INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID)

INTRODUCTORY NOTE

New Jurisdictional Hurdles, More on Investment Protection Standards and Novel Procedural Issues – ICSID Arbitration in 2006

I. Introduction

The 2006 cases contributed significantly to the existing ICSID jurisprudence. The growing case-law implies that in addition to decisions on jurisdiction and awards (on the merits or declining jurisdiction) other manifestations of the ICSID procedure can be encountered more frequently. In 2006, important questions relating to the confidentiality of investment arbitration were addressed in procedural orders such as the one in the *Biwater* v. *Tanzania* case;[1] *ad hoc* Committees rendered decisions on requests for a stay of enforcement of awards, as evidenced in the *CMS* v. *Argentina* case;[2] another *ad hoc* Committee in *Mitchell* v. *Congo*[3] decided to annul an ICSID award on the basis of a very strict interpretation of the jurisdictional ICSID requirement of an investment.

This introductory note aims at providing a selection of the most important issues addressed in the course of ICSID proceedings during 2006 without any claim to completeness.

II. ICSID Precedents or Inconsistent Rulings?

While it is generally accepted that ICSID tribunals are not legally "bound by any other judgments or arbitral awards"[4] and that "the decisions of ICSID tribunals are not binding precedents,"[5] investment tribunals have generally tried to interpret similar issues in a similar way attempting to establish a coherent body of law. In 2005, the notion of a "common legal opinion or jurisprudence constante" first raised by the *SGS*

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[1] *Biwater (Gauff) Tanzania Ltd.* v. *United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 3, 29 September 2006, 46 INTERNATIONAL LEGAL MATERIALS 15 (2007).

[2] *CMS Gas Transmission Company* v. *The Argentine Republic,* ICSID Case No. ARB/01/8, Decision on Argentine Republic's Request for a Continued Stay of Enforcement of the Award, 1 September 2006.

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

[4] *Gas Natural SDG, S.A.* v. *The Argentine Republic,* ICSID Case No. ARB/03/10, Decision on Jurisdiction, 17 June 2005, para. 36.

[5] *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 Corporation* v. *The Argentine Republic,* ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005, para. 23.

v. *Philippines* tribunal[6] was espoused by the *AES* tribunal which spoke of the contribution "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."[7]

In a similar vein, the 2006 *Suez* tribunal[8] spoke in the context of the increasing number of BITs and BIT arbitrations of "a growing jurisprudence of arbitral decisions interpreting treaty provisions,"[9] while the ICSID tribunal in *ADC* v. *Hungary*[10] found that "cautious reliance on certain principles developed in a number of those cases, as persuasive authority, may advance the body of law, which in turn may serve predictability in the interest of both investors and host States."[11]

This attempt at a uniform or at least consistent interpretation of investment law received a serious set-back by the *LG&E* v. *Argentina*[12] tribunal. In its 2006 decision on liability, this ICSID tribunal did not only ignore the findings of the *CMS* v. *Argentina*[13] tribunal, it also arrived at a result squarely contradicting the earlier decision. As will be discussed below,[14] the *LG&E* v. *Argentina* tribunal concluded that the situation in Argentina during a 15-months period between 2001 and 2003 constituted a state of necessity, exempting the respondent State of its responsibility for violating various investment standards under the Argentina-US BIT.

III. Jurisdictional Issues

In 2006, a number of ICSID tribunals and *ad hoc* committees addressed highly topical jurisdictional questions, concerning both Article 25 ICSID Convention[15] and various

[6] *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, para. 97.
[7] *AES*, *supra* note 5, para. 33.
[8] *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A.* v. *The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006.
[9] *Suez*, *supra* note 8, para. 50.
[10] *ADC Affiliate Limited and ADC & ADMC Management Limited* v. *Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006.
[11] *ADC*, *supra* note 10, para. 293.
[12] *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc*. v. *The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, 46 INTERNATIONAL LEGAL MATERIALS 40 (2007).
[13] *CMS Gas Transmission Company* v. *The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, 44 INTERNATIONAL LEGAL MATERIALS 1205 (2005).
[14] See *infra* text at note 145.
[15] Article 25(1), Convention on the Settlement of Investment Disputes between States and Nationals of Other States (=ICSID Convention), 18 March 1965, 575 UNTS 159; 4 INTERNATIONAL LEGAL MATERIALS 532 (1965), provides: "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."

other jurisdictional hurdles stemming from BITs and other international investment agreements as well as from general international law.

1. Investment criteria under Article 25 ICSID Convention

ICSID tribunals have repeatedly insisted that their subject-matter jurisdiction over "investment" disputes based on BITs depends upon the fulfilment of two separate tests, on the one hand, whether a specific activity qualifies as an "investment" under the applicable BIT and, on the other hand, whether the underlying activity may be characterized as an "investment" pursuant to Article 25 ICSID Convention. The latter issue has been crucial in the 2006 annulment decision of the *ad hoc* committee in the *Mitchell* case.[16]

In the absence of a definition of the notion of investment under the ICSID Convention, arbitral tribunals have developed a number of criteria typical for the existence of an investment.[17] The elements thus identified include 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.[18]

The *Mitchell ad hoc* Committee particularly emphasized the last aspect, the "contribution to the economic development of the host country". In its view, the services of "Mitchell & Associates", a law-firm operating in the host State, did not constitute an investment within the meaning of the ICSID Convention. The Committee held that it was not clear whether the law firm had any special consulting relationship to the host State or had helped the host State to attract foreign investors. The *ad hoc* Committee took issue with the original tribunal's failure to find that "through his know-how, the Claimant had concretely assisted the [Democratic Republic of Congo], for example by providing it with legal services in a regular manner or by specifically bringing investors."[19]

This is the first time that an ICSID *ad hoc* tribunal had annulled an award because it found that one of the unwritten elements of the jurisdictional requirement of an "investment" under Article 25 ICSID Convention was lacking. It remains to be seen whether other tribunals will follow this very strict interpretation of a "contribution to the development of the host country." Apparently, many other tribunals have interpreted the

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[16] *Mitchell*, *supra* note 3.

[17] *Fedax N.V.* v. *Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, 11 July 1997, 5 ICSID Reports 186 (2002); *Ceskoslovenska obchodni bank,* v. *Slovak Republic,* ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999, 14 ICSID REVIEW – FOREIGN INVESTMENT LAW JOURNAL 251 (1999); *Salini Construttori S.p.A. and Italstrade S.p.A.* v. *Kingdom of Morocco,* ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, 129 Journal du droit international 196 (2002) [English translations of French original in 42 INTERNATIONAL LEGAL MATERIALS 609 (2003), 6 ICSID Reports 400 (2004)].

[18] Cf. CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY (2001), 140.

[19] *Mitchell*, *supra* note 3, para. 39.

criteria developed by legal commentators as an illustrative rather than an exhaustive list of elements indicating the existence of an investment.

2. Disputes directly arising out of an investment

Many ICSID tribunals have already dealt with the jurisdictional question whether a dispute has arisen "directly out of an investment" as required by Article 25 ICSID Convention. In the Argentine cases,[20] most of which involve allegations that the economic measures taken in response to the financial crisis prevailing in Argentina between 1999 and 2002 amounted to violations of BIT standards, the respondent State has regularly questioned whether an ICSID tribunal had the power to rule on general economic measures. Argentina argued that because they were not specifically directed at investments they could not be considered to directly arise out of an investment. Since the 2003 decision in *CMS* v. *Argentina*,[21] however, this objection to jurisdiction has not fared well with ICSID tribunals.

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[20] For the cases currently pending see http://www.worldbank.org/icsid/cases/pending.htm; in a number of cases Decisions on Jurisdictions have already been made and in some instances Awards were rendered, see *AES Corporation* v. *The Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005; *AWG Group Ltd.* v. *The Argentine Republic*, UNCITRAL Decision on Jurisdiction, 3 August 2006; *Azurix* v. *Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003, Award, 14 July 2006; *BP America Production Co. and Others* v. *Argentine Republic*, ICSID Case No. ARB/04/8**,** Decision on Preliminary Objections, 27 July 2006; *Camuzzi International S.A.* v. *The Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Objections to Jurisdiction, 11 May 2005; *Camuzzi International S.A.* v. *The Argentine Republic*, ICSID Case No. ARB/03/7, Decision on Objections to Jurisdiction, 10 June 2005; *CMS Gas Transmission Company* v. *The Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Jurisdiction, 17 July 2003; Award, 12 May 2005, Argentine Republic's Application for Annulment, 8 September 2005; Decision on Argentine Republic's Request for a Continued Stay of Enforcement of the Award, 1 September 2006; *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal* v. *Argentine Republic*, ICSID Case No. ARB/97/3, Award, 21 November 2000, Decision on Jurisdiction, 14 November 2005; *Continental Casualty Company* v. *Argentina*, ICSID Case No. ARB/03/9, Decision on Jurisdiction, 22 February 2006; *El Paso Energy International Company* v. *The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006; *Enron and Ponderosa Assets* v. *Argentine Republic*, ICSID Case No. ARB/01/3**,** Decision on Jurisdiction, 14 January 2004, Decision on Jurisdiction (Ancilliary Claim), 2 August 2004; *Gas Natural SDG, S.A.* v. *The Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisidiction17 June 2005; *Lanco International Inc.* v. *Argentina*, ICSID Case No. ARB/97/6, Decision on Jurisdiction, 8 December 1998; *LG&E* v. *Argentina*, ICSID Case No. ARB/02/1, Decision on Jurisdiction, 30 April 2004, Decision on Liability, 3 October 2006; *Metalpar S.A. and Buen Aire S.A.* v. *Argentine Republic*, ICSID Case No. ARB/03/5, Decision on Jurisdiction, 27 April 2006; *National Grid plc* v. *The Argentine Republic*, UNCITRAL**,** Decision on Jurisdiction, 20 June 2006; *Pan American Energy LLC and BP Argentina Exploration Company* v. *Argentine Republic*, ICSID Case No. ARB/03/13**,** Decision on Preliminary Objections, 27 July 2006; *Sempra Energy International* v. *The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction, 11 May 2005; *Siemens* v. *Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A.* v. *The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006; *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.* v. *Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, 3 August 2006.

[21] *CMS Gas Transmission Company* v. *Argentina*, ICSID Case No. ARB/01/8, Decision on Jurisdiction, 17 July 2003, 7 ICSID Reports 494.

Also in 2006, this defense was rejected by an ICSID tribunal in *Suez* v. *Argentina*[22] in a rather pronounced way. In its decision on jurisdiction, the *Suez* tribunal found that it was "not concerned with the wisdom, legality, or soundness of the policy measures taken by Argentina to deal with the economic crisis. Rather, the Tribunal's task is to judge, at the merits stage of this case, whether the effect of Respondent's actions on the Claimants' investments violates the Respondent's international legal obligations contained in the Argentina-France and the Argentina-Spain BITs."[23]

Also in *Continental Casualty* v. *Argentina*,[24] an ICSID tribunal rejected the respondent State's argument that the challenged emergency measures were not specifically addressed to the Claimant's investment and thus fell outside the jurisdictional framework of Article 25 (1) ICSID Convention. The tribunal did "not consider that from a textual point of view the term "specific" can be considered as a synonym of "directly." A measure of the host State can affect directly an investment, so that the dispute as to the international legality of that measure arises directly out of that investment, even if the measure is not specifically aimed at that investment."[25]

3. Shareholder claims

Another frequently raised jurisdictional defense, in particular in the Argentina cases, has been the argument that shareholders should not be considered to have *locus standi* to raise claims which concern harm suffered by the companies they own.

It seems that by now ICSID tribunals have developed a consistent jurisprudence rejecting these *Barcelona Traction*-inspired challenges. In the *Barcelona Traction* case,[26] the ICJ had held that under customary international law the home State of the shareholders of a foreign incorporated company could not bring an international claim concerning acts directed against the company itself. The Court noted, however, that multilateral and bilateral treaties may change this result. Indeed the *ELSI* case[27] is often understood as a direct consequence of this dictum. In *ELSI*, the World Court upheld jurisdiction over a claim brought by the US on behalf of US shareholders in an Italian company because the applicable Treaty of Friendship, Commerce and Navigation protected the right to "organize, control and manage" corporations in the other Contracting State.

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[22] *Suez, supra* note 8.
[23] *Suez*, *supra* note 8, para. 29.
[24] *Continental Casualty Company* v. *Argentina*, ICSID Case No. ARB/03/9, Decision on Jurisdiction, 22 February 2006.
[25] *Continental, supra* note 24, para. 71.
[26] *Case concerning the Barcelona Traction Light & Power Company (Belgium* v. *Spain),* ICJ Reports (1970) p. 3.
[27] *Case concerning Elettronica Sicula S.p.A. (ELSI) (United States of America* v. *Italy),* ICJ Reports (1989) p. 15.

In the last years, ICSID tribunals in *Lanco,*[28] *CMS,*[29] *Azurix*[30] and *Enron*[31] have equally permitted so-called shareholder claims. Also the 2006 decision on jurisdiction in *Continental Casualty* v. *Argentina*[32] affirmed this approach. It upheld its jurisdiction "even assuming that the measures taken by Argentina and challenged by Continental as having breached its treaty rights were addressed and affected primarily or essentially the assets, investments, activities of the wholly owned subsidiary of Continental in Argentina."[33] The tribunal found that as a result of the applicable Argentina-US BIT,[34] at least in the case of a wholly owned subsidiary, "the treaty protection is not limited to the free enjoyment of the shares, that is the exercise of the rights inherent to the position as a shareholder, specifically a controlling or sole shareholder. It also extends to the standards of protection spelled out in the BIT with regard to the operation of the local company that represents the investment."[35] In its reasoning the *Continental Casualty* tribunal emphasized that Claimant was not bringing "indirect" or "derivative" claims on behalf of its subsidiary but invoked treaty rights concerning its investment in Argentina.[36] It expressly rejected Respondent's reliance on *Barcelona Traction* which it found controlling only in cases of shareholder protection under customary international law.

4. Contract vs. Treaty Claims and Umbrella Clauses

The "analytical distinction"[37] between treaty claims and contract claims – as expressed in the *Impregilo* case – has remained on the agenda of many ICSID tribunals. Jurisdictional challenges based on the argument that contractual dispute settlement clauses would deprive ICSID tribunals of their jurisdiction are often raised. However, it seems to have become rather settled that such objections are bound to fail where a treaty basis exists for the jurisdiction of an ICSID tribunal.

In the *Suez* case[38] the tribunal expressly endorsed the treaty/contract distinction of the *Vivendi ad hoc* Committee and pointedly summarized the current view as follows:

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[28] *Lanco International Inc.* v. *Argentina*, ICSID Case No. ARB/97/6, Decision on Jurisdiction, 8 December 1998, 5 ICSID Reports 369.
[29] *CMS, supra* note 21.
[30] *Azurix, supra* note 20.
[31] *Enron and Ponderosa Assets* v. *Argentine Republic*, ICSID Case No. ARB/01/3**,** Decision on Jurisdiction, 14 January 2004, 11 ICSID Reports 273, Decision on Jurisdiction (Ancilliary Claim), 2 August 2004, 11 ICSID Reports 295.
[32] *Continental, supra* note 24.
[33] *Continental, supra* note 24, para. 86.
[34] According to Article I(1)(a) of the Argentina-US BIT, "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….and includes without limitation: (ii) a company or shares of stock or other interests in a company or interests in the assets thereof."
[35] *Continental, supra* note 24, para. 79.
[36] Cf. *Continental, supra* note 24, para. 87.
[37] *Impregilo S.p.A.* v. *Islamic Republic of Pakistan***,** ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, para. 262.
[38] *Suez, ,supra* note 8.

"Many other international arbitral tribunals have taken the position that a dispute resolution clause in an underlying contract whereby contractual disputes are within the exclusive jurisdiction of local courts or arbitrations does not preclude an investor who is a party to such contract from bringing an arbitration proceeding to enforce its rights under a bilateral investment treaty."[39]

Similarly, the tribunal in the *Jan de Nul* case[40] stressed that "the fact that a dispute involves contract rights and contract remedies does not in and of itself mean that it cannot also involve treaty breaches and treaty claims."[41] It thus upheld its jurisdiction over claims, clearly formulated as treaty claims. It also rejected the assertion that it could not assert jurisdiction because a contractual dispute resolution clause submitted all disputes between the Claimants and the Suez Canal Authority to the jurisdiction of the Egyptian administrative courts. The tribunal found "that the claims brought in this arbitration are separate and juridically distinct from the contract claims asserted before the Egyptian courts. As such, they are not covered by the contract dispute settlement clause."[42]

5. *Prima Facie* Cases and Limited Jurisdiction as a Result of BIT Provisions

The pitfalls of close jurisdictional scrutiny became evident for a Norwegian investor in the Hungarian telecom sector in *Telenor* v. *Hungary*.[43] Claimant had alleged that a series of governmental and administrative acts by Hungary constituted indirect expropriation. The ICSID tribunal sitting in this case dismissed the claim, however, already on the jurisdictional level because it found that Telenor had failed to make out a "*prima facie* case" of expropriation.[44] Relying on a *prima facie* test, as endorsed by other investment tribunals,[45] according to which a tribunal will 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,"[46] the tribunal ultimately found that there "is no evidence before the Tribunal to suggest any activity on the part of the Hungarian Government that remotely approaches the effect of expropriation."[47]

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[39] *Suez*, *supra* note 8, para. 44.
[40] *Jan de Nul N.V. and Dredging International N.V.* v. *Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006.
[41] *Jan de Nul*, *supra* note 40, para. 80.
[42] *Jan de Nul*, *supra* note 40, para. 133.
[43] *Telenor Mobile Communications A.S.* v. *Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006.
[44] *Telenor*, *supra* note 43, para. 80.
[45] *Impregilo*, *supra* note 37; *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); *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, 19 November 2004, 44 INTERNATIONAL LEGAL MATERIALS 569 (2005); *SGS* v. *Philippines*, *supra* note 6.
[46] E.g. *Impregilo*, *supra* note 37, para. 254.
[47] *Telenor*, *supra* note 43, para. 79.

Telenor was equally unsuccessful to bring other investment claims, such as violations of fair and equitable treatment, because the applicable Hungary-Norway BIT provided for mixed arbitration only with regard to expropriation claims. Claimant's attempt to overcome this limitation by invoking the BIT's MFN-clause remained unsuccessful.

6. The Scope of MFN-Clauses

Thus, the *Telenor* case continues the intensive MFN-debate triggered by the *Maffezini* tribunal[48] which had held that a BIT's MFN-clause was not limited to substantive standards of treatment, but extended to procedural issues and thus permitted an investor to rely on more favourable (i.e. shorter) waiting periods before instituting arbitration which were contained in another BIT of the host State.[49] While this reasoning was followed and even broadened in cases like *Siemens* v. *Argentina*[50] and *Gas Natural* v. *Argentina*,[51] the tribunals in *Salini* v. *Jordan*[52] and in *Plama* v. *Bulgaria*[53] openly rejected the *Maffezini*-approach.

The *Telenor* tribunal clearly sided with *Salini* and *Plama* in its rejection of *Maffezini*. In a particularly sweeping assertion, the tribunal found that the "ordinary meaning" of a BIT clause calling for "treatment no less favourable than that accorded to investments made by investors of any third State" is "that the investor's *substantive* rights in respect of the investments are to be treated no less favourably than under a BIT between the host State and a third State, and there is no warrant for construing the above phrase as importing *procedural* rights as well."[54] In addition, the *Telenor* tribunal referred to the danger of treaty-shopping as well as to "uncertainty and instability" that would stem from the *Maffezini*-approach. Finally, it stressed the importance of ascertaining the intention of the Contracting States of BITs in order to justify its adherence to *Plama*.[55]

With respect to the interpretation of an MFN-clause, the *Telenor* award also contrasts with the view taken by the *Suez* tribunal[56] a few months earlier. The *Suez* tribunal permitted an investor to avoid a longer waiting period before commencing ICSID arbitration by relying on a more favourable BIT provision. The tribunal followed the *Maffezini* approach stressing that the applicable MFN clause referred to MFN treatment "in all matters governed by [the BIT]." Contrary to the *Telenor* tribunal, the *Suez* tribunal found that the "ordinary meaning" of the undefined term "treatment" within the

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[48] *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).
[49] *Maffezini, supra* note 48, para. 54.
[50] *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).
[51] *Gas Natural, supra* note 4.
[52] *Salini* v. *Jordan, supra* note 45.
[53] *Plama, supra* note 45.
[54] *Telenor*, *supra* note 43, para. 92.
[55] *Telenor*, *supra* note 43, paras. 93-95.
[56] *Suez, supra* note 8.

context of investment "include[d] the rights and privileges granted and the obligations and burdens imposed by a Contracting State on investments made by investors covered by the treaty" and that "dispute settlement" was certainly a "matter" governed by the Argentina-Spain BIT.[57]

7. Fraud and Corruption

In 2006, two ICSID tribunals held that claimants could not permissibly avail themselves of investment arbitration where they had acted fraudulently or tried to procure an investment agreement through corruption.

In *Inceysa* v. *El Salvador*,[58] the tribunal denied its jurisdiction in a case arising from a service contract for the installation of a highway control system in the host State. The tribunal found that the Spanish company had acted fraudulently in the bidding process when it had asserted that it possessed experience in the field which it did not possess in fact. For the tribunal this fraudulent acting implied that the investment fell outside the scope of consent of the parties which – on the part of the host State – was limited by a so-called "in accordance with the laws of the host State"-clause. Following the approach taken by the *Salini* v. *Morocco* tribunal,[59] the *Inceysa* tribunal found that this BIT clause excluded from the BIT protection investments made illegally.[60] In its scrutiny whether the investment had been made in accordance with the law of the host State, the tribunal did not restrict itself to a consideration of the law of El Salvador. Instead, it reasoned that – because treaties formed part of the law of El Salvador – the BIT with its reference to generally recognized rules and principles of international law allowed it to look at these sources in order to establish the legality or illegality of the investment. Relying on a number of general principles of law, such as *Nemo Auditur Propriam Turpitudinem Allegans*, the tribunal found, *inter alia*, "that the foreign investor cannot seek to benefit from an investment effectuated by means of one or several illegal acts and, consequently, enjoy the protection granted by the host State, such as access to international arbitration to resolve disputes, because it is evident that its act had a fraudulent origin and, as provided by the legal maxim, 'nobody can benefit from his own fraud'."[61]

2006 also saw the first ICSID award explicitly and extensively addressing the question of corruption and its implications for investment arbitration. In *World Duty Free* v. *Kenya*[62] an ICSID tribunal dismissed a "contract" claim, based on an investment agreement between a private company and the Republic of Kenya, on the ground that

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[57] *Suez*, *supra* note 8, para. 55.
[58] *Inceysa Vallisoletana S.L.* v. *Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006.
[59] *Salini* v. *Morocco*, *supra* note 17, para. 46.
[60] *Inceysa*, *supra* note 58, para. 190.
[61] *Inceysa*, *supra* note 58, para. 242.
[62] *World Duty Free Company Limited* v. *The Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006, 46 INTERNATIONAL LEGAL MATERIALS 339 (2007).

this agreement had been procured by a bribe. The tribunal found that various, rather considerable payments by a representative of the claimant company to the then president of Kenya "could not be considered as a personal donation for public purposes." Rather, they had been made to obtain "the agreement of the President on the contemplated investment."[63] The tribunal then broadly considered the consequences of the bribe both under international public policy and under English and Kenyan law, the applicable law according to the investment agreement. For its finding on the wide-spread condemnation of corrupt business practices, it referred to a number of regional and universal instruments outlawing bribery and corruption.[64] Ultimately, the *World Duty Free* tribunal concluded that "[i]n light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal."[65] Therefore, the claimant was not legally entitled to maintain any of its pleaded claims "as a matter of *ordre public international* and public policy under the contract's applicable laws."[66]

IV. Substantive Issues

The major ICSID awards on the merits in 2006 were *ADC* v. *Hungary*,[67] *Azurix* v. *Argentina*,[68] *Champion Trading* v. *Egypt*,[69] *LG&E* v. *Argentina*,[70] and *Salini* v. *Jordan*.[71] From the large number of ICSID proceedings against Argentina, raising similar issues stemming from the latter's economic emergency legislation at the beginning of the 21st century two further cases reached the merits with *Azurix* and *LG&E*. While both of them contain important clarifications concerning expropriation,

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[63] *World Duty Free*, *supra* note 62, para. 136.
[64] E.g. the OAS Inter-American Convention against Corruption, March 29, 1996, 35 INTERNATIONAL LEGAL MATERIALS 724 (1996); the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, November 21, 1997, 37 INTERNATIONAL LEGAL MATERIALS 4 (1998); the Council of Europe Criminal Law Convention on Corruption, January 27, 1999, 38 INTERNATIONAL LEGAL MATERIALS 505 (1999); the African Union Convention on Preventing and Combating Corruption, July 11, 2003, 43 INTERNATIONAL LEGAL MATERIALS 5 (2004); the United Nations Declaration against Corruption and Bribery in International Commercial Transactions, December 16, 1996, 36 INTERNATIONAL LEGAL MATERIALS 1043 (1997); and the United Nations Convention against Corruption, October 31, 2003, 43 INTERNATIONAL LEGAL MATERIALS 37 (2004).
[65] *World Duty Free*, *supra* note 62, para. 157.
[66] *World Duty Free*, *supra* note 62, para. 188.
[67] *ADC*, *supra* note 10.
[68] *Azurix*, *supra* note 20.
[69] *Champion Trading Company, Ameritrade International, Inc., James T. Wahba, John B. Wahba, Timothy T. Wahba* v. *Egypt*, ICSID Case No. ARB/02/9, Award, 27 October 2006.
[70] *LG&E*, *supra* note 12.
[71] *Salini Costruttori S.p.A. and Italstrade S.p.A.* v. *Jordan,* ICSID Case No. ARB/02/13, Award, 31 January 2006.

fair and equitable treatment as well as full protection and security, the *LG&E* case has aroused special controversy because it squarely contradicts the findings of another ICSID tribunal on the question of "state of necessity" as a defense actually available to Argentina under the prevailing conditions.[72]

1. Attribution

Also in 2006 the question of attribution attracted the attention of ICSID tribunals. In *Azurix* v. *Argentina*[73] an ICSID tribunal had no difficulty in attributing acts of Argentine provinces to the Republic of Argentina. According to the tribunal, the "responsibility of States for acts of its organs and political subdivisions is well accepted under international law. The Draft Articles [on State Responsibility[74]] are the best evidence of such acceptance and as such have been often referred to by international arbitral tribunals in investor-State arbitration."[75] The dispute arose from a water distribution concession between the claimant's subsidiary and the Argentine Province of Buenos Aires.

2. Fair and Equitable Treatment

The formulation of the fair and equitable treatment standard in the NAFTA[76] has led to the controversy whether this standard is identical with the international minimum standard or goes beyond it. A 2001 interpretation by the NAFTA Free Trade Commission[77] effectively equalizing the two standards has been followed in most

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[72] See August Reinisch, *Necessity in International Investment Arbitration – An Unnecessary Split of Opinions in Recent ICSID Cases? Comments on CMS and LG&E*, 8 THE JOURNAL OF WORLD INVESTMENT AND TRADE 192 (2007).
[73] *Azurix*, *supra* note 20.
[74] 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).
[75] *Azurix*, *supra* note 20, para. 50.
[76] Article 1105 NAFTA provides: "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."
[77] "1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. 2. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens." NAFTA Free Trade Commission Clarifications Related to NAFTA Chapter 11, Decision of 31 July 2001, available at <http://www.ustr.gov/regions/whemisphere/nafta-chapter11.PDF>.

NAFTA Chapter 11 cases,[78] though some arbitral tribunals expressly rejected that view.[79]

In 2006, the ICSID tribunal in the *Azurix* case[80] stressed that this question could not be answered in the abstract but must necessarily depend upon the precise wording of the applicable treaty standard. With regard to the fair and equitable treatment provision in the Argentina-US BIT,[81] it held that "[t]he clause, as drafted, permits to interpret fair and equitable treatment and full protection and security as higher standards than required by international law. The purpose of the third sentence is to set a floor, not a ceiling, in order to avoid a possible interpretation of these standards below what is required by international law."[82] It hastened to add, however, that the difference was not significant since the international minimum standard had evolved over time.[83]

In the view of the *Azurix* tribunal, it "does not require bad faith or malicious intention of the recipient State as a necessary element in the failure to treat investment fairly and equitably."[84] Instead, the "standards of conduct agreed by the parties to a BIT presuppose a favorable disposition towards foreign investment, in fact, a pro-active behavior of the State to encourage and protect it."[85] On the basis of such a relatively high fair and equitable treatment standard it was not surprising that the tribunal found a violation on the part of the host State.

Also the *LG&E* tribunal[86] found a violation of the fair and equitable treatment standard as a result of Argentina's unilateral suspension of key assurances given to the investor. *LG&E* v. *Argentina* involved three US corporations which held equity interests in various Argentine gas distribution companies. They argued that by enacting the Emergency Law and the Currency Exchange Law, which led to a suspension of specially guaranteed tariff adjustments, the Argentine government had committed

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

[79] *Pope & Talbot* v. *Canada*, UNCITRAL Arbitration Award in Respect of Damages of 31 May 2002, 41 INTERNATIONAL LEGAL MATERIALS 1347 (2002). See also for a non-NAFTA case *CME Czech Republic B.V.* v. *The Czech Republic, Partial Award*, UNCITRAL Arbitration Award of 13 September 2001, WORLD TRADE AND ARBITRATION MATERIALS 109 (2002), para. 156: "The broad concept of fair and equitable treatment imposes obligations beyond customary international requirements of good faith treatment."

[80] *Azurix, supra* note 20.

[81] Article II.2 (a) of the Argentina-US BIT provides: "Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than required by international law."

[82] *Azurix, supra* note 20, para. 361.

[83] *Ibid*.

[84] *Azurix, supra* note 20, para. 372.

[85] *Ibid*.

[86] *LG&E, supra* note 12.

violations of the Argentina-US BIT. As in the *CMS* case, decided less than a year earlier, the *LG&E* tribunal concluded that the Argentine measures violated the applicable fair and equitable treatment standard because they entirely transformed and altered the legal and business environment under which the investment had been initially made and thus ran counter to the required predictability and stability.[87] According to the *LG&E* tribunal, "the stability of the legal and business framework in the State party is an essential element in the standard of what is fair and equitable treatment."[88]

In the NAFTA-context, the question whether transparency formed part of the fair and equitable treatment standard has been highly controversial. It even led to the partial annulment of a NAFTA award in the *Metalclad* case[89] by a Canadian court.[90] For ICSID tribunals, the assumption of a "principle of transparency under international law" poses less of a problem. In 2006, the tribunal in *Champion Trading* v. *Egypt*,[91] relying on *Tecmed* v. *Mexico*,[92] implicitly acknowledged the existence of such a transparency principle as part of the international minimum standard[93] expressed in the applicable BIT as "treatment, protection and security of investments [which] shall never be less than that required by international law and national legislation."[94]

3. Full Protection and Security

BITs regularly contain the obligation of host States to provide full protection and security to investors from the other Contracting State. This obligation is usually understood as a duty to prevent actual physical harm to foreign investments by (private) third parties.[95] The full protection and security standard does not imply strict liability.[96]

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[87] *LG&E*, *supra* note 12, paras. 132, 133. See also *CMS*, *supra* note 13, paras. 275, 276, 281.
[88] *LG&E*, *supra* note 12, para. 125.
[89] The Additional Facility tribunal had found that "Mexico failed to ensure a transparent and predictable framework for Metalclad's business planning and investment. The totality of these circumstances demonstrates 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 in accordance with the NAFTA." *Metalclad* v. *Mexico*, ICSID Additional Facility Award, 30 August 2000, 5 ICSID Reports 209, para 99.
[90] *United Mexican States* v. *Metalclad*, Supreme Court of British Columbia, Judgment, 2001 BCSC 664, 2 Mai 2001, 5 ICSID Reports 236.
[91] *Champion Trading*, *supra* note 69.
[92] *Technicas Medioambientales Tecmed S.A.* v. *Mexico*, ICSID Case No. ARB/AF/00/2, Award, 29 May 2003, 43 INTERNATIONAL LEGAL MATERIALS 133 (2004).
[93] *Champion Trading*, *supra* note 69, para. 164.
[94] Article II (4) Treaty between The United States of America and The Arab Republic of Egypt Concerning the Reciprocal Encouragement and Protection of Investments, 29 September 1982.
[95] "The practice of arbitral tribunals seems to indicate, however, that the "full security and protection" clause is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force." *Saluka Investments BV (The Netherlands)* v. *The Czech Republic*, Partial Award, 17 March 2006, para. 484; see also *American Manufacturing & Trading, Inc (AMT) (US)* v. *Republic of Zaire*, ICSID Case No ARB/93/1, Award, 21 February 1997, 36 INTERNATIONAL LEGAL MATERIALS 1531 (1997), para 6.05; *Technicas Medioambientales Tecmed S.A.* v. *Mexico*, ICSID Case No. ARB/AF/00/2, Award, 29 May 2003, 43 INTERNATIONAL LEGAL MATERIALS 133 (2004), paras. 175-177.

Rather, it demands from host States to exercise due diligence in attempting to prevent harm.[97]

ICSID tribunals have found violations of the standard in cases like *AAP* v. *Sri Lanka*,[98] where a host State infringed its due diligence obligations in the course of military measures against insurgent forces, or *AMT* v. *Zaire*,[99] where the host government had taken no protective measures at all.

Since full protection and security is frequently found in combination with fair and equitable treatment in BITs, investment tribunals have started to blur the traditionally clear distinction between the two and found that the breach of one standard automatically entailed the breach of the other standard as well.

In 2006, the *Azurix* tribunal[100] followed this approach, clearly set out by an *ad hoc* tribunal in *Occidental* v. *Ecuador*,[101] which had found that "the question of whether in addition [to a breach of fair and equitable treatment] there has been a breach of full protection and security under this Article becomes moot as a treatment that is not fair and equitable automatically entails an absence of full protection and security."[102] The reasoning of the *Azurix* tribunal is, however, rather tortuous. The tribunal first stated that in some BITs fair and equitable treatment and full protection and security appear as a single standard, in others as separate protections. Though the applicable Argentina-US BIT contained both standards in one provision,[103] the tribunal held that "the two phrases describing the protection of investments appear sequentially as different obligations."[104] Nevertheless, the *Azurix* tribunal was "persuaded of the interrelationship of fair and equitable treatment and the obligation to afford the investor full protection and security."[105] It found support for its assumption that full protection and security went

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[96] "[T]he provision of 'constant protection and security' cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed." *Elettronica Sicula S.p.A. (ELSI)* (United States of America v. Italy), *supra* note 27, para. 108; "[…] [T]he guarantee of full protection and security is not absolute and does not impose strict liability upon the State that grants it." *Technicas Medioambientales Tecmed S.A.* v. *Mexico*, ICSID Case No. ARB/AF/00/2, Award, 29 May 2003, 43 INTERNATIONAL LEGAL MATERIALS 133 (2004), para. 177.

[97] "The Arbitral Tribunal is of the opinion that [full protection and security] obliges the parties to exercise such due diligence in the protection of foreign investment as reasonable under the circumstances." *Final Award in the Matter of an UNCITRAL Arbitration: Ronald S. Lauder* v. *The Czech Republic*, Award, 3 September 2001, 14 World Trade and Arbitration Materials 35 (2002), para. 308.

[98] *Asian Agricultural Production Ltd (AAP)* v. *Republic of Sri Lanka*, ICSID Case No ARB/87/3, Award, 27 June 1990, 30 INTERNATIONAL LEGAL MATERIALS 580 (1991).

[99] *American Manufacturing & Trading, Inc (AMT) (US*) v. *Republic of Zaire*, ICSID Case No ARB/93/1, Award, 21 February 1997, 36 INTERNATIONAL LEGAL MATERIALS 1531 (1997), para 6.08.

[100] *Azurix, supra* note 20.

[101] *Occidental Exploration and Production Company* v. *Ecuador*, LCIA Administered Case No. UN 3467, Award, 1 July 2004.

[102] *Occidental* v. *Ecuador*, *supra* note 101, para. 187.

[103] Article II 2 (a) of the Argentina-US BIT provides: "Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than required by international law."

[104] *Azurix*, *supra* note 20, para. 407.

[105] *Azurix*, *supra* note 20, para. 408.

beyond protection and security ensured by the police in the wording of some recent investment treaty provisions which expressly limited this standard "to the level of police protection required under customary international law."[106] According to the *Azurix* tribunal, "when the terms 'protection and security' are qualified by 'full' and no other adjective or explanation, they extend, in their ordinary meaning, the content of this standard beyond physical security."[107] Thus, the tribunal found that by failing to provide fair and equitable treatment the Respondent "also breached" the full protection and security standard.

4. Non-discrimination Standards

Contrary to fair and equitable treatment or full protection and security, the two non-discrimination standards regularly contained in investment agreements, national treatment and MFN-treatment, are rarely addressed by investment tribunals on the merits. MFN-clauses contained in many BITs have given rise to a prolonged controversy whether they extent to dispute settlement provisions or whether they are limited to substantive treatment.[108] There are almost no cases, however, dealing with the substantive treatment requirements under an MFN-clause.

One of the few exceptions is the 2006 award in *Champion Trading* v. *Egypt*[109] which had to interpret a combined non-discrimination clause in the applicable Egypt-US BIT according to which "Each Party shall accord investments in its territory, and associated activities in connection with these investments of nationals or companies of the other Party, treatment no less favorable than that accorded in like situations to investments and associated activities of its own nationals and companies, or nationals and companies of any third country, whichever is the most favourable."[110]

In the view of the *Champion Trading* tribunal, this standard "require[d] the Arbitral Tribunal to first determine whether the parties involved […] were in like situations, and then to compare the treatment being received by foreign investments with the treatment received by local investors to determine whether there was a violation of the provision."[111] Since the tribunal found, however, that the companies involved were not "in a like situation" it found that no discrimination on grounds of nationality had taken place.[112]

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106 *Ibid*.
107 *Ibid*.
108 See *supra* text starting at note 48. See also August Reinisch, *From Contested Jurisdiction to Indirect Expropriation and Fair and Equitable Treatment – Developments in ICSID Arbitration in 2004*, THE GLOBAL COMMUNITY. YEARBOOK OF INTERNATIONAL LAW AND JURISPRUDENCE 1653, at 1662 (2005).
109 *Champion Trading*, *supra* note 69.
110 Article II (2)(a) Treaty between The United States of America and The Arab Republic of Egypt Concerning the Reciprocal Encouragement and Protection of Investments, 29 September 1982.
111 *Champion Trading*, *supra* note 69, para. 128.
112 *Champion Trading*, *supra* note 69, para. 156.

5. Violation of Umbrella Clauses

Umbrella clauses are frequently relevant for jurisdictional purposes in order to ascertain whether a claim arising from the violation of contractual or similar obligations may be regarded as a treaty claim under a BIT.[113] Obviously, they become relevant again on the merits for the question whether a BIT violation has occurred.

This issue was addressed by the *LG&E* tribunal which found that Argentina had breached the applicable BIT's umbrella clause which provided that "[e]ach party shall observe any obligation it may have entered into with regard to investments."[114] According to this ICSID tribunal, "an "umbrella clause" is a general provision included in a fairly large number of bilateral treaties that creates a requirement for the host State to meet its obligations towards foreign investors, including those that derive from a contract."[115] In the *LG&E* case, however, it was not contractual stipulations which were violated by the respondent State but rather Argentina's abrogation of guarantees under the statutory framework, such as calculation of the tariffs in dollars before conversion to pesos, semi-annual tariff adjustments by the PPI and no price controls without indemnification, which violated the umbrella clause.

In this respect the *LG&E* tribunal concurred with the ICSID tribunal in the *CMS* case,[116] which also concluded that the same 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."[117]

6. Expropriation

On the issue of indirect expropriation, two non-ICSID awards have recently fuelled the discussion on how to distinguish non-compensable regulatory measures from compensable regulatory expropriation. The 2005 NAFTA award in *Methanex* v. *USA*[118] and the 2006 UNCITRAL award in *Saluka* v. *Czech Republic*[119] suggest that non-discriminatory, regulatory measures for a *bona fide* public purpose fall outside the scope of indirect expropriation in general. According to the *Methanex* tribunal "[…] as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative

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[113] See August Reinisch, *supra* note 108, at 1661 (2005).
[114] *LG&E*, *supra* note 12, para. 175.
[115] *LG&E*, *supra* note 12, para. 169.
[116] *CMS*, *supra* note 13.
[117] *CMS*, *supra* note 13, para. 303.
[118] *Methanex Corporation* v. *United States of America***,** NAFTA Arbitral Tribunal, Final Award on Jurisdiction and Merits, 3 August 2005.
[119] *Saluka Investments BV (The Netherlands)* v. *The Czech Republic*, UNCITRAL Partial Award, 17 March 2006.

foreign investor contemplating investment that the government would refrain from such regulation."[120] Similarly, the *Saluka* tribunal reasoned that as a matter of international law "States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare."[121] This approach clearly contrasts with the so-called sole effect doctrine espoused by many other tribunals which would only look at the intensity of the interference in order to ascertain whether an indirect expropriation has taken place.[122] Obviously, the effect of the *Methanex/Saluka* approach is likely to be a considerable narrowing of the scope of indirect expropriation and thus of the investment protection against expropriation.

The ICSID tribunal in *Azurix* v. *Argentina*[123] took a different approach, finding the purpose of a regulatory measure an "insufficient" criterion to distinguish measures for which a State would not be liable.[124] According to the *Azurix* tribunal, the "issue is not so much whether the measure concerned is legitimate and serves a public purpose, but whether it is a measure that, being legitimate and serving a public purpose, should give rise to a compensation claim."[125] Without directly referring to the *Methanex* and/or *Saluka* case, the *Azurix* tribunal takes issue with the view that "Parties [to the Bilateral Treaty] are not liable for economic injury that is the consequence of *bona fide* regulation within the accepted police powers of the State."[126] The *Azurix* tribunal considered this reasoning "somehow contradictory": "According to it, the BIT would require that investments not be expropriated except for a public purpose and that there be compensation if such expropriation takes place and, at the same time, regulatory measures that may be tantamount to expropriation would not give rise to a claim for compensation if taken for a public purpose."[127] Indeed, the *Methanex/Saluka* approach effectively transformed the traditional legality requirements for an expropriation (but for

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[120] *Methanex Corporation* v. *United States of America*, NAFTA Arbitral Tribunal, Final Award on Jurisdiction and Merits, 3 August 2005, IV D para. 7.
[121] *Saluka Investments BV (The Netherlands)* v. *The Czech Republic*, UNCITRAL Partial Award, 17 March 2006, para. 255.
[122] Cf. Rudolf Dolzer, *Indirect Expropriations: New Developments?* 11 N.Y.U. ENVIRONMENTAL LAW JOURNAL 64, 65 (2002); Yves Fortier and Stephen Drymer, *Indirect Expropriation in the Law of International Investment: I know It When I See It, or Caveat Investor*, ICSID REVIEW – FOREIGN INVESTMENT LAW JOURNAL 293 (2004); August Reinisch, *Expropriation*, in: P. Muchlinski/ F. Ortino (eds.), The Oxford Handbook of International Investment Law (OUP). ILA COMMITTEE ON THE INTERNATIONAL LAW ON FOREIGN INVESTMENT (forthcoming); pre-published version available at http://www.ilahq.org/pdf/Foreign%20Investment/ILA%20paper%20Reinisch.pdf.; Catherine Yannaca-Small, *"Indirect Expropriation" and the "Right to Regulate" in International Investment Law*, in OECD (ed.), INTERNATIONAL INVESTMENT LAW. A CHANGING LANDSCAPE 43 (2005).
[123] *Azurix*, *supra* note 20.
[124] *Azurix*, *supra* note 20, para. 310.
[125] *Ibid*.
[126] *Ibid*.
[127] *Azurix*, *supra* note 20, para. 311.

the requirement to pay compensation)[128] into criteria to ascertain whether an expropriation had taken place at all. This implied that whenever States took measures for a *bona fide* public purpose and in a non-discriminatory fashion, they did not act in an expropriatory way and would thus no longer be liable to pay compensation.

The *Azurix* tribunal, however, did not totally dismiss the public purpose criterion. Rather, it found that it should be "complemented" by considerations of proportionality, as found in the case-law of the European Court of Human Rights, which required that "a measure must be both appropriate for achieving its aim and not disproportionate thereto."[129] Ultimately, the *Azurix* tribunal seems to have relied upon the traditional effects test when concluding that the challenged measures affected the management of the investor "but not sufficiently for the Tribunal to find that Azurix's investment was expropriated."[130]

In 2006 the sole effect doctrine found its adherents in the *Telenor* Award[131] in which the tribunal referred to the "substantial volume of case law, both under the Washington Convention and in general public international law, as to the magnitude of the interference with the investor's property or economic rights necessary to constitute expropriation."[132] The tribunal added to the "traditional" criteria of indirect expropriation such as a "deprivation of a substantial or significant part of the economic value of the investment" some new formulations, trying to illustrate this concept. It characterized expropriatory action as "conduct [that must] be such as to have a major adverse impact on the economic value of the investment."[133]

The intensity of interference was also a major reason for the *LG&E* tribunal to find that the challenged State measures did not constitute indirect expropriation. According to the tribunal, they did not reach the level of a "permanent" and "severe" "deprivation" because the investors retained ownership and control of their investments.[134] Implicitly emphasizing the importance of effects, the *LG&E* tribunal considered that "[i]n evaluating the degree of the measure's interference with the investor's right of ownership, one must analyze the measure's economic impact – its interference with the investor's reasonable expectations – and the measure's duration."[135]

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[128] Cf. Article 1110 NAFTA: "1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:
(a) for a public purpose;
(b) on a non-discriminatory basis;
(c) in accordance with due process of law and Article 1105(1); and
(d) on payment of compensation in accordance with paragraphs 2 through 6."

[129] *James and Others* v. *United Kingdom*, 8 European Human Rights Reports 123-164 (1986), Judgment of 21 February 1986, Ser. A No. 98, cited in *Azurix*, *supra* note 20, para. 311.

[130] *Azurix*, *supra* note 20, para. 322.

[131] *Telenor*, *supra* note 43.

[132] *Telenor*, *supra* note 43, para. 65.

[133] *Telenor*, *supra* note 43, para. 64.

[134] *LG&E*, *supra* note 12, para. 200.

[135] *LG&E*, *supra* note 12, para. 190.

Expropriation was also one of the central issues in *ADC* v. *Hungary*.[136] The case concerned a contract to build and operate a new terminal at the Budapest International Airport which was expropriated by a government decree. Interestingly, the tribunal did not only find that an expropriation had taken place but also addressed at length the question of the legality of the taking. It came to the conclusion that the expropriation "was unlawful as: (a) the taking was not in the public interest; (b) it did not comply with due process […]; (c) the taking was discriminatory and (d) the taking was not accompanied by the payment of just compensation to the expropriated parties."[137]

With the decrease of outright takings of foreign investments in the last decades also the question of the legality of expropriations – once a core question of public international law regarding the treatment of foreigners – has been less frequently addressed. *ADC* v. *Hungary* is the first ICSID case broadly addressing this issue which has particular relevance for the quantum of the claim on the level of compensation/damages.[138]

The traditional legality requirements, markedly formulated in the so-called Hull-formula[139] and contained in numerous BITs and other international investment agreements,[140] were expressed in the applicable Cyprus-Hungary BIT as follows:

> "Neither Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments unless the following conditions are complied with:
> (a) The measures are taken in the public interest and under due process of law;
> (b) The measures are not discriminatory;
> (c) The measures are accompanied by provision for the payment of just compensation."[141]

With regard to these preconditions, the tribunal found, among others, that "a treaty requirement for "*public interest*" requires some genuine interest of the public. If mere reference to "*public interest*" can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless

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[136] *ADC, supra* note 10.
[137] *ADC, supra* note 10, para. 476.
[138] See *infra* text starting at note 160.
[139] In a diplomatic note sent to his Mexican counterpart in 1938, the US Secretary of State Cordell Hull demanded: "The Government of the United States merely adverts to a self-evident fact when it notes that the applicable and recognized authorities on international law support its declaration that, under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate and effective payment therefore." GREEN HAYWOOD HACKWORTH, 3 DIGEST OF INTERNATIONAL LAW 658-59 (1942), at § 288.
[140] E.g. Article 1110 NAFTA, *supra* note 128; Article 13 Energy Charter Treaty, Annex 1 to the Final Act of the European Energy Charter Treaty Conference, 17 December 1994; 34 INTERNATIONAL LEGAL MATERIALS 381 (1995).
[141] Article 4(1) Agreement between the Government of the Hungarian People's Republic and the Government of the Republic of Cyprus on Mutual Promotion and Protection of Investment.

since the Tribunal can imagine no situation where this requirement would not have been met."[142] Concerning the "due process" requirement, the *ADC* tribunal held that "[s]ome basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful."[143] Since these two conditions as well as the two other requirements were not fulfilled in the specific case, the tribunal held that the expropriation was unlawful.

7. The Necessity Defense

In 2006 the second of the Argentine ICSID cases addressing economic emergency measures was decided on the merits. Like in *CMS* v. *Argentina*,[144] a year earlier, the ICSID tribunal in *LG&E* v. *Argentina*[145] broadly dealt with the question whether Argentina could justify its BIT violations (fair and equitable treatment as well as umbrella clause) by invoking a state of necessity.

Since in both cases the BIT violations stemmed from the same acts of the Argentine government and since Argentina invoked the same factual circumstances as circumstances precluding wrongfulness under Article 25[146] of the ILC State Responsibility Articles[147] it was to be expected that the *LG&E* tribunal would be guided by the *CMS* tribunal's consideration of the matter. However, the *LG&E* tribunal did not only ignore the findings of the *CMS* v. *Argentina* tribunal with regard to state of necessity, it even arrived at a result squarely contradicting the earlier decision. According to the tribunal in *LG&E* v. *Argentina*, the situation in Argentina during a 15-months period between 2001 and 2003 constituted a state of necessity and exempted Argentina of its responsibility for violating various investment standards under the Argentina-US BIT.

As will be remembered, the *CMS* tribunal had found 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

[142] *ADC*, *supra* note 10, para. 432.
[143] *ADC*, *supra* note 10, para. 435.
[144] *CMS*, *supra* note 13.
[145] *LG&E*, *supra* note 12.
[146] 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."
[147] 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).

from its responsibility in the matter."[148] The *LG&E* tribunal, on the other hand, found that "from 1 December 2001 until 26 April 2003, Argentina was in a period of crisis during which it was necessary to enact measures to maintain public order and protect its essential security interests."[149] As a result, during that period, Argentina was found to be exempt from responsibility.

In spite of this conflicting assessment of the situation prevailing in Argentina during the same critical period, the two tribunals did concur on a number of important aspects of necessity defense under international law.[150]

8. Lack of an agreement to arbitrate

In its 2006 award in *Salini* v. *Jordan*,[151] an ICSID tribunal dismissed the Claimants' claims for lack of an agreement to submit the dispute to arbitration.[152] The case concerned a dispute between an Italian company and Jordan arising from the construction of a dam. In 2004, the tribunal had upheld its jurisdiction over the Claimants' claims that Jordan, by refusing to arbitrate pursuant to the construction contract, had breached the Jordan-Italy BIT.[153] The construction contract provided that any disputes, not amicable settled "shall be finally settled by reference to the competent Court of law in the Kingdom, unless both parties shall agree that the dispute be referred to arbitration."[154] Whether such an agreement to arbitrate had been reached through a series of official and quasi-official contacts between Italy and Jordan remained controversial. In fact, the prime ministers of Italy and Jordan had met in 2000 and discussed the *Salini* dispute. Subsequently, the Italian ambassador had summarized the content of the meeting in letters stating that an agreement to arbitrate had been reached. These letters remained unanswered by the Jordanian side which in its correspondence did not refer to any agreement to arbitrate. The *Salini* tribunal invoked the "well established principle of law that it is for a claimant to prove the facts on which it relies in support of his claim – "Actori incumbat probatio"."[155] On the issue of the existence of an agreement to arbitrate, the tribunal noted that "there are no specific requirements

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[148] *CMS*, *supra* note 13, para. 329.
[149] *LG&E*, *supra* note 12, para. 226.
[150] For a detailed comparison on the two awards see August Reinisch, *Necessity in International Investment Arbitration – An Unnecessary Split of Opinions in Recent ICSID Cases? Comments on* CMS *and* LG&E, in: 8 THE JOURNAL OF WORLD INVESTMENT AND TRADE (2007), 191-214.
[151] *Salini Costruttori S.p.A. and Italstrade S.p.A.* v. *The Hashemite Kingdom of Jordan,* ICSID Case No. ARB/02/13, Award, 31 January 2006.
[152] *Salini* v. *Jordan*, *supra* note 151, para. 100.
[153] *Salini* v. *Jordan, supra* note 45. See also August Reinisch, *From Contested Jurisdiction to Indirect Expropriation and Fair and Equitable Treatment – Developments in ICSID Arbitration in 2004*, THE GLOBAL COMMUNITY. YEARBOOK OF INTERNATIONAL LAW AND JURISPRUDENCE 1653, at 1664 (2005) and Christina Knahr, *Legal Maxims: Summaries and Extracts from Selected Case Law: ICSID*, THE GLOBAL COMMUNITY. YEARBOOK OF INTERNATIONAL LAW AND JURISPRUDENCE 1671, at 1819 (2005).
[154] Cited in *Salini* v. *Jordan*, *supra* note 151, para. 52.
[155] *Salini* v. *Jordan, supra* note 151, para. 70.

of form in public international law for the existence of an agreement"[156] and that thus all authorities "accept the possibility for states to conclude international agreements orally."[157] Relying on a wealth of writings and international jurisprudence, the tribunal also found that the prime ministers of the two countries were, in principle, empowered to commit their respective States. However, it found that Claimant failed "to prove that a binding agreement had been orally concluded in February 2000 between the Prime Minister of Italy and the Prime Minister of Jordan to submit the dispute between Salini Costruttori S.p.A. and JVA to arbitration."[158] According to the tribunal, "[s]uch a proof does not result from the unilateral documents provided by the Claimants, the accuracy of which is denied by the Respondent. It does not result either from the silence kept by Jordan on certain points."[159]

V. Remedies – Compensation or Damages

Whether successful claimants in investment arbitrations should receive compensation or damages is often unclear,[160] though the principle seems sufficiently straight forward – at least in cases of expropriation: Where States are lawfully taking the property of foreign investors, they are obliged to pay "just", "fair", "full" or "prompt, adequate and effective" compensation. The precise level of compensation which has been controversial in general international law ever since the debate about a New International Legal Order is frequently expressly laid down in the applicable investment agreements.[161] An unlawful taking, on the other hand, constitutes an illegal act triggering the expropriating State's international responsibility. According to the ILC Articles on State Responsibility, the consequence would be that full reparation has to be

[156] *Ibid*, para. 76.
[157] *Ibid*, para. 77.
[158] *Ibid*, para. 100.
[159] *Ibid*, para. 99.
[160] Cf. Irmgard Marboe, *Compensation and Damages in International Law*, 7 THE JOURNAL OF WORLD INVESTMENT AND TRADE 723 (2006).
[161] E.g. Art. IV (1) US-Argentina BIT provides: […] "Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; and be freely transferable at the prevailing market rate of exchange on the date of expropriation."
Art. V (3) Italy-Jordan BIT provides: "The just compensation shall be established on the basis of the real international market value immediately prior to the moment in which the decision to nationalize or expropriate is announced or made public. In the absence of an understanding between the host Contracting Party and the investor during the nationalization or expropriation procedure, compensation shall be based on the same reference parameters and exchange rates taken into account in the documents for the constitution of the investment. The exchange rate applicable to any such compensation shall be that prevailing on the date immediately prior to the moment in which the nationalization or the expropriation has been announced or made public."

made.[162] Since restitution in kind is frequently impossible or untenable, damages are the usual form of reparation.

In 2006, this distinction was clearly upheld and emphasized by the *ADC* tribunal which found that an unlawful expropriation had taken place.[163] The tribunal stressed: "The BIT only stipulates the standard of compensation that is payable in the case of a lawful expropriation, and these cannot be used to determine the issue of damages payable in the case of an unlawful expropriation since this would be to conflate compensation for a lawful expropriation with damages for an unlawful expropriation."[164] The tribunal thereby rejected Respondent's argument that the BIT provision on the amount of compensation, which referred to domestic Hungarian law, should be applied as a *lex specialis* vis-à-vis the general international law standard for the assessment of damages resulting from an unlawful act as set out in the PCIJ's *Chorzów Factory* judgment. On the contrary, the *ADC* tribunal endorsed the *Chorzów Factory* standard according to which "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[165] Because the value of the investment in the specific case had considerably risen after the expropriation, the *ADC* tribunal concluded that "it must assess the compensation to be paid by the Respondent to the Claimants in accordance with the *Chorzów Factory* standard, i.e., the Claimants should be compensated the market value of the expropriated investments as at the date of this Award."[166] In the view of the tribunal, the market value at that later date was considered appropriate since it "put the Claimants in the same position as if the expropriation had not been committed."[167]

VI. Annulment of Awards

As is well-known, the ICSID Convention offers a special control mechanism by providing for an annulment procedure. According to Article 52(1) ICSID Convention, an award may be set aside by an *ad hoc* committee if the tribunal was not properly constituted; the tribunal manifestly exceeded its powers; there was corruption on the part of a member of the tribunal; there was a serious departure from a fundamental rule of procedure; or the award failed to state the reasons on which it was based.[168] The

[162] Art 31(1) 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).
[163] See *supra* text at note 136.
[164] *ADC, supra* note 10, para. 481.
[165] *Germany* v. *Poland (Factory at Chorzów)*, Judgement of 15 May 1926, PCIJ Ser. A, No. 7 (1926), 44, at 47; cited in *ADC, supra* note 10, para. 484.
[166] *ADC, supra* note 10, para. 499.
[167] *Ibid*, para. 497.
[168] Article 52(1) ICSID Convention provides:
"Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

rather broad scope of review exercised by the first two *ad hoc* committees[169] provoked substantial criticism, mainly based on the fear that a broad scope of scrutiny may turn the annulment procedure into a *de facto* appellate system.[170] This apprehension was, however, mitigated in subsequent cases.[171] But the increased number of ICSID cases since the late 1990s has led to new annulment proceedings.[172]

The 2006 annulment decision in the *Mitchell* case[173] is likely to raise again concerns about the proper scope of judicial review to be exercised by *ad hoc* committees under Article 52(1) ICSID Convention. In that case, an ICSID Committee annulled a 2004 Award on the grounds of manifest excess of powers and failure to state reasons because the ICSID arbitral tribunal had accepted its jurisdiction on the erroneous assumption of the existence of an investment within the meaning of the ICSID Convention.[174] While the Committee's initial reflections on the proper role of annulment proceedings are likely to remain uncontroversial, its actual exercise of annulment "supervision" was problematic.

The *Mitchell ad hoc* committee set out to stress that "an annulment proceeding is different from an appeal procedure and that it does not entail the carrying out of a substantive review of an award."[175] It further emphasized that "[a]n *ad hoc* Committee should not decide to annul an award unless it is convinced that there has been a substantial violation of a rule protected by Article 52"[176] and that "excess of powers has no consequence unless it is manifest."[177] On the substance, however, the *Mitchell ad hoc* committee very closely scrutinized whether the operation of a law firm in the host State could be considered to fall under the notion of "investment" according to Article

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(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."

[169] *Klöckner* v. *Kameroon*, ICSID Case No. ARB/81/2, *Ad hoc* Committee decision of 3 May 1985, 2 ICSID REPORTS 95; *Amco Asia v Indonesia*, ICSID Case No. ARB/81/1, *Ad hoc* Committee decision of 16 May 1986, 1 ICSID REPORTS 509; 25 INTERNATIONAL LEGAL MATERIALS 1441 (1986).

[170] See W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 4 DUKE LAW JOURNAL 739 (1989); David D. Caron, *Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction between Annulment and Appeal*, 7 ICSID REVIEW – FOREIGN INVESTMENT LAW JOURNAL 21 (1992).

[171] *MINE* v. *Guinea*, ICSID Case No. ARB/84/4, Ad hoc Committee decision of 22 December 1989, 4 ICSID REPORTS 79.

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

[173] *Mitchell*, *supra* note 3.

[174] Cf. *Mitchell*, *supra* note 3, para. 67.

[175] *Ibid*, para. 19.

[176] *Ibid*, para. 19.

[177] *Ibid*, para. 20.

25 ICSID Convention.[178] In its view, the tribunal's award was "incomplete and obscure as regards what it considers an investment"[179], in particular with respect to the requirement of a "contribution to the economic development of the host country." The *ad hoc* tribunal did not only use a very demanding test for such contribution to the economic development of a host State, it also replaced the original tribunal's opinion on the matter by its on view. In effect, this annulment control came already very close to an appellate review.

VII. Procedural Issues

1. Confidentiality

Confidentiality was long considered one of the core virtues of international commercial arbitration, enabling companies to settle their disputes in a discreet way and avoiding too much publicity.[180] In recent years, however, the assumption that a duty of confidentiality should be viewed as an implicit arbitration obligation has been repeatedly questioned.[181]

Also in the field of investment arbitration, regularly involving State measures affecting not only foreign investors but also the public at large, calls for increased transparency have cast confidentiality requirements – at least from a policy perspective – into doubt. For various reasons, parties to investment cases have in fact made public statements about ongoing arbitration procedures and disclosed various documents used in such procedures. Already in 2000, NAFTA Chapter 11 panels had held that no "general principle of confidentiality" existed in investment arbitration.[182] In July 2001, also the NAFTA Free Trade Commission found that "[n]othing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration […]."[183]

In 2006, the matter was squarely addressed by an ICSID tribunal in *Biwater Gauff* v. *Tanzania*,[184] a high-profile water privatization case. In a procedural order, the tribunal

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[178] See *supra* text at note 16.
[179] *Mitchell*, *supra* note 3, para. 40.
[180] Cf. Steven Kouris, *Confidentiality: Is International Arbitration Losing One of Its Major Benefits?* 22 JOURNAL OF INTERNATIONAL ARBITRATION 127 (2005).
[181] Cf. Julian Lew, *The Case for the Publication of Arbitration Awards,* in: Schultsz J.C./Van den Berg A.J. (eds.), THE ART OF ARBITRATION, ESSAYS ON INTERNATIONAL ARBITRATION, LIBER AMICORUM PETER SANDERS 223 (1982).
[182] See *S.D. Myers Inc* v. *Canada,* Procedural Order No 16, 13 May 2000, para. 8; *Metalclad Corporation* v. *Mexico,* Case No. ARB(AF)/97/1, Award, 30 August 2000, 16 ICSID REVIEW – FOREIGN INVESTMENT LAW JOURNAL 168 (2001); 40 INTERNATIONAL LEGAL MATERIALS 36 (2001), para. 13.
[183] Notes of Interpretation of Certain Chapter 11 Provisions, NAFTA Free Trade Commission, 31 July 2001, para. 1.
[184] *Biwater Gauff, supra* note 1.

had to decide whether the respondent State's unilateral disclosure of various documents relating to the ongoing arbitration was permissible. It seized this opportunity and ruled broadly on the circumstances under which it considered disclosure of documents appropriate. Before doing so, it addressed the general policy issues concerning confidentiality, referring to the "obvious tension between the interests in transparency and in procedural integrity."[185] It expressly noted the view of NAFTA panels and of the ICSID tribunal in the *Amco* v. *Indonesia* case which had found that "as to the 'spirit of confidentiality' of the arbitral procedure, it is right to say that the Convention and the Rules do not prevent the parties from revealing their case."[186] However, instead of simply inferring a general freedom of disclosure, the *Biwater Gauff* tribunal merely recognized "an overall trend in [investment arbitration] towards transparency"[187] and continued to fashion a specifically tailored solution, depending upon the types of documents involved and the procedural stage during which disclosure is sought.[188] Its recommendations are likely to influence arbitral tribunals in future investment disputes.

2. Stay of Enforcement

The ICSID Convention enables States to request a stay of enforcement of an award until the *ad hoc* committee which has to decide upon an annulment makes such a ruling.[189] In the *CMS* case, an ICSID *ad hoc* Committee[190] granted such a stay of enforcement concerning the 2005 award in *CMS* v. *Argentina*.[191] In doing so, the committee followed what has now become a routine exercise by ICSID *ad hoc* committees.[192] What is notable about this decision is the reasoning why the *CMS ad hoc* committee did not require the posting of security by the requesting State. While the ICSID Convention and the ICSID Arbitration Rules do not expressly address this issue, tribunals have held that their discretion to grant a stay of enforcement encompassed the right to make such stay

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[185] *Biwater Gauff*, *supra* note 1, para. 140.
[186] *Amco Asia Corporation and others* v. *Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Provisional Measures, 9 December 1983, 1 ICSID Reports 410, 412, para. 4.
[187] *Biwater Gauff*, *supra* note 1, para. 122.
[188] *Biwater Gauff*, *supra* note 1, para. 163.
[189] Article 52(5) ICSID Convention provides: "The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request."
[190] *CMS, supra* note 2.
[191] *CMS*, Award, *supra* note 13.
[192] See also *Patrick Mitchell* v. *Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Stay of Enforcement of the Award, 30 November 2004; *Repsol YPF Ecuador S.A.* v. *Empresa Estatal Petroleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/01/10, Procedural Order No. 1 concerning the Stay of Enforcement of the Award, 22 December 2005; *Amco Asia Corporation and others* v. *Republic of Indonesia*, ICSID Case No. ARB/81/1, *Ad hoc* Committee Decision on the Application for Annulment of May 16, 1986, 25 INTERNATIONAL LEGAL MATERIALS 1439 (1986), Interim Order No. 1 Concerning the Stay of Enforcement of the Award of March 2, 1991, 9 ICSID Reports 59 (2006); *Wena Hotels Limited* v. *Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Application for Annulment of February 5, 2002, 41 INTERNATIONAL LEGAL MATERIALS 933 (2002); 6 ICSID Reports 129 (2004).

conditional upon the posting of adequate security.[193] The *CMS ad hoc* committee openly dealt with the practical implications of such a condition, acknowledging that "the provision of a bank guarantee puts a claimant in a better position that it would be if annulment had not been sought, since it converts the undertaking of compliance under Article 53 of the Convention into a financial guarantee and avoids any issue of sovereign immunity from execution, which is expressly reserved by Article 55 of the Convention. On the other hand, a request for annulment causes significant delay to the claimant, with the consequent possibility of prejudice."[194] The *CMS ad hoc* committee noted that Argentina had voiced misgivings about the outcome of various ICSID cases and requested national and international review of awards. It emphasized, however, that in the particular case, the *Procurador del Tesoro de la Naciôn Argentina,* acting as Agent of Argentina, had signed a letter on behalf of the Republic of Argentina, comprising "an undertaking to CMS Gas Transmission Company that, in accordance with its obligations under the ICSID Convention, it will recognize the award rendered by the Arbitral Tribunal as binding and will enforce the pecuniary obligations imposed by that award within its territories, in the event that annulment is not granted."[195] Relying on ICSID, ICJ and PCIJ cases concerning the binding value of statements made by state agents before international courts and tribunals, the Committee found that "[it] "can be in no doubt as to the binding character" of the statement made [...] on behalf of Argentina."[196]

VIII. Conclusions

The case-law produced in 2006 has helped to clarify important issues of international investment law and arbitration. Despite some conflicting outcomes, the general trend is one of contributing to a growing body of ICSID jurisprudence.

AUGUST REINISCH[*]

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[193] Cf. Schreuer, *supra* note 18, 1058; Paul Friedland, *Stay of Enforcement of the Arbitral Award Pending ICSID Annulment Proceedings,* in: Galliard and Banifatemi (eds), ANNULMENT OF ICSID AWARDS, 177 (2004).
[194] *CMS*, Stay of Enforcement, *supra* note 2, para. 39.
[195] *Ibid*, para. 47.
[196] *Ibid*, para. 49.
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