) of the BIT. As described above with regard to alleged arbitrariness, the situation of the Claimant, CSR and its employees was such that the judicial proceedings seemed to be the only solution to an otherwise insoluble situation. Bearing in mind the interests of the approximately 4,000 employees who depended on CSR and their prospects at that time, the initiation of the proceedings was neither unfair nor inequitable. This conclusion is reinforced by the consideration that the Respondent is not to be blamed for having violated any obligations under international law in connection with the indisputably dramatic economic situation at that time. Therefore, no violation of Art. II(2)(a) and its fair and equitable treatment standard has occurred." | **[183]** "Consequently, the Tribunal regards the judicial proceedings as a violation of neither Art. II(2)(a) nor Art. II(2)(b) BIT."

[Paras. 181, 182, 183]

I.17.1 EXPROPRIATION

D. Expropriation

[211] "The Tribunal will first consider whether the judicial proceedings can be regarded as a violation of Art. III(1) of the BIT which reads as follows:

> 'Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ('expropriation') except: for public purpose; in a non discriminatory 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). . . . '." |

[212] "The question for the Tribunal is whether judicial proceedings initiated by reason of a company's insolvency can be regarded as an expropriation at all. The ICJ, in the above-mentioned ELSI case, was faced with a situation which was similar to that in the present case. The Court was concerned with the requisitioning of a company the situation of which it described as follows: '. . . . *given an under-capitalized, consistently loss-making company, crippled by the need to service large loans, which company its stockholders had themselves decided not to finance further but to close and sell off because, as they were anxious to make clear to everybody concerned, the money was running out fast, it cannot be a matter of surprise if, several days after the date at which the management itself had predicted the money would run out, the company should be considered to have been actually or virtually in a state of insolvency for the purpose of Italian bankruptcy law*' (ICJ Reports 1989, p. 62, para. 100)." | **[213]** "CSR's economic situation was no better. The Claimant, effectively its sole shareholder, evidently had no funds of its own [. . .]. Moreover when the petitions for CSR's judicial reorganization were filed, neither the creditors nor the Respondent had any reason to be confident that, if and when GD 490 was implemented, the Claimant would be able at once to end, as had become imperative, the social crisis at Resita by clearing the arrears of wages and from then on paying the wages as they fell due. The purpose of the judicial reorganization was indeed to preserve, rather than to destroy, the possibility of the Claimant reviving CSR as an economic steel producer, which the Respondent still saw as being at least the 'best of a bad job' despite the risks and problems associated with the solution." | **[214]** "Regarding the question whether the requisitioning of the company in *ELSI* by the Mayor of Palermo constituted an expropriation or taking of property, the Court, for a number of reasons, denied such an effect. It held in particular: '*Even if it were possible to see the requisition as having been designed to bring about bankruptcy, as a step towards disguised expropriation, then if ELSI was already under an obligation to file a petition of bankruptcy, or in such a financial state that such a petition could not be long delayed, the requisition was an act of supererogation*' (ICJ Reports 1989, p. 71, para. 119.)." | **[215]** "As far as the present case is concerned, CSR was—as pointed out above—*de facto* insolvent, being unable to honour its obligations in particular toward its workforce. It is of no relevance in this context that the Claimant, contrary to the owners in *ELSI*, still had the intention to run the company in such a situation, albeit without the intention itself to invest." | **[216]** "The judicial proceedings, therefore, did not concern a viable company or valuable assets to be expropriated. Consequently, one cannot regard the proceedings to be a violation of Art. III(1) of the BIT."

[Paras. 211, 212, 213, 214, 215, 216]

E. Violation of the Claimant's Preemption Rights

[221] "The Tribunal takes note that the Claimant regards the violation of its preemption rights as being contrary to Art. II(2)(c) of the BIT. This presupposes that there was an obligation that the Respondent had 'entered into' with regard to the Claimant's investment in respect of the preemption rights. In this context, the Claimant refers to obligations flowing from GD 1280 and GEO 172. That legislation is mentioned by the Claimant in the context of the settlement agreement as a confirmation that a settlement agreement had been concluded (C II, para. 224). However, as the Tribunal has concluded above, no such settlement had been concluded." | **[222]** "There remains the question whether GD 1280 and GEO 172 can be regarded as creating obligations under Art. II(2)(c) of the BIT. In the judgment of the Tribunal, the legislation did not do so since it was enacted for the purpose of implementing a settlement agreement if and when such an agreement was concluded. If only for that reason, since no settlement agreement was concluded, the legislation created no obligations on the part of the Respondent on which the Claimant was entitled to rely by virtue of Article II.2(c) of the BIT or at all." | **[223]** "Accordingly this claim has to be dismissed."

[Paras. 221, 222, 223]

II.1.9 COSTS OF JUDICIAL AND ARBITRAL PROCEEDINGS

F. Costs

[233] "Provisions regarding the Tribunal's decision in the matter of costs are to be found in Art. 61(2) of the ICSID Convention and Arts. 28 and 47 (j) of the ICSID Arbitration Rules. Noting that none of these provisions mentions specific criteria for the decision on costs, the Tribunal takes into account the following particular considerations:" | **[234]** "On one hand, it is a principle common to both national laws and international law that a party injured by a breach must be compensated for its losses and damages, which include arbitration costs. On the other hand, the 'loser pays' principle is not common to all national laws or international law, and in particular is stated in neither the ICSID Convention nor the ICSID Arbitration Rules." | **[235]** "On the issue of costs the Tribunal has taken into consideration all the circumstances of this case. In particular, it notes that, although all the claims ultimately failed, the Claimant succeeded on certain issues, notably the fundamental legal issue of the umbrella clause contained in Article II(2)(c) of the BIT as a basis for liability under the BIT in this case and the factual issue with regard to the diligence exercised by SOF after the execution of the SPA, albeit without causal significance. The Tribunal also has in mind that the basic flaws in the SPA are to be attributed to both SOF and the Claimant." | **[236]** "Therefore, using the discretion that it has under the ICSID Convention and the ICSID Arbitration Rules, the Arbitral Tribunal deems it

fair and reasonable that the cost burden be shared equally between the parties, each bearing its own legal and other expenses and 50 % of the arbitration costs."

[Paras. 233, 234, 235, 236]

II.4.98 AWARD

III. AWARD

"For the foregoing reasons, the Tribunal renders the following award:

1. The claims raised by the Claimant are dismissed.

2. Each party shall bear the expenses incurred by it in connection with the present arbitration. The arbitration costs, including the fees of the members of the Tribunal, shall be borne by the parties in equal shares."

Aguas del Tunari S.A. v. Republic of Bolivia, ARB/02/3, Decision on Jurisdiction, 21 October 2005*

Original: English and Spanish

Present: Caron, *President of the Tribunal*
Alberro-Semerena, Alvarez, *Arbitrators*

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II.4.911 REQUEST FOR ARBITRATION
See also I.17.011

I. THE DISPUTE

[1] "The Claimant in this proceeding is Aguas del Tunari, S.A. ('AdT'), a company organized under the laws of Bolivia." | **[3]** "AdT claims the Republic of Bolivia ('Bolivia') through various acts and omissions leading up to, and including, the rescission of the Concession in April 2000, breached

* Summaries prepared by Christina Knahr, MPA, 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/AdT_Decision-en.pdf>. Original footnote numbers are indicated in brackets: [ ].

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

various provisions of a bilateral investment treaty, namely the Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Republic of Bolivia (the 'Netherlands-Bolivia BIT' or 'BIT').[1]" | **[4]** "AdT initiated this proceeding against Bolivia before the International Centre for Settlement of Investment Disputes ('ICSID') invoking the Netherlands-Bolivia BIT as the basis of jurisdiction."

[Paras. 1, 3, 4]

II. OBJECTIONS TO JURISDICTION

II.4.95 FORUM SELECTION CLAUSE
See also II.1.211; II.4.9215

A. Forum Selection Clause

[109] "This objection involves the legal interplay of forum selection clauses in contractual relationships and the availability of arbitration under a bilateral investment treaty. The Tribunal notes that several other tribunals have addressed these questions in the past few years. The Tribunal [. . .] in general, agrees with the direction taken by previous tribunals, although the reasoning employed here differs in several respects." | **[111]** "Two questions are presented. First, as a threshold matter, the Tribunal observes that in order for the separate document raised by the Respondent to be in conflict with this Tribunal's exercise of jurisdiction, that document must both deal with the same matters and parties and contain mandatory conflicting obligations. Second, if a true conflict exists, there then arises the question of what effect such a document has on the Tribunal's jurisdiction." | **[112]** "As to the requirement that the separate document contain mandatory conflicting obligations, the Tribunal concludes that Article 41.2 of the Concession does not place all disputes concerning the Concession within the *exclusive* jurisdiction of Bolivian courts. Article 41.2 provides:

> [The Concessionaire] recognizes the jurisdiction and competence of the authorities that make up the System of Sectoral Regulation (SIRESE) and of the courts of the Republic of Bolivia, in accordance with the SIRESE law and other applicable Bolivian laws.

This clause differs in wording and structure from other forum selection clauses encountered by the members of the Tribunal and those present in other ICSID proceedings where the issue of the effect of a contractual fo-

1 [1] The Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Bolivia, *entered into force* November 1, 1994. The text is available online at http://www.unctad.org/sections/dite/iia/docs/bits/netherlands_bolivia.pdf. As to the national implementation of this treaty, see for Bolivia, Law No. 1586 of August 12, 1994, and for the Netherlands, Tractatenblad 1994, Nr. 239.

rum selection clause on ICSID jurisdiction has been considered. For example, in *Vivendi* the forum selection clause at issue provided:

> For purposes of interpretation and application of this Contract, the parties submit themselves to the exclusive jurisdiction of the Contentious Administrative Tribunals of Tucuman.[2]

Two phrasings discussed in the *Vivendi* clause are frequently seen and noteworthy for this proceeding. First, the selection of a particular court is explicitly 'exclusive'. Second, the parties, in exclusively choosing a court, delineate explicitly the matters given to that court [. . .]. Article 41.2 of the Concession in the current case lacks the explicitness of both of these aspects. [. . .] It is sufficient that the Tribunal concludes that Article 41.2 of the Concession does not constitute an exclusive reference to the Bolivian legal system of all disputes arising under, not to mention those related to, the Concession." | **[113]** "Similarly to this case, the *Lanco* tribunal appears to have viewed the relevant clause in that case as not creating a mandatory conflicting obligation. The forum selection clause at issue in *Lanco* provided.

> For all purposes derived from the agreement and the BID CONDITIONS, the parties agree to the jurisdiction of the Federal Contentious-Administrative Tribunals of the Federal Capital of the ARGENTINE REPUBLIC.[3]

The *Lanco* tribunal held that this clause was not a 'previously agreed dispute settlement provision' within the meaning of the applicable BIT inasmuch as 'the contentious-administrative jurisdiction cannot be selected or waived [. . .].'[4]" | **[114]** "As to the requirement that the separate document deal with the same matters and parties, the Tribunal finds that the jurisdiction of the Bolivian courts recognized under Article 41.2 of the Concession, even if it were found to be exclusive, does not extend to the same obligations or parties raised by the Claimant under the BIT. Claimant in the instant proceeding [. . .] raises a claim against the Republic of Bolivia itself as party to the BIT. Likewise, [. . .] the Claimant in the instant case [. . .] alleges a breach of an obligation existing under the BIT.[5] The circumstance that a claim under the Concession against the Water Superintendency and a claim under the BIT against Bolivia could both point to the same set of facts should not blur the legal distinction between the two types of claims. It is

2 [87] *Vivendi* Award of November 21, 2000, 1127.

3 [88] *Lanco* Award, p. 6.

4 [89] *Id.,* p. 26. As one commentator wrote recently "[t]he most attractive and not least plausible explanation why the reasoning turned on Article 26 is that the forum clause was being seen as non-exclusive and so did not imply a waiver of the right to international arbitration in the first place." Ole Spiermann, *State Interests and the Power to Waive ICSID Jurisdiction under Bilateral Investment Treaties,* 20 Arbitration International 179, 191 (2004).

5 [90] An exclusive forum selection clause in a contact is generally regarded as severable from the contract of which it is a part. And although it is usually the case that such a clause only refers to disputes arising under the contract, it can be broader in scope. For example, some clauses refer not only to disputes "arising under" the contract but also disputes "related to" the contract.

often the case that one set of facts may give rise to disputes under different laws in different fora. The Tribunal notes that its conclusion accords with the reasoning of the tribunal in *Compania de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic,* Award of November 21, 2000,[6] and the subsequent decision of die *Ad Hoc* Committee appointed for die Annulment Proceeding in the same matter which in denying annulment of this aspect of the award indicated its agreement with the reasoning of the award.[7]" | **[115]** "[. . .] [T]he Tribunal holds that the question of whether a conflicting mandatory obligation in a separate document can affect the jurisdiction of an ICSID tribunal is a question of the intent of the Parties in concluding the separate document. As an inquiry into the intent of the parties, the Tribunal observes that this inquiry turns on the facts of the specific case. Nonetheless, the Tribunal finds it particularly helpful in such an inquiry to distinguish between: (1) a separate document that waives the right to invoke, or modifies the extent of, ICSID jurisdiction (where the intent of the parties to alter the possibility of ICSID jurisdiction is direct); and, (2) a separate document that contains an exclusive forum selection clause designating a forum other than ICSID (where the intent of the parties to alter the possibility of ICSID jurisdiction must be implied)." | **[116]** "As to the former case of a separate document that waives the right to invoke, or modifies the extent of ICSID jurisdiction, the Tribunal notes that Claimant at the Hearing in this case stated as a general matter that 'scholarly opinion is divided' on the issue of whether such a waiver is possible,[8] and directed the Tribunal's attention more specifically to the Decision on Jurisdiction in *Azurix Corp. v. The Argentine Republic*[9] *('Azurix')*." | **[117]** "The *Azurix* Award, however, does not address the question of whether an investor may waive its right to arbitration before ICSID, but rather holds that jurisdictional clauses contained within a set of Bidding Terms, a Concession Agreement, and Commitment Letters did not constitute such a waiver.[10] The several clauses in question in *Azurix* were similar to one another and are exemplified by clause 1.5.5. of the Bidding Terms and Conditions which provided for the exclusive jurisdiction of the courts for contentious-administrative matters of the city of La Plata 'for all disputes that may arise out of the Bidding,

6 [91] *Vivendi,* Award, § 53.

7 [92] *Vivendi,* Decision on Annulment Proceedings, §§ 73, 76, 80, and 95 to 97. "In accordance with this general principle (which is undoubtedly declaratory of general international law), whether there has been a breach of the BIT and whether there has been a breach of a contract are different question." *Id.,* at 96.

8 [93] Oral Statement of AdT's Counsel, Matthew Weiniger, (February 9, 2004), p. 38, Lines 13-14.

9 [94] *Azurix Corp. v. The Argentine Republic,* "Decision on Jurisdiction" dated December 8, 2003, *available at* http://www.asil.org/ilib/azurix.pdf.

10 [95] "Since the Tribunal has found that the waiver does not cover the claim of Azurix in the dispute before it, the Tribunal does not need to comment further on the issue of renunciation by individuals of rights conferred upon them by treaty." *Id., §* 85.

waiving any other forum, jurisdiction or immunity that may correspond'.[11] The *Azurix* tribunal held that this clause was not a waiver of a claimant's right to arbitration before ICSID for two reasons. First, the waiver clause was a part of a contract to which the respondent was not a party and, consequently, claimant's contractual obligation to waive access to certain other fora was not made 'in favor of Argentina'.[12] Second, the analysis of the waiver clause was held to be analogous to that made with regard to forum selection clauses in that the waiver of other fora was limited to claims under the contract just as the selection of an exclusive forum was limited to claims under the contract.[13] The *Azurix* tribunal therefore concluded that the waiver clause did not present a conflicting mandatory obligation. Both of the conclusions of the *Azurix* tribunal turned upon the particular facts of that case. Both conclusions are the consequence of an inquiry into the intent of the parties and an inclination to require specific language of a waiver of the right to invoke the jurisdiction of ICSID for claims of treaty rights under a BIT, an inclination with which this Tribunal agrees.[14]" | **[118]** "Assuming that parties agreed to a clear waiver of ICSID jurisdiction, the Tribunal is of the view that such a waiver would be effective. Given that it appears clear that the parties to an ICSID arbitration could jointly agree to a different mechanism for the resolution of their disputes other than that of ICSID, it would appear that an investor could also waive its rights to invoke the jurisdiction of ICSID.[15] [. . .]" | **[119]** "[. . .] [T]he Tribunal notes that the specific intent of the parties to preclude ICSID jurisdiction will be more difficult to ascertain than in the case of explicit waiver. The Tribunal is of the view that it is not the existence of the exclusive forum selection clause that

11 [96] *Id.,11* 26.

12 [97] *Id.,* 85.

13 [98] *Id.,* 80-81.

14 [99] In *Société Generale de Surveillance v. Republic of the Philippines* (January 29, 2004) (available at www.worldbank.org/icsid/cases/SGSvPhil-final.pdf) ("SGS"), the tribunal gave effect to a forum selection clause. The Tribunal emphasizes that the facts of the SGS case are distinct from the present proceeding.

First, the contractual forum clause at issue in SGS was found to contain mandatory conflicting obligations. The clause provided that "actions concerning disputes in connection with obligations of either party to this Agreement shall be filed at the Regional Trial Courts of Makati or Manila." The SGS tribunal found the clause to be a "binding exclusive jurisdiction clause" for "all actions concerning disputes in connection" with contractual obligations. (Of note, SGS did not object to this clause being effective and binding upon both parties.) The present proceeding does not involve a forum selection clause of this character.

Second, the applicable law was different. SGS presented its claim under the Swiss-Philippine BIT. The SGS tribunal gave effect to the forum selection clause. The tribunal did so—even though it recognized that SGS's claims were claims of a breach of the treaty obligations contained in Article X(2) (the "umbrella clause") of the Swiss-Philippine BIT—because it viewed SGS's claims as being essentially contractual in nature. The present proceeding does not involve an umbrella clause.

Despite these differences, the Tribunal also recognizes that its reasoning differs from that of the SGS tribunal. The Tribunal observes that its view is closer to that of paragraph 11 of the dissenting Declaration of Arbitrator Antonio Crivellaro in *Société Generale de Surveillance v. Republic of the Philippines.*

15 [100] *See* Spiermann, *supra* note 89.

would be given effect by an ICSID tribunal, but rather that the tribunal could, at most, give effect to a waiver implied from the existence of an exclusive forum selection clause. The Tribunal does not find the authority under the ICSID Convention for it to abstain from exercising its jurisdiction simply because a conflicting forum selection clause exists. To the contrary, it is the Tribunal's view that an ICSID tribunal has a duty to exercise its jurisdiction in such instances absent any indication that the parties specifically intended that the conflicting clause act as a waiver or modification of an otherwise existing grant of jurisdiction to ICSID. A separate conflicting document should be held to affect the jurisdiction of an ICSID tribunal only if it clearly is intended to modify the jurisdiction otherwise granted to ICSID. As stated above, an explicit waiver by an investor of its rights to invoke the jurisdiction of ICSID pursuant to a BIT could affect the jurisdiction of an ICSID tribunal. However, the Tribunal will not imply a waiver or modification of ICSID jurisdiction without specific indications of the common intention of the Parties." | **[121]** "First, the Tribunal notes that Respondent does not argue that there exists an explicit waiver of ICSID jurisdiction by AdT. Even assuming Concession Article 41 were an exclusive jurisdictional grant, the Article does not constitute an explicit waiver of ICSID jurisdiction." | **[122]** "Second, the Tribunal finds that there is not a sufficient basis in the written and oral submissions presented to the Tribunal as to the text of the Concession and Bolivia's record of its negotiating position to imply such a waiver. Both parties have presented conflicting arguments over what was and was not concluded during the Concession negotiations. Article 41 is silent as to the issue of the availability to AdT of ICSID and arbitration generally. [. . .] Having considered the language of Article 41 and the disputed nature of the negotiating history, the silence of Article 41 as to the right of AdT to invoke arbitration before ICSID reflects just as likely an impasse in the negotiations between the parties on this point. Consequently, the Tribunal finds neither common intention of the Parties to exclude ICSID jurisdiction in the case of a claim by AdT nor any clear waiver on the part of AdT in Article 41 or the Concession generally of its rights to pursue its claims before ICSID. The Tribunal will not read an ambiguous clause as an implicit waiver of ICSID jurisdiction; silence as to the question is not sufficient." | **[123]** "For the foregoing reasons, the Tribunal denies the first aspect of Respondent's First Objection."

[Paras. 109, 111, 112, 113, 114, 115, 116, 117, 118, 119, 121, 122, 123]

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

B. Standing of the Claimant

[133] "Respondent objects to ICSID jurisdiction on the ground that the Water Superintendency, not the Republic of Bolivia, is the proper party to this

arbitration. [. . .]" | **[134]** "Bolivia relies on the ICSID award in *Cable* TV. The jurisdictional basis of that case, however, is distinct from that presented in this proceeding." | **[135]** "In *Cable* TV, the Claimant cable corporation invested more than a million U.S. dollars on the Island of Nevis as part of a contract with the Government of Nevis. The dispute clause in the Agreement indicated that disputes relating to the contract would be referred to arbitration under the rules and procedures of the ICSID Convention. The tribunal in *Cable* TV held that it had no jurisdiction over the case because (1) the Federation of St. Kitts and Nevis was incorrectly named as a party in a dispute arising out of a contract involving only the Nevis Island Administration and (2) there was no other basis to find the consent of the Federation to arbitration either as a party itself or on behalf of the Nevis Island Administration.[16]" | **[136]** "The Tribunal acknowledges Bolivia's argument that the Water Superintendency is similar to the Nevis Island Administration as a somewhat autonomous unit within a larger State. More critically, however, the jurisdictional basis asserted in *Cable* TV was a clause in a concession contract and not, as in this proceeding, a bilateral investment treaty. The dispute brought by AdT before this Tribunal is based on alleged acts by Bolivia in violation of the BIT between the Netherlands and Bolivia. Unlike the situation in *Cable* TV, AdT has not named as a Respondent an entity which is not a party to the document containing the jurisdictional clause. The holdings in *Cable* TV do not bear on the situation presented in this proceeding." | **[138]** "The Tribunal denies the second aspect of Respondent's First Objection."

[Paras. 133, 134, 135, 136, 138]

I.1.16 TREATY INTERPRETATION
See also II.4.92

C. Article 2 of the BIT

[143] "Article 2 of the BIT provides:

> Either Contracting Party shall, within the framework of its law and regulations, promote economic cooperation through the protection in its territory of investments of nationals of the other Contracting Party. Subject to its right to exercise powers conferred by its laws or regulations, each Contracting Party shall admit such investments." |

[144] "Both sentences in Article 2 of the BIT contain a reference to the laws and/or the regulations of Bolivia. [. . .]" | **[145]** "As to the first sentence, the Tribunal observes that if one omits the reference to Bolivian law, the first sentence states that both Bolivia and the Netherlands 'shall . . . promote' economic cooperation by protecting in its territory the investments of nationals of the other contracting State. This sentence thus contains the obli-

16 [114] *Cable TV* at Section 8.01.

gation to 'promote economic cooperation' as a fundamental goal of the BIT[17] through the protection of investments. The BIT in its other provisions provides a forum and applicable substantive law for claims that an investment was not so protected. Article 2, in this sense, importantly requires that the host State take efforts to protect investments in its territory before such a dispute arises." | **[146]** "Given this interpretation of the first sentence, what meaning is to be given to the subordinate phrase 'within the framework of its law and regulations?' The BIT not only provides a remedy for breaches, but also attempts to facilitate the creation of a climate in which economic cooperation can flourish. Thus, the Tribunal reads the reference to 'the framework of its laws and regulations' as a reference limited to the details of how each contracting party undertakes in its national laws and regulations to promote economic cooperation through the protection of investments." | **[147]** "As to the second sentence, the Tribunal observes that if it omits the reference to Bolivian law, the second sentence states that both Bolivia and the Netherlands 'shall admit' the investments of nationals of the other Contracting Party. This obligation to allow the entry of foreign investment is a common provision in bilateral investment treaties, and is often termed an 'admission clause'. The obligation to admit is 'subject to' the decision of Bolivia ('its right') to 'exercise powers conferred by its laws or regulations'. The Tribunal concludes that the inclusion of the term 'subject to' indicates that the duty to admit investments is limited by 'the right to exercise powers conferred by its laws or regulations'. The Tribunal notes that the reference specifically subjects the State's duty to admit investments not to the laws and regulations of Bolivia, but rather to the 'right to exercise powers' conferred by such laws or regulations. The Tribunal finds this language significant as it implies an act at the time of admittance in accordance with the laws or regulations in force at that time." | **[148]** "The Tribunal thus concludes that (1) there is an effective reference to Bolivian law in both the first and second sentences of Article 2 of the BIT, but (2) that both references are of limited scope. [. . .]" | **[149]** "Bolivia argues for a broad interpretation of the role to be given the references to Bolivian law in Article 2. It argues that these references allow it to condition the basis on which a foreign investment enters its market. [. . .]" | **[151]** "The Tribunal disagrees with the breadth of Bolivia's interpretation of Article 2." | **[152]** "The Tribunal notes that it need not decide whether the Bolivian requirement to locally incorporate the vehicle of foreign investment is authorized by Article 2 of the BIT. First, it is clear that there is no question that AdT, the vehicle for foreign investment in the Concession, was locally incorporated.

17 [120] Specifically the Preamble to the BIT notes that the two governments enter into the agreement "[d]esiring . . . to extend and intensify the economic relations between them particularly with respect to Investments by the nationals of one Contracting Party in the territory of the other Contracting Party" and "[r]ecognizing that agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development cif the Contracting Parties [. . .]."

Second, [. . .] the Tribunal does not accept Bolivia's argument that local incorporation of an investor in and of itself establishes the exclusive jurisdiction of Bolivian courts and tribunals.[18]" | **[153]** "As to the more pertinent question of whether the references to Bolivian law in Article 2 reach so far as to encompass the conclusion that Bolivian courts and tribunals possess exclusive jurisdiction, the scope of the two references in Article 2 must be understood in terms of their context and purpose. In this regard, it need be recalled that a primary objective of the BIT, measured both in terms of the motivation for its conclusion and in terms of its substantive provisions, is agreement upon ICSID as an independent and neutral forum for the resolution of investment disputes in accordance with a substantive applicable law specified in the BIT. In this light, the Tribunal concludes that the State Parties cannot have intended the references to national law in Article 2 to be so encompassing as to defeat the object and purpose of the Treaty. [. . .]" | **[154]** "The Tribunal therefore concludes that the references to Bolivian law in Article 2 of the BIT do not extend, at a minimum, to aspects of Bolivian law that in turn would assert exclusive jurisdiction over disputes under the BIT." | **[155]** "The Tribunal denies the third aspect of Respondent's First Objection."

[Paras. 143, 144, 145, 146, 147, 148, 149, 151, 152, 153, 154, 155]

I.17.3 CONTRACT VIOLATION
See also II.4.92

D. Transfer of AdT's Stocks

[160] "Article 37.1 of the Concession requires '[e]very Founding Stockholder keep more than 50°/o of the original equity percentage in voting shares of the Concessionaire at least over the first seven (7) years of the Concessions'." | **[161]** "Annex 13 of the Concession lists IW Ltd, a wholly owned subsidiary of Bechtel Enterprises Holdings, Inc. (which owned 55 percent of AdT), as one of the 'Founding Stockholders'." | **[162]** "In December 1999, IW Ltd of the Cayman Islands changed its place of incorporation to Luxembourg. This was accomplished without the permission of Bolivia." | **[163]** "Bolivia argues that this change of place of incorporation is a breach of Article 37.1 of the Concession. [. . .]" | **[165]** "[. . .] In the Tribunal's view, the Concession allows for some change in the organizational chart depicting upstream ownership without the consent of Bolivia. The restrictions of Article 37.1 apply to the Founding Shareholders, but not to the Ultimate

18 [124] See *supra* §§ 109-123. The Tribunal observes that it is common practice as an investment pre-condition that the vehicle for foreign investment be locally incorporated. The Tribunal also observes that such local incorporation is not in practice a bar to ICSID jurisdiction. Indeed the ICSID Convention specifically contemplates the possibility of claims being brought by a locally incorporated investor, see Article 25(2)(b) of the Convention. *See, e.g.*, Nigel Blackaby, *Arbitration Under Bilateral Investment Treaties in Latin America,* in INTERNATIONAL ARBITRATION IN LATIN AMERICA 379, 388-89 (Nigel Blackaby, David Lindsey & Allessandro Spinillo eds., 2002).

Shareholders. Given this distinction between Article 37.1's application to the first-tier level ownership of AdT (the Founding Shareholders) and its inapplicability to the final tier of ownership (the Ultimate Shareholders), it follows that Article 37.1 did not restrict Ultimate Shareholders in their organization of the various tiers of ownership. The Tribunal thus concludes that Article 37.1 was not a guarantee that the organizational chart of corporate ownership would not change in any respect. Rather, the Tribunal interprets the provision to require that, among the Founding Shareholders (the first tier of upstream ownership of AdT), the same entities keep more than 50% of their original interest. The issue therefore is whether IW Ltd, as a Founding Shareholder, kept more than 50% of its original interest." | **[172]** "On the issue of corporate migration, Bolivia provided the Tribunal with the expert opinion of Professor Merritt B. Fox. Professor Fox is of the opinion that IW S.a.r.l. of Luxembourg is a 'different corporation' from IW Ltd. [. . .]" | **[174]** "The Tribunal finds that although Professor Fox's opinion may be accurate as a general matter, it does not bear on the particular situation presented by this case. The possibility of corporate migration between two jurisdictions appears to be relatively rare. It requires that the jurisdiction being left behind and the jurisdiction being entered both accept the possibility of migration in their legal systems. Not many national legal systems provide for corporate migration. The Tribunal concludes that, although unusual, a corporate migration is permitted by the laws of the Cayman Islands and its continuation as a legal entity is permitted by Luxembourg law." | **[176]** "[. . .] The status of IW S.a.r.l. is first a question governed by the law of Luxembourg. It is true that each country has the choice to recognize or not recognize the corporations of other States. As a question of private international law, States in examining the status of a foreign corporation generally defer either to the law of the seat of the company or the law at the place of incorporation.[19] Whichever of these approaches is adopted in this case, the Tribunal concludes on the bases of the arguments made and evidence submitted that the law that determines the status of IW S.a.r.l. would not be the substantive corporate law of Bolivia." | **[178]** "The Tribunal therefore concludes that the migration of IW Ltd from the Cayman Islands to Luxembourg with its change of name to IW S.a.r.l. did not constitute a breach of Article 37.1 of the Concession." | **[180]** "The Tribunal denies the fourth aspect of Respondent's First Objection."

[Paras. 160, 161, 162, 163, 165, 172, 174, 176, 178, 180]

19 [146] U. Drobnig, *Private International Law*, in III ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1116 (R. Bernhardt ed.1992).

II.4.93 CONSENT TO ICSID ARBITRATION

E. Consent to Arbitration

[202] "Bolivia argues that its consent to ICSID jurisdiction under the BIT is qualified by the particular circumstances of the case: the negotiation and terms of the Concession, and Article 2 of the BIT read in conjunction with the laws of Bolivia. Bolivia presents this objection as an extension of all its objections that speaks to the entire situation with which it is confronted." | **[203]** "The Tribunal by majority finds that Bolivia's objection that it limited the scope of its consent to ICSID jurisdiction by way of Article 2 of the BIT plus the structuring of the Concession, in particular requirements as to AdT's corporate structure, has already been dispensed with by way of the Tribunal's decisions regarding the first, second, third and fourth Aspects of the First objection.[20]" | **[204]** "In this Declaration, Arbitrator Alberro-Semerena dissents from the Tribunal's decision on the sixth aspect of the First Objection. The Tribunal observes that it is unanimous on the other aspects of its decision on the First Objection and that many of the points determined therein bear on the sixth aspect of the First Objection.[21] [. . .]" | **[205]** "The Tribunal denies the sixth aspect of Respondent's First Objection."

[Paras. 202, 203, 204, 205]

F. Is the Claimant a Bolivian Entity "Controlled Directly or Indirectly" by Nationals of the Netherlands?

I.1.16 TREATY INTERPRETATION
See also II.4.9224

1. The Meaning of the Phrase "Controlled Directly or Indirectly"

[227] "To find the 'ordinary meaning' of the word 'controlled', the Tribunal sought guidance from standard desk dictionaries. [. . .] [W]hile some definitions suggest the actual exercise of influence, others emphasize the possession of power over an object. Thus, the ordinary meaning of 'control' would seemingly encompass both actual exercise of powers or direction and the rights arising from the ownership of shares." | **[233]** "The Tribunal [. . .] concludes that the word 'controlled', like the word 'control', is not de-

20 [178] See *infra,* 109-123, 133-138, 142-155, 160-184.

21 [179] These are, primarily: (1) "the Tribunal finds neither common intention of the Parties to exclude ICSID jurisdiction in the case of a claim by AdT nor any clear waiver on the part of AdT in Article 41 or the Concession generally of its rights to pursue its claims before ICSID" (Paragraph 122, *supra),* (2) [t]he Tribunal . . . concludes that Article 37.1 was not a guarantee that the organizational chart of corporate ownership would not change in any respect" (Paragraph 165, *supra),* (3) [t]he Tribunal . . . concludes that the migration of IW Ltd from the Cayman Islands to Luxembourg with its change of name to IW S.a.r.l. did not constitute a breach of Article 37.1 of the Concession" (Paragraph 178, *supra)* and (4) "the Tribunal need not determine the precise content of representations contained within the [November 24, 1999] correspondence as the proposal was never executed and such representations cannot have legal effect" (Paragraph 189, *supra).*

terminative. The adjective 'controlled' may indicate that 'control' was actually exercised at some point in the past or it may mean that another possessed the capacity to control that company in the past (or indeed at the present moment). On the one hand, 'controlled' may mean that an entity was subject to the actual control of another. On the other, 'controlled' may mean that an entity was subject to the controlling capacity of another." | **[234]** "The Tribunal observes that there is no indication from any of the dictionaries consulted that 'control' necessarily entails a degree of active exercise of powers or direction. If the parties had intended this result, a better choice of word for the BIT would have been 'managed' rather than 'controlled'. In addition, although the contracting states would have eliminated uncertainty by utilizing phrasing such as 'under direct or indirect control of' or 'subject to the direct or indirect control of', rather than 'controlled directly or indirectly' by another company, the ambiguous meaning of 'controlled' leads the Tribunal to find the difference in phrasing to be not determinative." | **[236]** "The word 'controlled' is modified by the phrase 'directly or indirectly'. This phrase clearly indicates that one entity may control another entity in one of two ways. An entity that is directly controlled implies that there is no intermediary between the two entities, while an entity that is indirectly controlled implies that there is one or more intermediary entities between the two." | **[240]** "It is in the consideration of the context in which the phrase 'controlled directly or indirectly' is found, and in light of the object and purpose of the BIT, that the Tribunal finds the basis for the interpretation of the phrase." | **[241]** "As to the object and purpose of the BIT, the Tribunal notes that the Preamble to the BIT provides:

> The Government of the Kingdom of the Netherlands and The Government of the Republic of Bolivia,
>
> Desiring to strengthen the traditional ties of friendship between their countries, to extend and intensify the economic relations between them particularly with respect to investments by the nationals of one Contracting Party in the territory of the other Contracting Party.
>
> Recognizing that agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties and that fair and equitable treatment of investment is desirable [. . .].[22]

Thus the object and purpose of the treaty is to 'stimulate the flow of capital and technology' and the Contracting Parties explicitly recognize that such stimulation will result from 'agreement upon the treatment to be accorded

22 [216] It is widely accepted that the Preamble language of a treaty can be particularly helpful in ascertaining the motive, object and circumstances of a treaty. Dolzer and Stevens note in their book on BITs that even though preambles rarely contain binding obligations, they may serve as "useful aids to interpretation of the treaty." RUDOLF DOLZER AND MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES, 20 (1995).

to . . . investments' by 'the national of one Contracting Party in the territory of the other Contracting Party'." | **[242]** "As to the context in which the phrase 'controlled directly or indirectly' is found, the Tribunal notes that Article 1 in defining the concept of 'national' not only defines the scope of persons and entities that are to be regarded as the beneficiaries of the substantive rights of the BIT but also defines those persons and entities to whom the offer of arbitration is directed and who thus are potential claimants. Given the context of defining the scope of eligible claimants, the word 'controlled' is not intended as an alternative to ownership since control without an ownership interest would define a group of entities not necessarily possessing an interest which could be the subject of a claim. In this sense, 'controlled' indicates a quality of the ownership interest." | **[243]** "The question therefore is how the term 'controlled' in Article 1(b)(iii) is meant to qualify 'ownership'. [. . .]" | **[245]** "First, Claimant's view that 'control' is a quality that accompanies ownership finds support generally in the law. An entity that owns 100% of the shares of another entity necessarily possesses the power to control the second entity. The first entity may decline to exercise its control, but that is its choice. Moreover, the first entity may be held responsible under various corporate law doctrines for the actions of its subsidiary, whether or not it actually exercised control over that subsidiary's actions. Respondent contends that IWT B.V. and IWH B.V. are mere 'shells' which cannot even decline to exercise its possible control. Holding companies (if that is all IWT B.V. and IWH B.V. are in this case) owning substantial assets (here the rights under the Concession) are, however, both a common and legal device for corporate organization and face the same legal obligations of corporations generally.[23] The Tribunal acknowledges that the corporate form may be abused and that form may be set aside for fraud or on other grounds. [. . .] [T]he Tribunal finds no such extraordinary grounds to be present on the evidence." | **[246]** "Second, Respondent's argument that 'control' can be satisfied by only a certain level of actual control has not been defined by the Respondent with sufficient particularity. Rather, the concept is sufficiently vogue as to be unmanageable. Respondent asserts that the phrase 'controlled direcdy or indirectly' referred to the 'ultimate controller' provides a defined standard, but [. . .] the Tribunal rejects this interpretation as inconsistent with the language 'directly or indirectly'. Once one admits of the possibility of several controllers, then the definition of what constitutes sufficient 'actual' control for any particular controller, particularly when an entity may delegate such ac-

23 [218] The Tribunal agrees with the *Aucoven* tribunal which, although working in the different context of Article 25 of the ICSDI [sic] Convention, when faced with a similar argument concerning the substance of the entity said to "control" the claimant in that dispute, wrote: "Although [respondent] views [the corporation said to control the claimant] as a mere formality, this formality is the fundamental building block of the global economy. *Autopista Concesionada de Venezuela CA v. Bolivarian Republic of Venezuela* (hereinafter referred to as "*Aucoven*"), in its Decision on Jurisdiction of September 27, 2001 at § 67, *reprinted at* 16 ICSID Rev.—FILJ 469 (2001), 6 ICSID [Reports] 419 (2004).

tual control, becomes problematic. This becomes apparent with Respondent's difficulty in offering the Tribunal the details of its 'actual' control test. [. . .] Indeed, Respondent's argument that 'control' can be satisfied by only a certain level of actual control by one entity over another entity ignores the reality that such exercise of control may be delegated to a subsidiary or even to an independent subcontractor.[24] Moreover, the many dimensions of actual control of a corporate entity range from day to day operations up to strategic decision-making. [. . .]" | **[247]** "Third, the uncertainty inherent in Respondent's call for a test based on an uncertain level of actual control would not be consistent with the object and purpose of the BIT. The BIT is intended to stimulate investment by the provision of an agreement on how investments will be treated, that treatment including the possibility of arbitration before ICSID. If an investor can not ascertain whether their ownership of a locally incorporated vehicle for the investment will qualify for protection, then the effort of the BIT to stimulate investment will be frustrated."

[Paras. 227, 233, 234, 236, 240, 241, 242, 243, 245, 246, 247]

2. Conclusions

[264] "The Tribunal, by majority, concludes that the phrase 'controlled directly or indirectly' means that one entity may be said to control another entity (either directly, that is without an intermediary entity, or indirectly) if that entity possesses the legal capacity to control the other entity. Subject to evidence of particular restrictions on the exercise of voting rights, such legal capacity is to be ascertained with reference to the percentage of shares held. In the case of a minority shareholder, the legal capacity to control an entity may exist by reason of the percentage of shares held, legal rights conveyed in instruments or agreements such, as the articles of incorporation or shareholders' agreements, or a combination of these. In the Tribunal's view, the BIT does not require actual day-to-day or ultimate control as part of the 'controlled directly or indirectly' requirement contained in Article 1(b)(iii). The Tribunal observes that it is not charged with determining all forms which control might take. It is the Tribunal's conclusion, by majority, that, in the circumstances of this case, where an entity has both majority shareholdings and ownership of a majority of the voting rights, control as embodied in the operative phrase 'controlled directly or indirectly' exists."

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24 [220] The Tribunal is aware that the Respondent in particular asserts that IWT B.V. and IWH B.V. are in its view mere shells that do not oversee the operations of Claimant at all. For that limiting case, there could be an administrable factual test of managerial control. However, the vagueness of Respondent's factual inquiry would apply to all assertions that one entity controls another entity. The BIT does not suggest that there be one test for "shells" and another for all situations other than shells. More importantly, the pejorative use of the poorly defined word "shell" points to hypothetical situations more appropriately addressed by doctrines created to address the fraudulent or abusive use of corporate form, and, as found by the Tribunal at paragraph 331, *infra,* neither of these situations is apparent in this case.

| **[265]** "The Declaration of Jose Luis Alberro-Semerena dissents to the Tribunal's decision as to the interpretation given to the phrase 'controlled directly or indirectly'. The difference between the majority and the dissent as to Respondent's request for production for documents follows directly from their difference in the interpretation of that phrase."

[Paras. 264, 265]

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

G. Article 25 (2) ICSID Convention

[278] "The Netherlands-Bolivia BIT contains an offer by Bolivia and by the Netherlands to defined nationals of the other party to arbitrate specified disputes before ICSID. A claimant accepts this offer through its filing of a request for arbitration. This Tribunal is established pursuant to the ICSID Convention and its jurisdiction is limited by the ICSID Convention, as defined in Article 25. This Tribunal must therefore evaluate whether the dispute presented to it under the BIT passes through the jurisdictional keyhole defined by Article 25 of the ICSID Convention.[25] The state parties to the BIT can seek to encompass all manner of disputes. But in attempting to place disputes under their BIT before ICSID, an institution regulated by a separate instrument, the scope of the disputes which may be submitted is necessarily limited to those disputes that pass through the jurisdictional keyhole defined by Article 25.[26]" | **[279]** "The image of Article 25 of the ICSID Convention as a jurisdictional keyhole makes clear that the jurisprudence concerning the phrase 'foreign control' in Article 25(2) (b) is of quite limited relevance to the interpretation of the BIT." | **[280]** "Article 1(b)(iii) is an agreement of Bolivia and die Netherlands to treat a judicial person of one of them as a national of the other if that judicial person is 'controlled directly or indirectly' by nationals of the other. The question is whether this definition of control in the BIT is such that disputes under the BIT pass through the jurisdictional keyhole of Article 25. In this light, it is not at all surprising that the drafting history, commentary and arbitral awards concerning that phrase 'foreign control' in Article 25 all point to

25 [236] Report of the Executive Directors on the ICSID Convention, March 18, 1965. Paragraph 25 states: While consent of the parties is an essential prerequisite for the jurisdiction of the Centre, *consent alone will not sufice to bring a dispute within its jurisdiction.* In keeping with the purpose of the Convention, the jurisdiction of the Centre is further limited by reference to the nature of the dispute and the parties thereto. (Emphasis added).

26 [237] In *Vacuum Salt Products Ltd. v. Republic of Ghana,* Award of February 16, 1994, 9 ICSID REV.—FILJ (1994), 4 ICSID REP. 329 (1997), the tribunal noted that "[t]he reference in Article 25(2)(b) to "foreign control" necessarily sets an *objective* Convention limit beyond which ICSID jurisdiction cannot exist and parties therefore lack power to invoke same no matter how devoutly they may have desired to do so." Ld., at § 36 (emphasis added). Yet, although there is an objective limit, a Tribunal must also remain flexible so as to accommodate the agreement of the parties as to the definition of "foreign control."

'foreign control' being 'flexible' so that reasonable definitions in referring instruments may pass through the jurisdictional keyhole." | **[281]** "Thus Professor Schreuer notes that national and treaty-based definitions should be deferred to, so long as they are reasonable:

> Definitions 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 Art. 25(2)(b) have been met. They are part of the legal framework for the host State's submission to the Centre. Upon acceptance in writing by the investor, they become part of the agreement on consent between the parties. Therefore, any *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.[27]" |

[283] "The drafting history of Article 25 as well as arbitral awards and scholarly commentary indicate, however, that the drafters intended a flexible definition of control in Article 25 not because they regarded 'control' as requiring a wide ranging inquiry, but rather—recognizing the keyhole function that would be played by Article 25—to accommodate a wide range of agreements between parties as to the meaning of 'foreign control'." | **[284]** "Aron Broches, chairman of the consultative meetings for the negotiation of the ICSID Convention and General Counsel of the World Bank and subsequently ICSID's first Secretary-General, writes that during the drafting the attempt to provide an exacting definition of foreign control was 'abandoned' and that instead it was decided that 'an attempt should be made . . . to give the greatest possible latitude to the parties to decide under what circumstances a company could be treated as a 'national of another Contracting State''.[28]" | **[285]** "There is no issue in the Tribunal's view that Article 1 of the BIT under either the Claimant's or Respondent's interpretation would be an agreement as to 'foreign control' that satisfies the flexible and deferential requirement of Article 25(2)." | **[286]** "For the foregoing reasons, the Tribunal does not find the jurisprudence concerning the phrase 'foreign control' in Article 25(2)(b) to assist the Tribunal in interpreting Article 1 (b)(iii) of the BIT."

[Paras. 278, 279, 280, 281, 283, 284, 285, 286]

H. Concluding Remarks

[330] "Respondent objects to Claimant's assertion of jurisdiction implying that die availability of the BIT is the result of strategic changes in the corporate structure that somehow rise to the level of fraud or abuse of corporate form. The Tribunal observes that to the extent that Bolivia argues that the

27 [238] Schreuer, para. 481, p. 286 (emphasis added) (internal citations omitted).

28 [241] Aron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 136 Recueil des Cours 331, 360 (1972-11). [. . .]

December 1999 transfer of ownership was a fraudulent or abusive device to assert jurisdiction under the BIT, that:

> a. the joint venture between Bechtel Enterprises Holding Inc. and Edison S.p.A in November-December of 1999 involved significantly more operations than AdT's concessionary rights and duties,
>
> b. the present record does not establish why the joint venture was headquartered in the Netherlands as opposed to some other jurisdiction, although Claimant indicated that the Netherlands was chosen for reasons of taxation,
>
> c. a decision as to where to locate a joint venture is often driven by taxation considerations, although other factors such as the availability of BITs can be important to such a decision, and
>
> d. it is not uncommon in practice, and—absent a particular limitation—not illegal to locate one's operations in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for examples, of taxation or the substantive law of the jurisdiction, including the availability of a BIT." |

[331] "The Tribunal does not find a sufficient basis in the present record to support an allegation of abuse of corporate form or fraud. The Tribunal, however, notes that Article 41(2) of the ICSID Arbitration Rules provides:

> The Tribunal may an its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence.

The Tribunal will bear in mind its duty to protect the integrity of ICSID jurisdiction during the merits phase as die Parties submit their full memorials and supporting evidence." | **[332]** "This Decision reflects die growing web of treaty based referrals to arbitration of certain investment disputes. Although titled 'bilateral' investment treaties, this case makes clear that which has been clear to negotiating states for some time, namely, that through the definition of 'national' or 'investor', such treaties serve in many cases more broadly as portals through which investments are structured, organized, and, most importantly, encouraged through the availability of a neutral forum.[29] The language of the definition of national in many BITs evidences that such national routing of investment is entirely in keeping with the purpose of the instruments and the motivations of the state parties."

[Paras. 330, 331, 332]

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29 [274] Indeed, the negotiating history of the ICSID Convention indicates that the "CHAIRMAN [Aron Broches] observed that the consideration of the definition of 'national of a Contracting State' was related to the entire scope of the draft Convention. II(1) DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE ICSID CONVENTION 395 (1968).

III. DECISION

[334] "In light of the foregoing, the Tribunal decides:

a. Respondent's First Objection to the jurisdiction of the Tribunal, except as to the sixth aspect, in each of the ways in which it asserts a lack of consent, is denied;

b. By majority, the sixth aspect of Respondent's First Objection is denied;

c. By majority, Respondent's Second Objection to the jurisdiction of the Tribunal based on whether Claimant is 'controlled directly or indirectly" by nationals of the Netherlands is denied; and

d. By majority, Respondent's request for the production of evidence is, as a consequence of the Tribunal's holding as to the Second Objection, without object and is denied." |

[335] "The Tribunal's decision as to the awarding of costs will be addressed as a part of the final award in this matter." | **[336]** "The Tribunal will proceed to the scheduling of the merits phase of the proceeding." | **[337]** "The dissenting Declaration of José Luis Alberro-Semerena is appended to the present Decision."

[Paras. 334, 335, 336, 337]

Wena Hotels Ltd. v. Arab Republic of Egypt, ARB/98/4, Decision on Application for Interpretation of Award, 31 October 2005*

Original: English

Present: Sachs, *President of the Tribunal*
Fadlallah, Salans, *Arbitrators*

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* Summaries prepared by Christina Knahr, MPA, 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/WenaInterpretationDecision.pdf>. Original footnote numbers are indicated in brackets: [ ].

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

II.1.12 APPLICATION
See also I.17.011; II.4.981

I. THE DISPUTE

[1] "The present interpretation proceedings were initiated on June 29, 2004, when Wena Hotels Limited ('Wena')[1] filed with the Secretary-General of the International Centre for Settlement of Investment Disputes ('ICSID') an application for interpretation (the 'Application') under Article 50 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the 'Convention' or the 'ICSID Convention') of an arbitral award[2] rendered on December 8, 2000 (the 'Award') in the arbitration proceedings between Wena and the Arab Republic of Egypt ('Egypt'), ICSID Case No. ARB/98/4." | **[2]** "The Award was the result of an ICSID arbitration proceeding initiated by Wena on July 10, 1998 against Egypt (the 'Original Arbitration'). The dispute related to the seizure by Egyptian officials of the Nile Hotel in Cairo and the Luxor Hotel (collectively, the 'Hotels') in Luxor on April 1, 1991. The Hotels were operated by Wena under two lease and development agreements that it had entered into in 1989 and 1990, respectively, with the Hotels' owner, the Egyptian Hotels Company ('EHC'). EHC was a 'public' sector company wholly owned by the Egyptian government.[3]" | **[3]** "In said proceedings, Wena sought damages for Egypt's alleged violation of the Agreement for the Promotion and Protection of Investments between the United Kingdom and Egypt dated June 11, 1975 (the 'IPPA')." | **[6]** "The Application was filed by Wena against Egypt, stating that a dispute has arisen between Wena and Egypt concerning the meaning of the Award. Wena asserts that despite the Award's conclusion that Egypt expropriated Wena from the Nile and Luxor Hotel lease and development agreements (the 'Nile Lease' and the 'Luxor Lease', respectively; collectively, the 'Hotel Leases') in 1991, recent legal actions of Egypt and its constituent entities against Wena raise important questions about the Award's finding that Egypt expropriated Wena's interests in the Luxor Lease [. . .]."

[Paras. 1, 2, 3, 6]

1 [1] Wena Hotels Limited is a British company incorporated in 1982 under the laws of England and Wales. Note, in referencing the documentary annexes submitted by the parties, the notation "W" indicates a document submitted by Claimant, Wena Hotels Limited. The notation "E" indicates a document submitted by Respondent, the Arab Republic of Egypt.

2 [2] Application, Annex 1.

3 [3] Award, Section 65.

II. CONSIDERATIONS OF THE TRIBUNAL

II.1.121 ADMISSIBILITY OF THE APPLICATION
See also II.1.122

A. Preliminary Remarks and Relevant Provisions

[70] "Wena requests an interpretation of the Original Tribunal's determination that Egypt expropriated Wena's rights under the Luxor Lease and deprived Wena of its '*fundamental rights of ownership*'. In particular, Wena requests that the interpretation address whether the expropriation constituted a total and permanent deprivation of Wena's rights under the Luxor Lease, such as to preclude subsequent legal actions by Egypt that presume the contrary. Wena further requests a confirmation that such expropriation took place on April 1, 1991. Egypt requests that the Tribunal reject the Application in its entirety." | **[71]** "The Tribunal has carefully considered the positions of the parties. For the reasons explained in detail below, the Tribunal by unanimous decision partly approves, and partly rejects, the Application for Interpretation of the Arbitral Award rendered on December 8, 2000." | **[72]** "Wena's Application for Interpretation is the first request of its kind ever received by ICSID.[4] Accordingly, no previous decisions by ICSID arbitral tribunals exist that deal with the purpose, scope and limits of the interpretation procedure. However, in making its decision, the Tribunal was able to rely not only on the relevant provisions of the ICSID Convention and the ICSID Arbitration Rules and their interpretation by well-known scholars, but also on decisions by other tribunals, in particular, the Permanent Court of International Justice ('PCIJ') and its successor, the ICJ." | **[73]** "The Application for Interpretation now before the Tribunal is based on Article 50(1) of the ICSID Convention, which reads as follows:

> '(1) If any dispute shall arise between the parties as to the meaning or scope of an award, either party may request interpretation of the award by an application in writing addressed to the Secretary-General'." |

[74] "The requirements for an admissible application for interpretation are set forth in Article 50(1) of the ICSID Arbitration Rules as follows:

> '(1) An application for the interpretation, revision or annulment of an award shall be addressed in writing to the Secretary-General and shall:
>
> (a) identify the award to which it relates;
>
> (b) indicate the date of the application;

4 [53] Indeed, there was an application for interpretation in the case Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Decision on Correction and Interpretation of the Award, dated June 13, 2003, 18 ICSID Rev.—F.I.L.J. 595 (2003). Said application was governed by the Additional Facility Rules and was mainly a request for corrections. Therefore, it is different from the case at hand which is governed by the ICSID Convention and Arbitration Rules.

(c) state in detail:

(i) in an application for interpretation, the precise points in dispute;

(ii) in an application for revision, . . .

(iii) in an application for annulment, . . .

(d) be accompanied by the payment of a fee for lodging the application'." |

[75] "Further, Article 53 of the ICSID Arbitration Rules provides:

'The provisions of these Rules shall apply mutatis mutandis to any procedure relating to the interpretation, revision or annulment of an award and to the decision of the Tribunal or Committee'." |

[76] "Taken together, the relevant provisions of the ICSID Convention and the ICSID Arbitration Rules thus establish two main conditions for the admissibility of an application for interpretation: first, there has to be a dispute between the original parties as to the meaning or scope of the award; second, the purpose of the application must be to obtain an interpretation of the award." | **[77]** "These conditions concur with the requirements for the admissibility of interpretation proceedings established by the PCIJ in the *Chorzów Factory Case*.[5] In this decision, the PCIJ relied on Article 60 of its Statute, which reads as follows:

'The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any Party'.[6] " |

[78] "In its judgment, the PCIJ stated:

'From the article [60] it appears that these conditions are the following:

(1) there must be a dispute as to the meaning and scope of a judgment of the Court;

(2) the request should have for its object an interpretation of the judgment'.[7]" |

[79] "These requirements were also confirmed by the ICJ in the *Asylum Case*[8] and in the *Continental Shelf Case (Tunisia v. Libyan Arab Jamahiriya)*[9]

5 [54] *Interpretation of Judgments Nos. 7 and 8 (the Chorzów Factory),* Judgment of December 16, 1927, PCIJ Series A, No. 13.

6 [55] *Id.*, p. 10.

7 [56] *Id.*

8 [57] *See Colombia v. Peru, supra* footnote 50 [*Request for Interpretation of the Judgment of November 20, 1950 in the Asylum Case (Colombia v. Peru),* Judgment of November 27, 1950, 1950 ICJ Rep. 395].

9 [58] *Application for Revision and Interpretation of the Judgment of February 24, 1982 in the Case Concerning the Continental Shelf (Tunisia v. Libya),* Judgment of December 10, 1985, 1985 ICJ Rep.192, p. 223.

with regard to Article 60 of the Statute of the ICJ. In the *Asylum Case*, the ICJ established the following:

> 'Thus it [Article 60] lays down two conditions for the admissibility of such a request:
>
> (1) The real purpose of the request must be to obtain an interpretation of the judgment. [. . .]
>
> (2) In addition, it is necessary, that there should exist a dispute as to the meaning or scope of the judgment.'[10]"

[Paras. 70, 71, 72, 73, 74, 75, 76, 77, 78, 79]

I.14.0 CONCEPT OF INTERNATIONAL DISPUTE

B. The Existence of a Dispute Regarding the Meaning or Scope of the Award

[80] "[. . .] [T]he first condition for the admissibility of an application for interpretation is the existence of a dispute between the parties as to the meaning or scope of the award." | **[81]** "The existence of a dispute as to the meaning or scope of an award requires that the dispute is sufficiently concrete to be susceptible of a specific request for interpretation.[11] Whereas it is not necessary to show the existence of a dispute in a specific manner, such as in formal communications between the parties, it is sufficient if—but also mandatory that—the two parties have actually exposed their divergence of views on definite points in relation to the award's meaning or scope.[12] In contrast, general complaints about the award's lack of clarity do not suffice.[13]" | **[82]** "Furthermore, the dispute must relate to the meaning or scope of what has been decided with binding force, thus in principle to the award's operative section, a condition well adhered to by international practice and confirmed by opinions of scholars, as will be shown below. Thus, in the *Chorzów Factory Case*, the PCIJ stated that the request must relate to the operative part:

> 'In order that a difference of opinion should become the subject of a request for interpretation under Article 60 of the Statute, there must therefore exist a difference of opinion between the Parties as to those points in the judgment in question which have been decided with binding force'.[14]

10 [59] *Colombia v. Peru, supra* footnote 50, p. 402 [*Request for Interpretation of the Judgment of November 20, 1950 in the Asylum Case (Colombia v. Peru),* Judgment of November 27, 1950, 1950 ICJ Rep. 395].

11 [60] Schreuer, *The ICSID Convention: A Commentary* (2001), p. 857.

12 [61] *Chrozów [sic] Factory, supra* footnote 54, pp. 10 *et seq.*

13 [62] Schreuer, *supra* footnote 60, p. 858.

14 [63] *Chrozów [sic] Factory, supra* footnote 54, p. 11.

The Court further explained:

> 'A difference of opinion as to whether a particular point has or has not been decided with binding force also constitutes a case which comes within the terms of the provision in question, [. . .].'[15]" |

[83] "These principles were confirmed by the ICJ in the Continental Shelf Case (Tunisia v. Libyan Arab Jamahiriya):[16]

> 'The question is therefore limited to whether the difference of views between the Parties which has manifested itself before the Court is 'a difference of opinion between the Parties as to those points in the judgment in question which have been decided with binding force'. Including 'A difference of opinion as to whether a particular point has or has not been decided with binding force'.'" |

[84] "However, in the *Delimitation of the Continental Shelf Case*, the Court of Arbitration in that dispute clarified that although the application for interpretation must be directed towards clarifying an ambiguity in the operative section, a tribunal is not constrained from referring to the grounds of the award, stating the following:

> 'The Court of Arbitration considers it to be well settled that in international proceedings the authority of res judicata, that is the binding force of the decision, attaches in principle only to the provisions of its dispositif and not to its reasoning. In the opinion of the Court it is equally clear that, having regard to the close links that exist between the reasoning of a decision and the provisions of its dispositif, recourse may in principle be had to the reasoning in order to elucidate the meaning and scope of the dispositif. From this it follows that under certain conditions and within certain limits, the reasoning in a decision may properly be invoked as a ground for requesting an interpretation of provisions of its dispositif [. . .]. But the subject of a request of interpretation must genuinely be directed to the question of what it is that has been settled with binding force in the decision, that is in the dispositif; the reasoning cannot therefore be invoked for the purpose of obtaining a ruling on a point not so settled in the dispositif [. . .].'[17]" |

[85] "Commentators on international arbitration also share this approach to determine the existence of a dispute as to the meaning or scope of an award.[18] It is stated:

> 'The interpretation of an arbitral award is only really helpful where the ruling, which is generally presented in the form of an order, is so ambiguous

15 [64] *Id.*, p. 12.

16 [65] *Tunisia v. Libya, supra* footnote 58, p. 218.

17 [66] *U.K. v. France, supra* footnote 43, p. 170. As to the exigency of an ambiguity in the *operative* section, *see* also *Panacaviar S.A v. Iran, see* Exhibit E 7.

18 [67] Craig, Park and Paulsson, *International Chamber of Commerce Arbitration* (3rd ed. 2002) [hereinafter cited as "Craig, Park"], p. 408; Fouchard, Gaillard and Goldmann, *On International Commercial Arbitration* (1999), p. 776 [hereinafter cited as "Fouchard"]; Poudret and Besson, *Droit comparé de l'arbitrage international* (2002), margin note no. 760.

> that the parties could legitimately disagree as to its meaning. By contrast, any obscurity or ambiguity in the grounds for the decision does not warrant a request for interpretation of the award.'[19]" |

[86] "Furthermore, some scholars take the view that a request for interpretation is only admissible on condition that the enforcement of the award is concerned. For instance, prior to the adoption of the 1998 Arbitration Rules of the International Chamber of Commerce ('ICC Rules')—and therefore the possibility of an application for interpretation as set forth in Article 29(2) of the ICC Rules—the Court of Arbitration of the International Chamber of Commerce (the 'ICC Court') allowed interpretation only as to assure that its awards were enforceable at law.[20] Under the ICC Rules, a request for interpretation is only deemed admissible '*when the terms of an award are so vague or confusing that a party has a genuine doubt about how the award should be executed*.'[21]" | **[87]** "It is true that interpretation proceedings are particularly relevant if a dispute about the exact meaning of the award is likely to prevent its execution. However, neither Article 50(1) of the ICSID Convention nor the ICSID Arbitration Rules establish such a requirement for the admissibility of an application for interpretation, and it seems possible that there are situations where a party may have a valid interest to obtain an interpretation of an award, even though its enforcement is not (directly) concerned. However, the Tribunal agrees with the view taken by a commentator to the ICSID Convention that the dispute must at least have some practical relevance to the award's implementation; mere theoretical discussions about the award's meaning or scope are not sufficient.[22]" | **[88]** "In the oral hearing it became clear that the parties largely agree on the aforementioned legal authorities.[23] [. . .]" | **[92]** "The Tribunal therefore notes [. . .] that their disagreement relates to the application of those principles."

[Paras. 80, 81, 82, 83, 84, 85, 86, 87, 88, 92]

1. Dispute Within the Meaning of Article 50(1) of the ICSID Convention

[93] "[. . .] [T]he Tribunal shall first assess whether there is a dispute between the parties within the meaning of Article 50(1) of the ICSID Convention, *i.e.*, a dispute as to the meaning or scope of the operative part of the

19 [68] Fouchard, *supra*, p. 776.

20 [69] Daly, "Correction and Interpretation of Arbitral Awards under the ICC Rules of Arbitration" (2002) 13:1 ICC Bulletin 61, p. 62; Craig, Park and Paulsson, *Annoted Guide to the 1998 ICC Arbitration Rules* (1998), p. 160.

21 [70] *Daly*, *supra*, (63 *et seq.*); *see also* on this issue Craig, Park, *supra* footnote 67, p. 408.

22 [71] Schreuer, *supra* footnote 60, p. 858; in this sense also Fouchard, *supra* footnote 67, p. 776.

23 [72] For Wena *see* Transcript, p. 5 line 23 and for Egypt *see* Transcript, p. 47, lines 19 *et seq*.

Award." | **[94]** "In doing so, the Tribunal shall first analyze the precise scope of Wena's requested relief, which [. . .] reads as follows:

> 'Wena respectfully requests an interpretation of the Tribunal's determination that Egypt expropriated Wena's rights in the Luxor Lease and deprived Wena of its 'fundamental rights of ownership'. In particular, Wena requests that the interpretation address whether the expropriation constituted a total, permanent deprivation of Wena's rights in the Luxor Lease, such as to preclude subsequent legal actions by Egypt that presume the contrary.'[24]" |

[95] "In the oral hearing, counsel for Wena clarified that Wena also requests an interpretation that the expropriation took place as of April 1, 1991.[25]" | **[96]** "[. . .] Claimant made clear that its interpretation request regarding the consequences of the expropriation indeed has two branches: On the one hand, Wena is seeking a clarification that the result of the expropriation is 'such as to preclude subsequent legal actions by Egypt that presume the contrary'; on the other hand, Wena also requests the Tribunal to address the consequences of the expropriation regarding Wena's legal relationships with third parties [. . .] and, more specifically, whether or not Wena, as the party expropriated from a given right, can incur any liability associated with that right.[26] Even though this second branch of Wena's relief has not been formally presented, it has clearly evolved in the interpretation proceedings, and has been addressed by both parties.[27] The Tribunal, therefore, feels obliged to also address this second branch of Claimant's relief, and it will do so separately below [. . .]." | **[97]** "Having thus analyzed the precise scope of Wena's request for interpretation, the Tribunal has to examine whether the different points covered by the interpretation request are in dispute between the parties. [. . .]" | **[98]** "One could indeed take the view that since Egypt paid the full amount it had been ordered to pay to Wena, there is no room for any further dispute between the parties that could have some practical relevance as to the Award's implementation. However, Wena correctly points out that the Award, in its operative section, not only ordered Egypt to pay compensation, including damages and interest (*see* Section 136 of the Award), but also found that Egypt's actions, as determined by the Original Tribunal, amounted to an expropriation (*see* Section 135 of the Award). Wena submits that the meaning of the term 'expropriation' used in Section 135 was touched upon in the reasoning of the

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24 [84] *See* Application, Section 50.

25 [85] *See* Transcript, p. 13, line 21 to p. 14, line 1; p. 14, lines 11 to 14; p. 17, lines 15 to 17; p. 18, line 23 to p. 19, line 1. Upon further question of the Tribunal, counsel for Wena clarified that its Relief sought should be read as per Section 50 of Wena's Application in combination with Section 47 of its Application, which would technically mean that the Tribunal has to add the words "as of April 1, 1991" to Section 50 of the Application; *see* Transcript, p. 95, lines 19 to 24.

26 [86] In its Application (Section 48) and its Reply Memorial (Section 42), Wena has described the resulting effects of the expropriation more generally as meaning that "*a party expropriated from a given right cannot incur any liability associated with that right*".

27 [87] Application, Sections 47 and 48; Reply Memorial, Sections 2, 5, 13, 42 and 46; Rejoinder, Sections 4, 5 and 9.

Award, although the Original Tribunal did not expressly state what Wena alleges to be the necessary consequences of Section 135 of the Award, *i.e.*, that the expropriation was total and permanent; it took place as of April 1, 1991; and as a consequence, subsequent legal actions by Egypt that presume the contrary are precluded; and Wena as the expropriated party cannot incur any liability associated with the expropriated rights." | **[99]** "Through its submissions and oral argument, it became clear that Egypt disputes that the expropriation as decided by the Original Tribunal had any of these consequences. Specifically, Egypt denies that the expropriation had a total and permanent effect.[28] Further, Egypt denies that the Original Tribunal made any ruling regarding the contractual rights and obligations of Wena under the Luxor Lease.[29] In addition, upon question by the Tribunal, Egypt did not unequivocally declare the date of April 1, 1991, as undisputed.[30]" | **[100]** "Considering the foregoing, the Tribunal is of the opinion that there does actually exist a dispute between Wena and Egypt, within the meaning of Article 50(1) of the ICSID Convention, regarding the meaning of the term 'expropriation' as used in the operative section of the Award." | **[101]** "The Tribunal also is of the opinion that this dispute is indeed a dispute between the parties to the Original Arbitration, *i.e.,* Wena and Egypt. It is true that most of the actions by which Wena claims to be adversely affected concern relations which Wena has with EGOTH[31], as the purported successor of EHC under the Luxor Lease. On the other hand, the Original Tribunal ascertained Egypt's liability under the IPPA based on Egypt's own actions and omissions, rather than investigating EHC's actions and EHC's status under Egyptian law. Hence, for the purposes of these interpretation proceedings, the Tribunal likewise finds it irrelevant whether EGOTH is the successor of EHC and whether Egypt is responsible for EGOTH's alleged actions.[32] Rather, it is decisive that the dispute as to the meaning of the term 'expropriation' is a genuine dispute between the parties of the original and the present proceedings, *i.e.,* Wena and Egypt." | **[102]** "Consequently, the Tribunal considers that the first condition of the admissibility of the Application provided for in Article 50(1) of the ICSID Convention is met, *i.e.*, the existence of a dispute between the parties relating to the meaning of the Award."

[Paras. 93, 94, 95, 96, 97, 98, 99, 100, 101, 102]

28 [88] *See* Rejoinder, Section 14.

29 [89] *Id.,* p. 53, lines 19 *et seq.*; p. 57, lines 1 *et seq.*; p. 58, lines 2 *et seq.*

30 [90] *See* Transcript, p. 94, line 24 to p. 95, line 6.

31 The Egyptian General Company for Tourism and Hotels (EGOTH) is the successor to the Egyptian Hotels Company (EHC).

32 [91] *See* Reply Memorial, Section 21.

II.1.122 OBJECT OF THE APPLICATION
See also II.1.08; II.4.984

2. The Purpose of Interpretation

[103] "[. . .] [T]he second condition for the admissibility of a request for interpretation is that the purpose of the request must be to obtain an 'interpretation' of the award. The Tribunal is mindful that the admissibility of an application for interpretation has to be balanced against the principle that an ICSID award is final and binding on the parties to the dispute. This, again, is in line with the findings of the ICJ in the *Asylum Case*,[33] where the Court stated the following in connection with the purpose of an interpretation:

> 'The real purpose of the request must be to obtain an interpretation of the judgment. This signifies that its object must be solely to obtain clarification of the meaning and the scope of what the Court has decided with binding force, and not to obtain an answer to questions not so decided. Any other construction of Article 60 of the Statute would nullify the provision of the article that the judgment is final and without appeal.'" |

[104] "Accordingly, the purpose of an interpretation is to obtain a clarification of the meaning or scope of an award. It cannot be invoked for the purpose of obtaining an answer or ruling regarding points which were not settled with binding force in the underlying decision. In this connection, the Court of Arbitration, in the *Delimitation of the Continental Shelf Case*, held:

> 'At the same time, account has to be taken of the nature and limits of the right to request from a Court an interpretation of its decision. 'Interpretation' is a process that is merely auxiliary, and may serve to explain but may not change what the Court has already settled with binding force as res judicata. It poses the question, what was it that the Court has already settled with binding force in its decision, not the question what ought the Court now decide in the light of fresh facts or fresh arguments. A request for interpretation must, therefore, genuinely relate to the determination of the meaning and scope of the decision, and cannot be used as a means for its 'revision' or 'annulment' processes of a different kind to which different considerations apply.'[34]" |

[105] "In the *Chorzów Factory Case*, the PCIJ stated that interpretation must be understood as meaning to give a precise definition of the meaning or

33 [92] *Colombia v. Peru, supra* footnote 50, p. 402 [*Request for Interpretation of the Judgment of November 20, 1950 in the Asylum Case (Colombia v. Peru)*, Judgment of November 27, 1950, 1950 ICJ Rep. 395].

34 [93] *U.K. v. France, supra* footnote 43, pp. 170 *et seq* [*Delimitation of the Continental Shelf (U.K. v. France): Interpretation of the Decision of June 30, 1977*, Decision, dated March 14, 1978, 54 ILR 139 (1978)].

scope which the Court intended to give to the judgment in question. It added:

> 'The interpretation adds nothing to the decision, which has acquired the force of res judicata and can only have binding force within the limits of what was decided in the judgment construed.'[35]" |

[106] "Thus, the purpose of interpretation is to enable the Tribunal to clarify points which had been settled with binding force in the award, without deciding new points which go beyond the limits of the award.[36]" | **[107]** "[. . .] [I]t became clear during the oral hearing that the parties agree on these legal principles.[37]"

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

I.17.1 EXPROPRIATION

3. Expropriation

[108] "Wena's Application for Interpretation concerns the Original Tribunal's finding in the operative section of the Award that:

> '. . .Egypt breached its obligations to Wena by failing to accord Wena's investments in Egypt fair and equitable treatment and full protection and security in violation of Article 2(2) of the IPPA, . . .
>
> Egypt's actions amounted to an expropriation without prompt, adequate and effective compensation in violation of Article 5 of the IPPA.'[38]" |

[109] "[. . .] Wena [. . .] requests an interpretation of the Tribunal's determination that Egypt expropriated Wena's rights in the Luxor Lease and deprived Wena of its 'fundamental rights of ownership' addressing, in particular, whether the expropriation constituted a total, permanent deprivation of Wena's rights in the Luxor Lease as well as a confirmation that the expropriation took place as of April 1, 1991, and that the result of the expropriation is such as to preclude subsequent legal actions by Egypt that presume the contrary." | **[110]** "The Tribunal is of the opinion that the issues addressed in the first part of Wena's Application are within the purpose of interpretation."

[Paras. 108, 109, 110]

35 [94] *Chorzów Factory, supra* footnote 54, p. 21.

36 [95] Schreuer, *supra* footnote 60, p. 858.

37 [96] Except for the differences mentioned above in Sections 88 *et seq*., the parties declared that there is agreement as to the legal principles and authorities, *see* footnote 72 above.

38 [97] *See* Award, Sections 134 and 135.

a. Permanent Character, Date and Consequences of Expropriation

[111] "The first branch of Wena's request [. . .] contains three points: (i) whether the expropriation constituted a total and permanent deprivation of Wena's rights in the Luxor Lease; (ii) whether the expropriation took place as of April 1, 1991; and (iii) clarification that the result of the expropriation is such as to preclude subsequent legal actions by Egypt that presume the contrary." | **[112]** "[. . .] [T]he Tribunal observes that the Award nowhere states that Egypt expropriated Wena's 'rights in the Luxor Lease'. Rather, the Award consistently refers to Wena's 'investments' and states that Egypt's actions amounted to the expropriation of Wena's 'investments'.[39]" | **[113]** "The Award makes clear that Wena's investments in question are the capital investments made by Wena in the development and renovation of the Hotels in order to operate the Hotels and to enjoy the benefits thereof in accordance with the Hotel Leases entered into with EHC." | **[114]** "Thus, the provisions of the Luxor Lease are summarized at Section 17 of the Award as follows:

> 'Pursuant to the agreement, Wena was to 'operate and manage the 'Hotel' exclusively for [its] account through the original or extended period of the 'Lease,' to develop and raise the operating efficiency and standard of the 'Hotel' to an upgraded four star hotel according to the specifications of the Egyptian Ministry of Tourism or upgratly [sic] it to a five star hotel if [Wena] so elects. . .'. The agreement provided that EHC would not interfere 'in the management and/or operation of the 'Hotel' or interfere with the enjoyment of the lease' by Wena [. . .].'[40]" |

[115] "In the Original Arbitration, Wena had claimed that 'Egypt violated the IPPA, Egyptian law and international law by expropriating Wena's investment without compensation.'[41]" | **[116]** "Egypt had responded that Wena 'cannot [. . .] claim compensation for the alleged loss of leasehold interests [. . .].'[42]" | **[117]** "The Original Tribunal disagreed. It reviewed the legal theory of expropriation, as follows:

> 'It is also well established that an expropriation is not limited to tangible property rights. As the panel in SPP v. Egypt explained, 'there is considerable authority for the proposition that contract rights are entitled to the pro-

39 [98] *See*, for example, Section 77 of the Award; here the Tribunal considered the IPPA to be the primary source of applicable law for the arbitration (Section 78 of the Award). Under Article 2(1) of the IPPA, Egypt and the United Kingdom promised to "encourage and create favourable conditions for nationals or companies of the other Contracting Party to invest capital in its territory (Section 16 of the Award). Indeed, the Tribunal established jurisdiction over Wena on the fact that Claimant has made an investment, that money was spent in the development and renovation of the Hotels and that money was paid by the Claimant, rather than any other party (Section 5 of the Award).

40 [99] In Section 18 of the Award, the Tribunal noted that the Nile Lease was almost identical to the Luxor Lease.

41 [100] *See* Award, Section 75.

42 [101] *Id.*, Section 76.

> tection of international law and that the taking of such rights involves an obligation to make compensation therefore.' Similarly, Chamber Two of the Iran-U.S. Claims Tribunal observed in the Tippets case 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, even where legal title to the property is not affected.' The chamber continued by noting: [. . .] while assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner has been deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral.'[43]" |

[118] "In its reasoning, the Original Tribunal therefore concluded that:

> '[it] had no difficulty in finding that the actions . . . described constitute such an expropriation. Whether or not it authorized or participated in the actual seizures of the Hotels, Egypt deprived Wena of its 'fundamental rights of ownership' by allowing EHC forcibly to seize the Hotels, to possess them illegally for nearly a year, and to return the Hotels stripped of much of their furniture and fixtures. Egypt has suggested that this deprivation was merely 'ephemeral' and therefore did not constitute an expropriation. The Tribunal disagrees. Putting aside various other improper action, allowing an entity (over which Egypt could exert effective control) to seize and illegally possess the Hotels for nearly a year is more than an ephemeral interference 'in the use of that property or with the enjoyment of its benefit'.'[44]" |

[119] "Thus, taking into account (i) the fact that Egypt allowed EHC to forcibly seize the Hotels on April 1, 1991 (which were not restored to Wena until nearly a year later), (ii) the vandalization of the Hotels and the removal and auction of much of the Nile Hotel's fixtures and furniture and (iii) the denial of a permanent operating license for the Luxor Hotel and withdrawal of the operating license for the Nile Hotel by the Ministry of Tourism,[45] the Original Tribunal concluded that Egypt had deprived Wena of its 'fundamental rights of ownership',[46] *i.e.*, in the given case where, as the Tribunal has stated, no tangible property rights but rather leasehold rights are at stake, Wena's rights to make use of its investments made under the Hotel Leases and to enjoy the benefits thereof in accordance with the Leases." | **[120]** "It is true that the Original Tribunal did not explicitly state that such expropriation totally and permanently deprived Wena of its fundamental rights of ownership. However, in assessing the weight of the actions described above, there was no doubt in the Tribunal's mind that the deprivation of Wena's fundamental rights of ownership was so profound that the

43 [102] *Id.*, Section 98.

44 [103] *Id.*, Section 99.

45 [104] *Id.*, Sections 53, 56, 57 and 92.

46 [105] *Id.*, Section 99.

expropriation was indeed a total and permanent one." | **[121]** "In making its decision, the Original Tribunal knew that on April 28, 1992, Wena had re-entered the Luxor Hotel (*see* section 57 of the Original Award) and operated it from that date until its final eviction on August 14, 1997 (*see* section 62 of the Original Award).[47]" | **[122]** "However, this fact had no bearing on the decision since the Tribunal found, as set forth above, that the condition in which the Luxor Hotel was returned to Wena was so poor and the conditions under which it could be operated during these years were so unsatisfactory, as compared to the situation prior to the seizure, that the temporary re-entry and continued operation of the Luxor Hotel by Wena from 1992 to 1997 did not counter the finding that Egypt's actions amounted to an expropriation." | **[123]** "That the expropriation was meant to constitute a total and permanent deprivation of Wena's investments is also reflected by the method the Tribunal used to calculate the compensation awarded. The Tribunal based its compensation award on Wena's actual investments in the two Hotels, in essence returning to Wena its total investment, and adding interest at the rate of 9% compounded quarterly from the date of expropriation to the date of the award. This interest rate was deemed appropriate by reference to long-term investments, *i.e.,* government bonds, in Egypt. In granting this compensation, the Tribunal disregarded Wena's re-entry and temporary operation of the Hotels subsequent to April 1, 1991. It considered the expropriation of Wena's rights to be total and permanent."

[Paras. 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123]

I.17.133 COMPENSATION
See also I.17.1332

[124] "Regarding the second point, even though the Original Tribunal did not state so expressly in the Award, it is also clear that such expropriation occurred as of April 1, 1991. The Original Tribunal calculated the compensation pursuant to Article 5 of the IPPA, *i.e.,* by awarding compensation amounting to the market value of the investments expropriated immediately before the expropriation.[48] The '*dies a quo*' on which the Original Tribunal based its calculation was indeed April 1, 1991.[49] Hence, the date Wena's investments were expropriated is April 1, 1991."

[Para. 124]

47 [106] By contrast Wena's management never operated the Nile Hotel again (*see* Award, Section 56).

48 [107] *See* Award, Sections 118 and 125.

49 [108] Also the Committee held that April 1, 1991 appeared implicitly as the "*dies a quo*" from the Tribunal's statement with respect to the day when the expropriation of Wena's rights occurred; *see* Section 98 of the copy of the Decision of the *ad hoc* committee dated February 5, 2002, attached to the Application as Annex 2.

II.1.121 ADMISSIBILITY OF THE APPLICATION

[125] "Finally, as to the consequences of the expropriation on Egypt's alleged actions towards Wena following the Award, even though this had not been expressed in the Award, it is clear that Egypt, as a party to the original proceedings and the present interpretation proceedings, is indeed precluded from legal actions that would presume the contrary of the Tribunal's determinations in the Award." | **[126]** "To conclude, the first branch of Wena's Application for Interpretation shall be granted."

[Paras. 125, 126]

b. Liabilities as a Consequence of Expropriation

[127] "As to the second branch of Wena's request for interpretation [. . .] *i.e.*, that a party expropriated from a given right cannot incur any liability associated with that right,[50] the Tribunal finds that this Application is outside the scope of the Original Award. Indeed, this issue was not raised at any time during the proceedings between Wena and Egypt leading up to the Award. In those proceedings, the Original Tribunal was only asked to make findings on Wena's claims that '*Egypt violated Article 2(2) of the IPPA, and other international norms, by failing to accord Wena's investments 'fair and equitable treatment' and 'full protection and security*' and '*Egypt's actions constitute an unlawful expropriation without 'prompt, adequate and effective' compensation in violation of Article 5 of the IPPA, as well as Egyptian law and other international law*.'[51] In order to decide these claims, the Original Tribunal investigated Egypt's conduct towards Wena relating to the seizures of the Hotels and found Egypt liable under Articles 2(2) and 5 of the IPPA. Therefore, it ordered Egypt to pay compensation to Wena." | **[128]** "But besides stating that Egypt's actions amounted to an expropriation under the IPPA and fixing the compensation to be paid, the Original Tribunal did not decide on any further consequences of the expropriation. In particular, the Original Tribunal did not decide on the consequences of the expropriation on the legal relationships between Wena and third parties." | **[129]** "As to Wena's argument that it could not '*anticipate that it could face rent demands for the very property that it was expropriated from*,'[52] the Tribunal again refers to the purpose of interpretation, namely, to give a clarification of what has been decided with binding force without adding new facts and arguments. It is for the parties in the initial proceedings to present their case and to establish the limits of the Award." | **[130]** "This point of view is in line with interna-

50 [109] Application, Section 48.

51 [110] *See* Award, Section 75.

52 [111] *See* Reply Memorial, Section 42.

tional jurisprudence. The Court of Arbitration stated in the *Delimitation of the Continental Shelf Case* that interpretation:

> '. . . poses the question, what was it that the Court decided with binding force in its decision, not the question what ought the Court now to decide in the light of fresh facts or fresh arguments. . .'[53]

and the ICJ stated in the *Asylum Case:*

> '. . . this question was completely left outside the submissions of the Parties. The Judgment in no way decided it, nor could it do so. It was for the Parties to present their respective claims on this point. [. . .] Interpretation can in no way go beyond the limits of the Judgment, fixed in advance by the Parties themselves in their submissions.'[54]" |

[131] "In the light of the foregoing, the Tribunal finds that the second branch of Wena's Application for Interpretation falls outside the scope of the interpretation proceedings under Article 50(1) of the ICSID Convention."

[Paras. 127, 128, 129, 130, 131]

C. Conclusion

[132] "The Tribunal concludes that Wena's Application for Interpretation is justified regarding the questions whether the expropriation was total and permanent; whether it took effect on April 1, 1991; and whether Egypt is precluded from taking legal actions that presume the contrary. By way of interpretation, the Tribunal finds that the expropriation was a total and permanent deprivation of Wena's fundamental rights of ownership, *i.e.*, its rights to make use of its investments made under the Luxor Lease and to enjoy the benefits of such investments in accordance with such Lease. The Tribunal finds further that such expropriation was effective as of April 1, 1991 and was such that Egypt, as a party to the proceedings, is precluded from taking legal actions that presume the contrary." | **[133]** "With regard to the consequences of such expropriation for Wena's legal relationships with third parties and more generally on the requested interpretation that Wena cannot incur liability to any party in connection with the expropriated rights, the Tribunal finds that this part of the Application is outside the scope of an interpretation proceeding since Wena is seeking to obtain a new ruling on issues not decided with binding force in the Award. Therefore, this branch of Wena's Application is dismissed."

[Paras. 132, 133]

53 [112] *U.K. v. France, supra* footnote 43, p. 171.

54 [113] *Colombia v. Peru, supra* footnote 50, p. 403.

II.1.9 COSTS OF JUDICIAL AND ARBITRAL PROCEEDINGS

III. COSTS

[134] "Under Article 61 (2) of the ICSID Convention, in the absence of agreement by the parties, it is the responsibility of the Tribunal to apportion the charges. As the Tribunal was satisfied that the Application for Interpretation related to certain precise points of dispute between the parties and was filed for interpretation purposes, the Tribunal considers it to be reasonable and fair that Wena bears 50 % and Egypt bears 50 % of the expenses and charges of the ICSID, including the arbitrators' fees and expenses. As to the parties' legal costs and fees, the Tribunal deems it to be appropriate that each party takes in charge its own fees and expenses."

[Para. 134]

II.4.981 INTERPRETATION OF AWARD

IV. DECISION OF THE TRIBUNAL

[135] "For these reasons, THE ARBITRAL TRIBUNAL, unanimously," | **[136]** "DECLARES the Application for Interpretation of the Award by Wena to be admissible as far as it relates to the question whether the expropriation constituted a total and permanent deprivation of Wena's fundamental rights of ownership as of April 1, 1991, and whether Egypt is precluded from taking legal actions that presume the contrary;" | **[137]** "DECLARES, by way of interpretation of the Award, that (i) the term 'expropriation' used in Section 135 of the Award in connection with the awarding of damages and interest to Wena in Section 136 of the Award is to be understood to mean that the expropriation constituted a total and permanent deprivation of Wena's fundamental rights of ownership, *i.e.*, its rights to make use of its investments made under the Luxor Lease and to enjoy the benefits of such investments in accordance with such Lease; (ii) said expropriation occurred as of April 1, 1991; and (iii) subsequent legal actions by Egypt, as a party to the arbitration, that presume the contrary are precluded." | **[138]** "DECLARES the Application for Interpretation of the Award by Wena to be inadmissible as far as it relates to the consequences of the expropriation on Wena's legal relationships with third parties." | **[139]** "DECLARES that Wena and Egypt shall each bear 50 % of the arbitration costs; and that each party shall take in charge its own legal fees and expenses."

[Paras. 135, 136, 137, 138, 139]

Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ARB/03/29, Decision on Jurisdiction, 14 November 2005

Original: English

Present: Kaufmann-Kohler, *President of the Tribunal*
Berman, Böckstiegel, *Arbitrators*

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II.4.911 REQUEST FOR ARBITRATION
See also I.17.011

I. THE DISPUTE

[2] "The Claimant, Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. A.S. ('Bayindir') is a company incorporated and existing under the laws of the Republic of Turkey. [. . .]" | **[3]** "The Claimant is part of the Bayindir group

* Summaries prepared by Christina Knahr, MPA, 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/ARB0329Decisionjurisdiction.pdf>. Original footnote numbers are indicated in brackets: [ ].

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

of companies. It is engaged in the business of construction of motorways and other larger infrastructure projects in Turkey and abroad." | **[10]** "The National Highway Authority ('NHA') is a public corporation established by the Pakistani Act No XI (National Highway Authority Act) of 1991 to assume responsibility for the planning, development, operation and maintenance of Pakistan's national highways and strategic roads. Although controlled by the Government of Pakistan, NHA is a body corporate in Pakistan with the right to sue and to be sued in its own name [. . .]" | **[11]** "Among other projects, NHA has planned the construction of a six-lane motorway and ancillary works known as the 'Pakistan Islamabad-Peshawar Motorway' (the 'M1 Project')." | **[12]** "In 1993, NHA and Bayindir entered into an agreement for the construction of the M1 Project (the '1993 Contract') [. . .]" | **[13]** "Disputes arose in connection with the 1993 Contract, which NHA and Bayindir resolved in 1997. [. . .]" | **[14]** "On 3 July 1997, the Parties entered into a new contract, [. . .] (the '1997 Contract') [. . .]. The 1997 Contract incorporated the 1993 Contract 'in its entirety' with some 'overriding conditions' agreed by the parties in the Memorandum of Agreement signed on 29 March 1997." | **[15]** "[. . .] [T]he Tribunal will simply use the term 'Clause of the Contract' to mean the relevant clause of the (FIDIC) General Conditions of Contract (Conditions of Contract—Part I incorporated in the 1993 agreement), as possibly supplemented by the Conditions of Particular Applications (Conditions of Contract—Part II incorporated in the 1993 agreement), as revived and possibly amended by the 1997 Contract. The Tribunal will refer to the (revived) contractual relationship between the parties as the 'Contract'." | **[16]** "The Contract is governed by the laws of Pakistan." | **[22]** "Between September 1999 and 20 April 2001, Bayindir submitted several claims regarding payment and four claims for extension of time (EOT) invoking different omissions on the part of Pakistan (in particular delays in the construction work resulting from late hand over of the land by Pakistan and/or NHA[1])." | **[29]** "On 23 April [. . .] NHA served a 'Notice of Termination of Contract' upon Bayindir requiring the latter to hand over possession of the site within 14 days [. . .]. Thereafter, the Pakistani army surrounded the site and Bayindir's personnel were evacuated." | **[30]** "On 23 December 2002 NHA concluded a contract for the 'Completion of Balance Works of Islamabad—Peshawar Motorway (M-1) Project' with 'M/s Pakistan Motorway Contractors Joint Venture (PMC JV)' [. . .]." | **[36]** "The present proceedings are based on the 'Agreement Between the Republic of Turkey and the Islamic Republic of Pakistan Concerning the Reciprocal Promotion and Protection of Investments' of 16 March 1995 (the 'BIT'), which entered into force on 3 September 1997." | **[38]** "On 15 April 2002, Bayindir submitted a Request for

1 [6] During the same period, Bayindir also issued several claims for delay in the settlement of Bayindir's monthly progress payments (interim payment certificates).

Arbitration (the 'Request' or 'RA') to the International Centre for the Settlement of Investment Disputes ('ICSID' or the 'Centre') [. . .]."

[Paras. 2, 3, 10, 11, 12, 13, 14, 15, 16, 22, 29, 30, 36, 38]

II. PRELIMINARY CONSIDERATIONS

I.1.16 TREATY INTERPRETATION
See also I.14.11; II.4.92

A. Notification of the Dispute

[80] "Article VII of the BIT contains the following dispute settlement clause:

> 1. Disputes between one of the Parties and an investor of the other Party, in connection with his investment, shall be notified in writing, including a detailed information, by the investor to the recipient Party of the investment. As far as possible, the investor and the concerned Party shall endeavour to settle the disputes by consultations and negotiations in good faith.
>
> 2. If these disputes cannot be settled in this way within six months following the date of the written notification mentioned in paragraph 1, the dispute can be submitted, as the investor may choose, to:
>
> > (a) the International Centre for Settlement of Investment Disputes (ICSID) set up by the 'Convention on Settlement of Investment Disputes Between States and nationals of other States'; [in case both Parties become signatories of this Convention]
> >
> > (b) an ad hoc court of arbitration laid down under the Arbitration Rules of Procedure of the United Nations Commission for International Law (UNCITRAL), [in case both Parties are members of UN]
> >
> > (c) the Court of Arbitration of the Paris International Chamber of Commerce, provided that, if the investor concerned has brought the dispute before the courts of justice of the Party that is a party to the dispute and a final award has not been rendered within one year." |

[95] "[. . .] In the Tribunal's view, the requirement of notice contained in Article VII of the BIT should not be interpreted as a precondition to jurisdiction." | **[96]** "Determining the real meaning of Article VII of the BIT is a matter of interpretation. Pursuant to the general principles of interpretation set forth in Article 31 of the Vienna Convention on the Law of Treaties, and consistently with the practice of previous ICSID tribunals dealing with notice provisions[2], this Tribunal considers that the real meaning of Article VII of the BIT is to be determined in the light of the object and purpose of that provision." | **[98]** "The Tribunal notes that Pakistan has not denied

2 [28] See, for instance, *L.E.S.I. v. Algeria* [*supra* Fn. 26], § 32. In *L.E.S.I. v. Algeria* the tribunal considered the purpose of the notice provision to hold that one could not require that the notice contains more than the general framework of the claim: "*Il n'est nulle part exigé que cette requête comprenne d'autres éléments, qui seraient de toute façon étrangers au but poursuivi par la règle*" (see *L.E.S.I. v. Algeria* [*supra* Fn. 26], § 32(iii)).

that the main purpose of Article VII of the BIT is to provide for the possibility of a settlement of the dispute. In the Tribunal's view, the purpose of the notice requirement is to allow negotiations between the parties which may lead to a settlement. Significantly, Article VII(2) does not read, if these disputes 'are not settled' within six months but 'cannot be settled' within six months, which wording implies an expectation that attempts at settlement are made. Faced with a similar situation, the tribunal in *Salini v. Morocco* refused to adopt a formalistic approach and stated that an attempt to reach amicable settlement implies merely 'the existence of grounds for complaint and the desire to resolve these matters out-of court'[3]." | **[99]** "[. . .] In the specific setting of investment arbitration, international tribunals tend to rely on the non-absolute character of notice requirements to conclude that waiting period requirements do not constitute jurisdictional provisions but merely procedural rules that must be satisfied by the Claimant[4]:

> Compliance with such a requirement is, accordingly, not seen as amounting to a condition precedent for the vesting of jurisdiction.[5]" |

[100] "The Tribunal agrees with the view that the notice requirement does not constitute a prerequisite to jurisdiction. Contrary to Pakistan's position, the non-fulfilment of this requirement is not 'fatal to the case of the claimant' (Tr. J., 222:34). As Bayindir pointed out, to require a formal notice would simply mean that Bayindir would have to file a new request for arbitration and restart the whole proceeding, which would be to no-one's advantage (Tr. J., 184:18 *et seq*.)." | **[101]** "The Tribunal is reinforced in this conclusion by the undisputed fact that on 4 April 2002, Bayindir notified the Government of Pakistan that it was compelled to commence ICSID arbitration regarding the 'serious disputes in connection with the investments made by Bayindir' given that its efforts to negotiate had 'failed to bear fruit' (Exh. [Bay.] B-40). Pakistan did not respond to this letter by pointing to the requirement of notice and the obligation to endeavour to reach a settlement contained in Article VII of the BIT. Similarly, in its first response to Bayindir's RA, Pakistan did not rely on Article VII of the BIT but heavily insisted on the fact that Bayindir 'had already filed three (3) suits in the courts of law in Pakistan'[6]. It was the ICSID Secretariat, on 14 June 2002, which raised the issue asking Bayindir to provide further information and documentation regarding 'the fulfilment of the condition set

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3 [30] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction of 23 July 2001, § 20 as translated in 42 ILM 609 (2003); (Exh. [Pak]L-6 = Exh. [Bay]CLEX 15); also available at http://www.worldbank.org/icsid/cases/salini-decision.pdf.

4 [31] *Ronald S. Lauder v. The Czech Republic*, UNCITRAL Final Award, 3 September 2001, § 187 (Exh. [Bay]CLEX 30); available at http://www.mfcr.cz/cps/rde/xbcr/mfcr/FinalAward_pdf.pdf.

5 [32] *SGS Société Générale de Surveillance SA v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction of 6 August 2003, § 184 (Exh. [Bay]CLEX 9 = Exh. [Pak]L-7), 42 ILM 1290 (2003); also available at http://www.investmentclaims.com/decisions/SGS-Pakistan-Jurisdiction-6Aug2003.pdf.

6 [33] Letter of Pakistan to the Centre of 23 May 2002.

forth at the beginning of Article VII(2) [. . .] as it appears that the first notice mentioning the BIT was made on April 4, 2002'[7]. Two weeks later, on 28 June 2002, Pakistan wrote to the Centre to challenge its jurisdiction without making any mention of the requirements of Article VII of the BIT[8]." | **[102]** "The Tribunal further notes that Pakistan made no proposal to engage in negotiations with Bayindir following Bayindir's notification of 4 April 2002, which made an explicit reference to the failure of the efforts to negotiate. In the Tribunal's view, if Pakistan had been willing to engage in negotiations with Bayindir, in the spirit of Article VII of the BIT, it would have had many opportunities to do so during the six months following the notification of 4 April 2002[9]. Along the lines of the award rendered in Lauder v. The Czech Republic, the Tribunal is prepared to find that preventing the commencement of the arbitration proceedings until six months after the 4 April 2002 notification would, in the circumstances of this case, amount to an unnecessary, overly formalistic approach which would not serve to protect any legitimate interests of the Parties[10] and hold 'that the six-month waiting period in [the BIT] does not preclude it from having jurisdiction in the present proceedings'[11]."

[Paras. 80, 95, 96, 98, 99, 100, 101, 102]

III. JURISDICTION *RATIONE MATERIAE*

A. Definition of Investment

II.4.9211 QUALIFICATION AS INVESTMENT
See also I.17.011

1. Investment under Art. I (2) of the BIT

[108] "[. . .] In and of itself the representation that Bayindir was not making an investment given for the purposes of obtaining an authorisation by the Board of Investment does not mean that the activity of Bayindir does not qualify as an investment under Pakistani laws. Moreover, Pakistan does not set forth any domestic laws or regulations providing for a specific defi-

7 [34] Letter of the Centre to Bayindir of 14 June 2002.

8 [35] Letter of Pakistan to the Centre of 28 June 2002. In fact, Pakistan invoked Article VII of the BIT for the first time in a letter of the Attorney General of 22 December 2003 requesting the Centre to recall the decision to register the RA. [Following the Centre's letter of 14 June 2002, on 8 July 2002 NHA filed an unsolicited response referring for the first time to Article VII of the BIT noting that "no mention of the BIT was ever made by Bayindir 'the Contractor' in their correspondence regarding amicable settlement of disputes" and emphasizing that Bayindir letter of 4 April was addressed to Pakistan, "and not to NHA". It was only in the beginning of 2003 that NHA relied for the first time on Article VII of the BIT (see letter of NHA to the Centre of 2 January 2003).]

9 [36] The Tribunal notes that in *Impregilo*, "immediately after the registration of Impregilo's first request for arbitration by ICSID, negotiations took place between the Parties on the initiative of the Pakistan Minister of Finance" (*Impregilo v. Pakistan* [*supra* No. 74], § 44).

10 [37] *Lauder v. Czech Republic* [*supra* Fn. 31], §§ 189-190.

11 [38] *Lauder v. Czech Republic* [*supra* Fn. 31], § 191.

nition of investment." | **[109]** "[. . .] [T]he Tribunal cannot see any reason to depart from the decision of the tribunal in *Salini v. Morocco* holding that 'this provision [i.e., the requirement of conformity with local laws] refers to the validity of the investment and not to its definition'[12]. The mere fact that in *Salini* the phrase 'in accordance with' qualified the words 'assets invested' and not the term 'investment' is not a sufficient basis to distinguish *Salini* [. . .]. Indeed, the *Salini* holding refers explicitly to the 'investment' and not to the 'assets invested'." | **[110]** "[. . .] [T]he Tribunal considers that the reference to the 'hosting Party's laws and regulations' in Article I(2) of the Treaty could not in any case oust the Tribunal's jurisdiction in the present case." | **[111]** "Accordingly, the question boils down to whether Bayindir made an investment within the meaning of Article I(2) of the BIT. Before listing a non exhaustive series of examples, Article I(2) provides as a general definition that investment 'shall include every kind of assets'." | **[112]** "[. . .] Bayindir contends that the indication 'that investment includes 'every kind of asset' suggest[s] that the term embraces everything of economic value, virtually without limitation' (C-Mem. J., p. 17, § 57)." | **[113]** "The Tribunal agrees with Bayindir that the general definition of investment of Article I(2) of the Treaty is very broad. On a comparative basis, it has been suggested that the reference to 'every kind of asset' is '[p]ossibly the broadest' among similar general definitions contained in BITs[13]." | **[115]** "Bayindir alleges that it has trained approximately 63 engineers, and provided significant equipment and personnel to the Motorway." | **[116]** "On the facts of the case, this cannot be seriously disputed. Bayindir's contribution in terms of know how, equipment and personnel clearly has an economic value and falls within the meaning of 'every kind of asset' according to Article I(2) of the BIT." | **[119]** "The very fact that a part of the price is paid in advance has in and of itself no bearing on the existence of a financial contribution. In any event, Pakistan's contention overlooks the fact that Bayindir provided bank guarantees equivalent to the amount of the Mobilisation Advance payable to NHA 'on his first demand without whatsoever right of objection on our part and without his first claim[ing] to the Contractor' [. . .]. Specifically, Pakistan did not dispute Bayindir's allegation that it 'has incurred bank commission charges in excess of USD 11 million' (C-Mem. J., p. 19 § 33)." | **[120]** "Under these circumstances, the Tribunal concludes that Bayindir made a substantial financial contribution to the Project." | **[121]** "Considering Bayindir's contribution both in terms of know how, equipment and personnel and in terms of injection of funds, the Tribunal considers that Bayindir did contribute 'assets' within the

12 [40] *Salini v. Morocco* [*supra* No. 98], § 46. Neither the fact that the regularity-validity of the investment under the host state law is specifically dealt with in another provision of the Treaty (namely Article II(1) and (2)) nor the fact that in *Salini* the provision qualified the words 'assets invested' and not 'the term investment', provides sufficient grounds to depart from the *Salini* reasoning.

13 [42] N. RUBINS, The Notion of 'Investment' in International Investment Arbitration, in: N. Horn (ed), Arbitrating Foreign Disputes, The Hague, 2004, p. 292.

meaning of the general definition of investment set forth in Article I(2) of the BIT."

[Paras. 108, 109, 110, 111, 112, 113, 115, 116, 119, 120, 121]

2. Investment under Article 25 of the ICSID Convention

[128] "[. . .] The construction of a highway is more than construction in the traditional sense. As noted by the tribunal in *Aucoven*, the construction of a highway, 'which implies substantial resources during significant periods of time, clearly qualifies as an investment in the sense of Article 25 of the ICSID Convention'[14]." | **[129]** "The Tribunal is reinforced in this conclusion by the fact [. . .] that in the recent *Impregilo* case, which regarded a similar dispute concerning the construction of a dam, Pakistan did not challenge the existence of an investment under Article 25 of the ICSID Convention.[15]" | **[130]** "Both parties relied upon previous decisions by ICSID Tribunals to define the notion of investment under Article 25 of the ICSID Convention and in particular upon the decision in *Salini v. Morocco*[16]. The Tribunal in *Salini* held that the notion of investment presupposes the following elements: (a) a contribution, (b) a certain duration over which the project is implemented, (c) sharing of the operational risks, and (d) a contribution to the host State's development, being understood that these elements may be closely interrelated, should be examined in their totality,[17] and will normally depend on the circumstances of each case[18]. In the following paragraphs the Tribunal will examine these conditions in turn." | **[131]** "Firstly, to qualify as an investment, the project in question must constitute a substantial commitment on the side of the investor. In the case at hand, it cannot be seriously contested that Bayindir made a significant contribution, both in terms of know how, equipment and personnel and in financial terms [. . .]." | **[132]** "Secondly, to qualify as an investment, the project in question must have a certain duration. The element of duration is the paramount factor which distinguishes investments within the scope of the ICSID Convention and ordinary commercial transactions. When denying the qualification of investment to an ordinary sales contract (even if complex), the Tribunal in *Joy Mining* expressly distinguished *Salini v. Morocco* on the ground that '[i]n that case, however, a major project for the construction of a highway was involved and this indeed required not only

14 [45] *Autopista Concesionada de Venezuela v. Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction, 27 September 2001, § 101 (Exh. [Bay]CLEX 14); also available at http://www.worldbank.org/icsid/cases/decjuris.pdf.

15 [46] See *Impregilo v. Pakistan* [*supra* No. 74], § 111(a).

16 [47] *Salini v. Morocco* [*supra* No. 98], *passim*.

17 [48] *Id.* See also *L.E.S.I. v. Algeria* [*supra* Fn. 26], § 13 (iv).

18 [49] *Joy Mining Machinery Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Decision on jurisdiction of 6 August 2004, § 53 *in fine* (Exh. [Pak]L-11); available at http://www.worldbank.org/icsid/cases/joy-mining-award.pdf.

heavy capital investment but also services and other long-term commitments.'[19]" | **[133]** "Bayindir points out that the Contract had an initial duration of three years followed by a defect liability period of one year and a maintenance period of four years against payment. It is further undisputed that the project had been underway for three years and that Bayindir was granted a contractual extension of an additional twelve months. Contracts over similar periods of time have been considered to satisfy the duration test for an investment[20]. Since Pakistan has not contended that the project was not sufficiently extended in time to qualify as an investment, the Tribunal considers that this requirement is met. More generally, as mentioned by the tribunal in *L.E.S.I. v. Algeria*, one cannot place the bar very high, as (a) experience shows—and a preliminary assessment of the facts of the case seem to confirm—that this kind of project more often than not requires time extensions, and (b) the duration of the contractor's guarantee should also be taken into account[21]." | **[134]** "Thirdly, to qualify as an investment, the project should not only provide profit but also imply an element of risk. Pakistan's argument in this respect is that 'the risk engaged was minimal because Bayindir had received such a substantial mobilisation advance, which it was to retain (proportionally reduced) until the end of the Contract' (Mem. J., § 2.19, p. 16)." | **[135]** "Bayindir contested this argument, *inter alia*, on the ground that it had placed itself at considerable risk by securing first demand bank guarantees, and by opening itself to the danger of an unlawful call on the guarantees. More generally [. . .] Bayindir relied on the following passage of the *Salini* decision:

> It does not matter in this respect that these risks were freely taken. It also does not matter that the remuneration of the Contractor was not linked to the exploitation of the completed work. A construction that stretches out over many years, for which the total cost cannot be established with certainty in advance, creates an obvious risk for the Contractor.[22]" |

[136] "The Tribunal cannot agree with Pakistan's objection. Besides the inherent risk in long-term contracts, the Tribunal considers that the very existence of a defect liability period of one year and of a maintenance period of four years against payment, creates an obvious risk for Bayindir. Under these circumstances, the Tribunal is of the opinion that Bayindir's participation in the risks of the operation was significant." | **[137]** "Lastly, relying on the preamble of the ICSID Convention, ICSID tribunals generally consider that, to qualify as an investment, the project must represent a sig-

19 [50] *Joy Mining v. Egypt* [*supra* Fn. 49], § 62.

20 [51] *Salini v. Morocco* [*supra* No. 98], §§ 54-55, citing D. CARREAU *et al.*, Droit International Economique, pp. 558-78 (3d ed., 1990); C.H. SCHREUER, Commentary on the ICSID Convention (1996) 11 ICSID Rev—FILJ 318 et seq).

21 [52] *L.E.S.I. v. Algeria* [*supra* Fn. 26], § 14(ii) *in fine*: "*On ne peut de toute façon pas se montrer excessivement rigoureux tant l'expérience apprend que des objets du genre de celui qui est en cause justifient souvent des prolongations, sans parler de la durée de la garantie.*"

22 [53] *Salini v. Morocco* [*supra* No. 98], § 56 referred to in C-Mem. J.

nificant contribution to the host State's development[23]. In other words, investment should be significant to the State's development. As stated by the tribunal in *L.E.S.I*, often this condition is already included in the three classical conditions set out in the 'Salini test'[24]. In any event, in the present case, Pakistan did not challenge the numerous declarations of its own authorities emphasising the importance of the road infrastructure for the development of the country[25]." | **[138]** "For all the foregoing reasons, the Tribunal concludes that Bayindir made an investment both under Article I(2) of the BIT and Article 25 of the ICSID Convention. Accordingly, Pakistan's jurisdictional challenge that there is no investment fails."

[Paras. 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138]

II.4.9215 CONTRACT CLAIMS—TREATY CLAIMS

B. Contract Claims—Treaty Claims

[148] "As a preliminary matter, the Tribunal notes that Pakistan accepts that 'treaty claims are juridically distinct from claims for breach of contract, even where they arise out of the same facts' (Reply J., p. 18, § 2.38). The Tribunal considers that this principle is now well established[26]. The ad hoc committee in *Vivendi v. Argentina* described this 'conceptual separation'[27] as follows:

> A particular investment dispute may at the same time involve issues of the interpretation and application of the BIT's standards and questions of contract.[28] Whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law in the case of the BIT, by international law, in the case of the Concession Contract, by the proper law of the contract.[29]" |

[149] "The *Vivendi* ad hoc Committee went on to state:

> [W]here '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

23 [54] The significance of the contribution, an element that was not contemplated in *Salini*, was added in *Joy Mining v. Egypt* [*supra* Fn. 49], § 53.

24 [55] *L.E.S.I. v. Algeria* [*supra* Fn. 26], § 13(iv) *in fine*.

25 [56] See for instance CX 122 referred to in C-Mem. J. p. 14 § 46.

26 [61] See, for instance, *Siemens v. Argentina* [*infra* Fn. 80], § 180; *AES Corp. v. Argentina* [supra No. 76], §§ 90 *et seq*.

27 [62] B. CREMADES and D.J.A CAIRNS, Contract and Treaty Claims and Choice of Forum in Foreign Investment Disputes, in: T. Weiler (Ed) International investment law and arbitration: leading cases from the ICSID, NAFTA, bilateral treaties and customary international law, London, 2005, p. 331.

28 [63] *Compañia de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic*, Decision of Annulment, 3 July 2002, § 60 (Exh. [Pak]L-5 = Exh. [Bay]CLEX16); ICSID Review (2004), vol. 19, No. 1, 41 ILM 1135 (2002), also available at http://www.worldbank.org/icsid/cases/vivendi_annul.pdf

29 [64] *Ibid.*, § 96.

> existence of an exclusive jurisdiction clause [or, for present purpose, an arbitration clause[30]] in a contract between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard.[31]

And:

> 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." |

[150] "In the present case, it is undisputed that the 1997 Contract contains a dispute settlement clause providing for arbitration under the 1940 Arbitration Act of Pakistan." | **[151]** "As a matter of principle, this arbitration clause is irrelevant for the purpose of the jurisdiction of this Tribunal over the Treaty Claims[32]. [. . .]" | **[157]** "The Tribunal is however of the opinion that the fact that a State may be exercising a contractual right or remedy does not of itself exclude the possibility of a treaty breach [. . .]." | **[166]** "Under these circumstances, the Tribunal holds that the present case is not a case where the essential basis of the claims is purely contractual. Hence, there is no reason to depart from the principle of the independence of treaty claims and contract claims as it was expressed by the ad hoc Committee in *Vivendi*." | **[167]** "In conclusion, the Tribunal considers that when the investor has a right under both the contract and the treaty, it has a self-standing right to pursue the remedy accorded by the treaty. The very fact that the amount claimed under the treaty is the same as the amount that could be claimed (or was claimed) under the contract does not affect such self-standing right." | **[171]** "In the Tribunal's opinion, one should distinguish between Bayindir's tactical choice to abandon the Contract Claims at the outset of the jurisdictional hearing and Bayindir's fundamental choice to pursue the Treaty Claims. It is evident that Bayindir's initial choice to raise Contract Claims and its late withdrawal of these Claims may have engendered a significant amount of useless work for both the Tribunal and Pakistan. Whether Bayindir's late abandonment of the Contract Claims should have an incidence on the allocation of costs will be addressed below [. . .]." | **[172]** "The same can be said of Bayindir's contention that, on the basis of the 'relevant limitation periods under the law of Pakistan, there are no contract claims being maintained by the claimant in arbitration or in legal proceedings in Pakistan nor is there a possibility that any contract claims could be maintained because they are out of time' (Tr. J., 229:7-11). If the Tribunal can only regret that this submission was made at the very

30 [65] See, for instance 90-91.

31 [66] *Vivendi v. Argentina* [*supra* No. 148], § 101. See also *Impregilo v. Pakistan* [*supra* No. 74], § 225.

32 [67] See also *Camuzzi International S.A. v. Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Jurisdiction of 11 May 2005, available at http://www.worldbank.org/icsid/cases/camuzzi-en.pdf, § 89, where the tribunal seems to limit the relevance of the contractual forum only to "purely contractual questions having no effect on the provisions of the Treaty".

end of the jurisdictional hearing, this does not make Bayindir's pursuit of the Treaty Claims abusive." | **[173]** "Hence, the Tribunal dismisses Pakistan's challenge to its jurisdiction to the extent it is based on an alleged abuse of process."

[Paras. 148, 149, 150, 151, 157, 166, 167, 171, 172, 173]

II.1.41 BURDEN OF PROOF
See also II.4.92

C. Burden of Proof

[190] "In accordance with accepted international (and general national) practice, a party bears the burden of proving the facts it asserts. In *Impregilo*, the tribunal took it for granted that the Claimant had to satisfy 'the burden of proof required at the jurisdictional phase' and make 'the *prima facie* showing of Treaty breaches required by ICSID Tribunals'.[33]" | **[191]** "[. . .] Bayindir declared that it did not accept this passage of the *Impregilo* decision (Tr. J., 13:34-36). [. . .] Bayindir expressed the following view:

> [I]t is necessary for this objection to be successful to the Republic of Pakistan to say on this preliminary documentation that even if [Bayindir] establish the matters and the characterisation of those matters which [it asserts], it becomes untenable to make out [the Treaty] breach. (Tr. J., 156:24-30)" |

[192] "In the Tribunal's understanding, this approach does not alter the fact that [. . .] Bayindir has the burden of demonstrating that its claims fall within the Tribunal's jurisdiction." | **[193]** "In their written submissions, the parties formulated the test which the Tribunal is to apply in determining jurisdictional disputes in various ways. They made extensive reference to decisions of the International Court of Justice, ICSID tribunals and other international tribunals. The gap between their positions appeared to narrow down through that written process and [. . .] counsel for both parties accepted the following test stated by the tribunal in Impregilo (Tr. J., 157:13 et seq. [Bayindir]; 198:31 et seq. [Pakistan]):

> [T]he Tribunal has considered whether the facts as alleged by the Claimant in this case, if established, are capable of coming within those provisions of the BIT which have been invoked.[34]" |

[194] "The tribunal in *Impregilo* went on to explain that, applying the approach set out above, the tribunal has to determine whether the 'Treaty Claims fall within the scope of the BIT, assuming pro tem that they may be

33 [75] *Impregilo v. Pakistan* [*supra* No. 74], § 79.

34 [76] *Impregilo v. Pakistan* [*supra* No. 74], § 254, emphasis in the original.

sustained on the facts'[35]. In other words, the Tribunal should be satisfied that, if the facts or the contentions alleged by Bayindir are ultimately proven true, they would be capable of constituting a violation of the BIT." | **[195]** "The Tribunal notes that the approach has been followed by several international arbitration tribunals deciding jurisdictional objections by a respondent state against a claimant investor, including *Methanex v. USA, SGS v. Philippines*[36]*, Salini v. Jordan*[37]*, Siemens v. Argentina*[38] *and Plama v. Bulgaria*[39]. In the last of these cases, the tribunal held that 'if on the facts alleged by the Claimant, the Respondent's actions might violate the [BIT], then the Tribunal has jurisdiction to determine exactly what the facts are and see whether they do sustain a violation of that Treaty'[40]. Likewise, the tribunal in Impregilo considered that 'it must not make findings on the merits of those claims, which have yet to be argued, but rather must satisfy itself that it has jurisdiction over the dispute, as presented by the Claimant'[41]." | **[196]** "The Tribunal is in agreement with this approach, which strikes a helpful balance between the need 'to ensure that courts and tribunals are not flooded with claims which have no chance of success or may even be of an abusive nature' on the one side, and the necessity 'to ensure that, in considering issues of jurisdiction, courts and tribunals do not go into the merits of cases without sufficient prior debate' on the other." | **[197]** "Accordingly, the Tribunal's first task is to determine the meaning and scope of the provisions which Bayindir invokes as conferring jurisdiction and to assess whether the facts alleged by Bayindir fall within those provisions or are capable, if proved, of constituting breaches of the obligations they refer to[42]. In performing this task, the Tribunal will apply a *prima facie* standard, both

35 [77] *Impregilo v. Pakistan* [*supra* No. 74], § 263. In this respect, the Tribunal agrees with the observation in *United Parcel Service v. Government of Canada* that "the reference to the facts alleged being 'capable' of constituting a violation of the invoked obligations, as opposed to their 'falling within' the provisions, may be of little or no consequence. (*United Parcel Service v. Government of Canada* (NAFTA), Decision on Jurisdiction, 22 November 2002, § 36; available at http://www.investmentclaims.com/decisions/UPS-Canada-Jurisdiction-22Nov2002.pdf.)

36 [78] *Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction of 29 January 2004, § 29 (Exh. [Pak]L-9); available at http://www.worldbank.org/icsid/cases/SGSvPhil-final.pdf.

37 [79] *Salini Costruttori S.p.A and Italstrade S.p.A v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Award of 15 November 2004, §§ 31 *et seq*. (Exh. [Pak]L-12); also available at http://www.worldbank.org/icsid/cases/salini-decision.pdf.

38 [80] *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction of 3 August 2004 (Exh. [Pak]L-10); available at http://www.asil.org/ilib/Siemens_Argentina.pdf, § 180: "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."

39 [81] *Plama Consortium Limited v. The Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005, § 119; available at http://www.worldbank.org/icsid/cases/plama-decision.pdf.

40 [82] *Plama v. Bulgaria* [*supra* Fn. 81], § 132.

41 [83] *Impregilo v. Pakistan* [*supra* No. 74], § 237.

42 [84] Contrary to the tribunal in *L.E.S.I.*, this Tribunal will not simply verify that the Claimant invokes treaty breaches (see *L.E.S.I. v. Algeria* [*supra* Fn. 26], § 25.4. The Tribunal observes that a simi-

to the determination of the meaning and scope of the BIT provisions and to the assessment whether the facts alleged may constitute breaches. If the result is affirmative, jurisdiction will be established, but the existence of breaches will remain to be litigated on the merits."

[Paras. 190, 191, 192, 193, 194, 195, 196, 197]

I.17.22 MFN-TREATMENT

D. MFN-Clause

[205] "Pakistan [. . .] contends that MFN claims 'are predominantly about regulatory action where a local investor or a foreign investor is offered better treatment, i.e., a more preferable regulatory treatment than the foreign investor', which is clearly not the case of Bayindir (Tr. J., 100:24-30). In other words, the obligation arising out of the most favourable treatment clause concerns 'regulatory protection not the exercise of discretion where no legal obligation exists', in particular in contractual matters:

> The periods for the completion of the project and the employer's remedies for a failure to complete on time, just like questions of remuneration, are matters that fall within the scope of a given construction contract. [. . .] The fact that NHA may not have terminated contracts in other cases is wholly irrelevant. (Tr. J. 96:11-22)" |

[206] "The Tribunal disagrees. The mere fact that Bayindir had always been subject to exactly the same legal and regulatory framework as everybody else in Pakistan does not necessarily mean that it was actually treated in the same way as local (or third countries) investors. In other words, as is evident from the broad wording of Article II(2) of the BIT, the treatment the investor is offered under the MFN clause is not limited to 'regulatory treatment'[43]." | **[207]** "Hence, the Tribunal will verify whether the facts alleged by Bayindir fall within this broad wording of the MFN clause or would be capable if proved of constituting breaches asserted. [. . .]" | **[210]** "This Tribunal notes that the decisions cited in both the *Hostages* and *Nicaragua* cases were concerned with decisions *on the merits*, to which the corresponding standard of proof therefore applied. The position is obviously different where, as here, the tribunal is merely applying a *prima facie* standard for the purpose of determining whether it has jurisdiction." | **[211]** "Accordingly, irrespective of the evidentiary weight of these press reports on the merits, the Tribunal considers that they constitute a sufficient basis for the purpose of establishing jurisdiction. Additional elements support this *prima fa*cie basis. Indeed, in connection with the Constitutional Petition, Pakistan sub-

lar approach was adopted by the Tribunal in Consortium *RFCC v. Royaume du Maroc*, Decision on jurisdiction, §§ 70-71; available at http://www.investmentclaims.com/decisions/-Consortium-Morocco-Jurisdiction-16Jul2001.pdf).

43 [85] See also the developments regarding the scope of the obligation of fair and equitable treatment (see *infra* NNo. 240-240) [sic].

mitted that the 1997 Contract was a 'bonanza' for Bayindir and was 'highly favorable to the petitioner and against the [. . .] economic and social interests of Pakistan' (Exh. [Bay.] CX 30). Moreover, Bayindir's alleged expulsion appears to have been decided after reports by the World Bank indicating that the most economic course of action would be to stop the M1 Project (see *infra* No. 247). Whatever the weight that they may carry when the Parties will have fully briefed the merits and presented their evidence, at this preliminary stage these elements are a sufficient basis to establish jurisdiction."

[Paras. 205, 206, 207, 210, 211]

1. More Favorable Timetable

[212] "Bayindir alleges that Pakistan breached the MFN clause because it awarded PMC JV, the local contractor that replaced Bayindir, a four-year extra 'time and space', while it was itself expelled having requested an EOT for a much shorter period. It also argues that, although the project is still not terminated, the local contractor remains in place and continues to benefit from Pakistan's leniency as to delays." | **[213]** "Having concluded that the MFN clause is not limited to regulatory treatment [. . .], it is clear that awarding an extended timetable to the local investor can fall within Article II(2) of the BIT." | **[214]** "Pakistan objects that:

> [t]he periods for the completion of the project and the employer's remedies for a failure to complete on time, just like questions of remuneration, are matters that fall within the scope of a given construction contract. They are not matters of a treaty. (Tr. J., 96:11 *et seq*.)" |

[215] "The Tribunal can certainly agree with the first sentence. However, the very fact that these questions are governed by specific contractual provisions does not necessarily mean that they have no relevance in the framework of a treaty claim. One cannot seriously dispute that a State can discriminate against an investor by the manner in which it concludes an investment contract and/or exercises the rights thereunder. Any other interpretation would consider treaty and contract claims as mutually exclusive, which would be at odds with the well-established principles deriving from the distinction between treaty and contract claims as discussed above [. . .]." | **[216]** "Pakistan's main contention in this respect is that Bayindir's claim is 'untenable', in particular because '[o]ther projects must be examined on their merits and in the light of their factual and contractual context' (Reply J., p. 71, § 4.96). *Prima facie*, this argument may well apply to Bayindir's contention that it was the only contractor expelled when 29 out of 35 projects were delayed as a result of problems very similar to those faced at M-1 [. . .] but not to the contract with PMC JV, which relates to the very same project from which Bayindir was expelled. Indeed, and this is not disputed by Pakistan, PMC JV was awarded the contract for the remaining works on the

M-1 Project with a four year (1460 days) completion deadline (Exh. [Bay.] CX 29)." | **[217]** "Moreover, the memorandum of understanding between NHA and PMC JV provided that the time of completion would be 'agreed between the parties depending upon the situation of NHA cashflow' (Exh. [Bay.] CX 132). The mere allegation that NHA's financial difficulties were due to the fact that it 'has already paid up to date Bayindir insofar as the works on the project, and has already paid to Bayindir the very, very substantial advance mobilisation payment' (Tr. J. 98:28-35) does not appear to explain the difference in treatment with respect to the completion deadlines." | **[218]** "Failing an explanation or particular insight about the reasons for the extended timetable agreed with PMC JV, Bayindir's allegation of discrimination with respect to the construction schedules cannot be considered as untenable under the applicable *prima facie* standard."

[Paras. 212, 213, 214, 215, 216, 217, 218]

2. Selective Tendering

[219] "Bayindir further contends that Pakistan did not follow a bid procedure to replace it for the completion of the remaining works. [. . .] Bayindir submits that it was only after the memorandum of understanding had been signed with PMC JV that Pakistan organized a 'selective tendering' (limited to two governmental organizations) as a later stage 'cover-up' (C-Mem. J., p. 46, 159-160)." | **[220]** "Again Pakistan does not contest that a selective tendering in favor of local contractors could constitute a violation of the MFN clause. What Pakistan disputes is the alleged irregularity of the process [. . .]." | **[222]** "It would be both premature and inappropriate for the Tribunal to express any views as to the regularity of the tendering process on these (and other) materials. Whatever their weight on the merits, it is clear that NHA informed the press immediately following the expulsion of Bayindir that a local consortium would complete the works. Under these circumstances, Bayindir's allegations as to the openness of the tendering cannot be deemed untenable for jurisdictional purposes." | **[223]** "The fact remains that, taken together, Bayindir's allegations in respect of the selective tender, and that the expulsion was due to Pakistan's decision to favor a local contractor, and that the local contractor was awarded longer completion time-limits, if proven, are clearly capable of founding a MFN claim[44]."

[Paras. 219, 220, 222, 223]

44 [88] At the hearing Bayindir noted that "[i]t is an aggregation of matters which we say if not answered form a basis for the Tribunal to make inferences" (Tr. J., 150:19-21); "that is information to the Tribunal which has not been denied and possibly when we get to the merits we can require some document to establish that" (Tr. J., 156:12-15).

3. Conclusion

[224] "As a final matter, and irrespective of the circumstances of the case, the Tribunal wishes to emphasize that it is generally difficult to prove that an objectively different situation is the result of unequal treatment rather than of the existence of reasons to treat the two situations differently. At this preliminary stage this reinforces the Tribunal in its conclusion that it has jurisdiction to hear Bayindir's most favored nation claims on the merits."

[Para. 224]

I.17.24 FAIR AND EQUITABLE TREATMENT
See also I.1.022; I.17.011

E. Fair and Equitable Treatment

[225] "[. . .] Bayindir's fair and equitable treatment claim is based on Pakistan's alleged 'failure to provide a stable framework for Bayindir's investment' and on the alleged fact that 'Pakistan's expulsion of Bayindir was unfair and inequitable'." | **[226]** "Pakistan's case is that there is no obligation of equitable treatment in the BIT and, even if there were, there would be no violation of fair and equal treatment." | **[230]** "[. . .] [I]t is doubtful that, in the absence of a specific provision in the BIT itself, the sole text of the preamble constitutes a sufficient basis for a self-standing fair and equitable treatment obligation under the BIT. It remains however for the Tribunal to consider whether, through the most favoured nation clause contained in Article II(2) of the BIT, Bayindir is entitled to rely on Pakistan's obligation to act in a fair and equitable manner contained in other BITs concluded by Pakistan. [. . .]" | **[232]** "Under these circumstances and for the purposes of assessing jurisdiction, the Tribunal considers, *prima facie*, that Pakistan is bound to treat investments of Turkish nationals 'fairly and equitably'.[45]" | **[234]** "The fact that an act is, or may be, in accordance with the Contract would not in and of itself rule out a treaty violation. The real question for present purposes is whether the facts alleged by Bayindir are capable of constituting a violation of Pakistan's obligation to treat Bayindir's investment fairly and equitably." | **[235]** "Accordingly, the Tribunal will review Bayindir's main allegation, namely that (i) Pakistan failed to provide a stable framework for Bayindir's investment and that (ii) Pakistan's expulsion of Bayindir was unfair and inequitable." | **[237]** "The contents of the obligation to provide fair and equitable treatment were described in *Tecmed v. Mexico*, to which both Parties refer [. . .]. Reasoning 'in light of the good

45 [89] As to the general possibility to "import" a fair and equitable treatment provision contained in another BIT, see, for instance *Pope & Talbot Inc. v. Government of Canada*, Decision of 10 April 2001, §§ 111, 115.

faith principle established by international law', the tribunal held that the concept of fair and equitable treatment obliges the State:

> [t]o 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." |

[239] "The Tribunal considers that [. . .] it cannot *prima facie* be ruled out that Pakistan's fair and equitable treatment obligation comprises an obligation to maintain a stable framework for investment." | **[240]** "It is true that Pakistan asserted that the obligation to afford fair and equitable treatment as expressed in *Tecmed v. Mexico*[46] relates to 'changes to the regulatory framework in which an investment has been made' and that 'Bayindir can point to no equivalent regulatory changes in this case and of course there are none'. However, the general definition of fair and equitable treatment in *Tecmed* refers not only to 'all rules and regulations that will govern [the] investments' but also to 'the goals of the relevant policies and administrative practices or directives'[47]. Hence, the fact that in Tecmed the change concerned a failure to renew a necessary operating permit does not rule out that a State can breach the 'stability limb' of its obligation through acts which do not concern the regulatory framework but more generally the State's policy towards investments." | **[241]** "Under these circumstances, the Tribunal considers that, if proven, Pakistan's alleged change in its general policy toward Bayindir's investment is capable of constituting a breach of Pakistan's obligations to accord fair and equitable treatment." | **[242]** "Bayindir's 'central allegation' concerning the fair and equitable treatment

46 [91] *Técnicas Medioambientales, Tecmed S.A., v. The United Mexican States*, Case No. ARB (AF)/00/2, Award of 29 May 2003, § 154; unofficial translation (Exh. CLEX 34); ICSID Review (2004), vol. 19, no. 1, also available at http://www.worldbank.org/icsid/cases/laudo-051903%20-English.pdf.

47 [92] *Tecmed v. Mexico* [supra No. 237], § 154.

claim is that the expulsion was motivated by 'local favouritism' and that the alleged delays in completion were merely a pretext [. . .]" | **[246]** "[. . .] At this stage, the only relevant issue is whether it cannot be ruled out, at least *prima facie*, that the alleged unfair and inequitable expulsion is, if proven, capable of falling within the Scope of Pakistan's obligation to accord fair and equitable treatment." | **[250]** "Having considered that the allegedly unfair motives of expulsion, if proven, are capable of founding a fair and equitable treatment claim under the BIT, the Tribunal concludes that it has jurisdiction to hear Bayindir's claims based on Pakistan's obligation to accord fair and equitable treatment to foreign investment."

[Paras. 225, 226, 230, 232, 234, 235, 237, 239, 240, 241, 242, 246, 250]

I.17.1 EXPROPRIATION
See also I.17.133; I.17.3

F. Expropriation

[253] "Article III (1) of the BIT states the following in connection with expropriation:

> Investments shall not be expropriated, nationalized or subject, directly or indirectly to measures of similar effects except for a public purpose, in a non-discriminatory 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 of this Agreement." |

[254] "Bayindir contends that the following actions of Pakistan constitute an expropriation within the meaning of Article III (1) of the BIT:

> (i) Pakistan's expulsion of Bayindir from the site, enforced by armed units of the Frontier Works Organization, was 'a large-scale taking of Bayindir's Motorway investment [including a right to payment for several months of Interim Payment Certificates and works in progress], for the purpose of transferring property and interests into government hands before being passed along to PMC N' (C-Mem. J., pp. 49-50, 173).
>
> (ii) On the ground that Bayindir did not re-export equipment within the time limit set by the applicable Pakistani regulation, Pakistan's Customs services encashed bank guarantees issued by Standard Chartered Bank ('SCB') securing unpaid import customs duties on behalf of Bayindir (Rejoinder J., pp. 30-31, 101-102)." |

[255] "It is not disputed that expropriation is not limited to *in rem* rights and may extend to contractual rights. More generally, the Tribunal considers that, in the absence of a specific definition in the BIT, expropriation can take place also where the measure is not technically a regulatory act. As it has been consistently held in investment cases, expropriation may arise out

of a simple interference by the host State in the investor's rights with the effect of depriving the investor—totally or to a significant extent—of its investment (*RFCC v. Morocco*, [*supra* Fn. 71], 64)" | **[257]** "It is common ground, as the tribunal in *Impregilo* explicitly held, 'that only measures taken by Pakistan in the exercise of its sovereign power ('*puissance publique*'), and not decisions taken in the implementation or performance of the Contracts, may be considered as measures having an effect equivalent to expropriation'[48]." | **[258]** "True it is that the tribunal in *Impregilo* considered that the claims based on 'unforeseen geological conditions' did 'not enter within the purview [of the expropriation clause of the BIT]' and declined jurisdiction in this regard[49]. Geological conditions, let alone when unforeseen, are—by their very nature—not attributable to an act of State. Thus, the tribunal in *Impregilo* had no hesitation over excluding them from its jurisdiction[50]. It is clear that, in counsel for Pakistan's words, this kind of claim 'would fail at the jurisdictional threshold' (Tr. J., 75:23-31)." | **[259]** "The situation is very different where, as in this case, a party invokes an action by the State, which may or may not have been taken in *puissance publique*. Unlike the case of geological conditions, it is difficult to rule out *puissance publique* upon a *prima facie* analysis at the jurisdictional stage. Significantly, the tribunal in *Impregilo* asserted jurisdiction over Impregilo's other claims based on 'alleged breaches of contract' because it was not then in a position to decide whether or not these could be considered as breaches of Article 5 of the BIT [i.e., expropriation][. . .][51]. Similarly, the tribunal in *Siemens* considered that 'the issue whether the breach of the Contract may or may not be an act of expropriation is a matter related to the merits of the dispute'[52]. Indeed, Pakistan's argument that 'expropriation of contract rights [. . .] goes beyond the exercise or purported exercise of contractual powers and capacities' relies on the *Waste Management* case (Tr. J., 202:16-33), which was an award *on the merits*[53]." | **[260]** "In the present case [. . .] the Tribunal cannot rule out that there may have been a sufficient in-

48 [95] *Impregilo v. Pakistan* [*supra* No. 74], § 281 (referred to, for instance, in Tr. 75:23-31).

49 [96] *Impregilo v. Pakistan* [*supra* No. 74], § 282.

50 [97] *Impregilo v. Pakistan* [*supra* No. 74], § 283.

51 [98] *Impregilo v. Pakistan* [*supra* No. 74], § 284. The tribunal concluded this passage noting that "only after a careful examination of those alleged breaches will the Tribunal be able to determine whether the behaviour of Pakistan went beyond that which an ordinary Contracting party could have adopted".

52 [99] *Siemens v. Argentine* [*supra* Fn. 80], § 182.

53 [100] *Waste Management. v. Mexico* [*supra* Fn. 94], § 174; in the relevant section the tribunal was dealing with the question "Was there conduct tantamount to an expropriation of Acaverde's contractual rights?". This Tribunal observes that this question was not dealt with in the Decision on Jurisdiction (see *Waste Management, Inc. v. Mexico* ICSID Case No. ARB(AF)/98/2, Decision on Jurisdiction of 2 June 2000; available at http://www.investmentclaims.com/decisions/WasteMgmt-Mexico-2-Jurisdiction-26Jun2002.pdf). For the sake of completeness, it is useful to observe that at the jurisdictional stage the tribunal held that "it is clear that one and the same measure may give rise to different types of claims in different courts or tribunals. Therefore, something that under Mexican legislation would constitute a series of breaches of contract expressed as

volvement by the State in the alleged taking of Bayindir's investment so as to amount to an expropriation under the BIT." | **[261]** "The Tribunal is reinforced in this conclusion by the unchallenged fact that Bayindir's equipment was retained on site following the expulsion. In the Tribunal's understanding, Bayindir's claim for taking of its investment includes the retention of the equipment. Pakistan objects that this retention was provided for in the Contract (Reply J., pp. 69-70, 487-491), including a mechanism for compensating Bayindir for the equipment:

> Any issue relating to amounts due to Bayindir for the value of such equipment, if any, shall be calculated and paid after the completion of the project in accordance with Clause 63.3 of the Conditions of Contract. (Reply J., p. 70, 4.91)" |

[262] "Here again, this argument neglects the principle of the possible coincidence of treaty and contract claims. Moreover, in the Tribunal's view, such a payment may qualify as 'compensation' within the meaning of Article III of the BIT. Whether such compensation would be 'prompt, adequate, and effective', which may render an expropriation of the equipment lawful under the BIT, is a question for the merits." | **[263]** "For all these reasons, the Tribunal concludes that it has jurisdiction over the Treaty Claims raised in these proceedings. The Tribunal emphasizes that this decision is not equivalent to joining the question of jurisdiction to the merits as contemplated by Rule 41(4) of the ICSID Arbitration Rules[54]. Rather, it holds that Bayindir's claims are capable of constituting a violation of the BIT. As it emphasized on several occasions, the threshold at the jurisdictional level, which implies a *prima facie* standard, is different from the standards which the Claimant will have to discharge on the merits to show an actual treaty breach."

[Paras. 253, 254, 255, 257, 258, 259, 260, 261, 262, 263]

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non-payment of certain invoices, violation of exclusivity clauses in a concession agreement, etc., could, under the NAFTA, be interpreted as a lack of fair and equitable treatment of a foreign investment by a government (Article 1105 of NAFTA) or as measures constituting "expropriation" under Article 1110 of the NAFTA. In any case, it is not the mission of the Tribunal, at this stage of the proceedings, to make an in-depth analysis of alleged breaches of the NAFTA invoked by the Claimant, since that task, should it become necessary, belongs to an analysis of the merits of the question" (*ibid.*, § 27(a)).

54 [101] From this point of view, the Tribunal cannot share the approach adopted by the tribunal in *Impregilo v. Pakistan* [*supra* No. 74], § 285.

II.4.97 DECISION ON JURISDICTION

IV. DECISION

"For the reasons set forth above, the Tribunal makes the following decision:

a) The Arbitral Tribunal has jurisdiction over the dispute submitted to it in this arbitration.

b) The Tribunal denies Respondent's application to suspend these proceedings.

c) The Tribunal will, accordingly, make the necessary order for the continuation of the proceedings on the merits.

d) The decision on costs is deferred to the second phase of the arbitration on the merits."

Systematic Index of the Section*

* *See* Systematic Classification Scheme, at page 193 of Volume I.