Sonderdruck aus:

GERMAN YEARBOOK OF INTERNATIONAL LAW

JAHRBUCH FÜR INTERNATIONALES RECHT

Volume 48 · 2005

DUNCKER & HUMBLOT / BERLIN 2006

Contents

Awards and Decisions of ICSID Tribunals in 2005

By Richard Happ* and Noah Rubins**

A. Introduction

This report covers publicly available awards and decisions of arbitral tribunals constituted under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID), which have been rendered between December 2004 and November 2005 and have been published or made available to the authors. This is the third report in this series, following directly upon the report published in this *Yearbook* last year.[1]

2005 has again been a busy year for ICSID. At the time of writing, 23 new cases have been filed with ICSID and its Additional Facility, bringing the total number of pending registered disputes to 103. In contrast to last year, only four of the new cases have been filed against Argentina. The remaining cases are geographically spread over five continents: two cases each against Georgia, Romania, Egypt, Mexico and Ecuador, and one new case each against Tanzania, Congo, Yemen, Kazakhstan, Grenada, Malaysia, Lithuania, Bangladesh, Zimbabwe, Venezuela and Algeria. It is to be noted that several cases which were instituted in 2003 and 2004 have been settled by agreement of the parties.

The steady stream of decisions and the limited space available here make it impracticable and unnecessary to cover each and every decision. The authors

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Mr. *Rubins* would like to thank *Jamsheed Peeroo* and *Peter Nikitin* for their assistance in preparing this report.

[1] *Richard Happ/Noah Rubins,* Awards and Decisions of ICSID Tribunals in 2004, German Yearbook of International Law (GYIL), vol. 47, 2004, 878.

have therefore decided to concentrate on the awards and decisions that seem most relevant from the viewpoint of international law. The following decisions are covered below: *Consorzio Groupement L.E.S.I. – DIPENTA v. Republic of Algeria* (B.); *Empresas Lucchetti and Lucchetti Peru v. Peru* (C.); *Plama Consortium Limited v. Republic of Bulgaria* (D.); *Impregilo S.p.A. v. Islamic Republic of Pakistan* (E.); *CMS Gas Transmission Company v. Republic of Argentina* (F.); *Camuzzi International S.A. v. Argentine Republic* (G.); *Sempra Energy International v. Argentine Republic* (H.); *Gas Natural SDG, S.A. v. Argentine Republic* (J.); *Noble Ventures, Inc. v. Romania* (K.); *Wena Hotels Ltd. v. Arab Republic of Egypt* (L.). The decisions in *Aguas del Tunari S.A. v. Republic of Bolivia*[2] and *Bayindir Insaat Turizim Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*[3] have been rendered during the time period in review, but were published only in mid-December, too late to be included in this report.

B. Consorzio Groupement L.E.S.I. – DIPENTA *v.* Republic of Algeria (Case No. ARB/03/08)

The award[4] was rendered on 10 January 2005 by a Tribunal consisting of Professor *Pierre Tercier* as President and Mr. *André Faurès* and Professor *Emmanuel Gaillard* as members of the Tribunal. This award provides interesting general guidelines on how Article 25 para. 1 of the Washington Convention[5] should be interpreted.[6]

[2] *Aguas del Tunari S.A. v. Republic of Bolivia*, ARB/02/3, Decision Respondent's Objections to Jurisdiction of 21 October 2005 (*Caron, Alberro-Semerena, Alvarez* as members of the Tribunal). The text of the decision (and of many others) is available *via* the ICSID homepage at: http://www.worldbank.org/icsid/cases/awards.htm.

[3] *Bayindir Insaat Turizim Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ARB/03/29, Decision on Jurisdiction of 14 November 2005 (*Kaufmann-Kohler, Berman, Böckstiegel* as members of the Tribunal), available at ICSID homepage (note 2).

[4] *Consorzio Groupement L.E.S.I. – DIPENTA v. Republic of Algeria*, ARB/03/08, Award of 10 January 2005, available at ICSID homepage (note 2) (*Dipenta*).

[5] Convention on the Settlement of Investment Disputes between States and Nationals of other States, 14 October 1966, UNTS, vol. 575, 159 (Washington Convention or ICSID Convention).

[6] For a comment on the Tribunal's interpretation of the notion of "investment," see *Farouk Yala*, La notion "d'investissement", Les Cahiers de l'arbitrage/Gazette du palais, 2005/3, 38.

I. The Dispute

The dispute arose out of a concession agreement for the construction of the Koudiat Acerdoun dam in Algeria. The agreement was signed in December 1993 by a special-purpose consortium of two Italian companies, *L.E.S.I.* and *DIPENTA,* and by the *Agence nationale des barrages* (*ANB*) of Algeria. It was alleged by the consortium that since December 1993 it had been encountering various problems, mainly due to the lack of security in the region, and that these difficulties had prevented the construction project from progressing to completion.

In 1997, *ANB* modified the agreement, and requested that a new type of dam be built. This required the prior approval of the African Development Bank. The African Development Bank imposed a new international tender as a condition for the grant of the necessary additional financing. The *ANB* accordingly terminated the concession agreement in 2001 on the ground of *force majeure,* and agreed to compensate the consortium. However, the parties failed to agree upon the amount of the compensation.

The consortium brought a claim on the basis of the ICSID arbitration clause contained in the 1991 bilateral investment treaty (BIT) between Italy and Algeria.[7]

II. The Decision

The Respondent objected to the jurisdiction of the Tribunal, as well as to the admissibility of the claim. The Tribunal mentioned that any distinction between the two types of objections had no practical effect in ICSID proceedings.[8] However, since the two issues, which involved different questions of law, had

[7] Tra il Governo della Repubblica Italiana ed il Governo della Repubblica Algerina Democratica e Popolare sulla promozione e protezione degli investimenti, 18 May 1991, text available *via* the UNCTAD homepage at: http:/www.unctadxi.org/templates/DocSearch____779.aspx.

[8] *Dipenta* (note 4), Part 1, para. 2. On the distinction between admissibility and jurisdiction and its possible relevance, see *Ian Laird,* A Distinction without a Difference? An Examination of the Concepts of Admissibility and Jurisdiction in Salini v. Jordan and Methanex v. USA, in: *Todd Weiler* (ed.), International Investment Law and Arbitration, 2005, 201.

been presented separately in the parties' pleadings, the Tribunal proceeded to deal with the issue of jurisdiction first, before ruling on admissibility.

The Respondent's objections to jurisdiction were that the requirements of Article 25 para. 1 of the Washington Convention had not been satisfied, and, alternatively, that jurisdiction should be limited to violations of the BIT (and not to contract breaches). Regarding admissibility, Algeria argued that the Claimant lacked standing, and that the pre-arbitration procedure under Article 8 of the BIT had not been satisfied.[9]

1. Jurisdiction

The Tribunal first dealt with the four jurisdictional requirements imposed by Article 25 para. 1 of the Washington Convention, namely, the existence of a legal dispute, that the dispute arises directly from an investment, that the dispute arises between a contracting State and a national of another contracting State, and that the relevant State has consented in writing to ICSID jurisdiction.[10]

With regard to the first condition the Claimant's submission of a complaint to the Tribunal was considered to be sufficient. The Tribunal observed that the fact that the dispute related only to the quantum of damages rather than to liability was irrelevant, and accordingly found that a legal dispute for the purposes of Article 25 para. 1 of the Washington Convention existed in the case at hand.

The Tribunal sought to determine whether and to what extent a construction contract satisfied the relevant conditions, and could be seen as an "investment" under the Convention. Having considered the relevant ICSID case-law on the issue,[11] the Tribunal identified a trend to adopt a relatively broad notion of investment. Although it recognized that no clear general principles had been laid down, the Tribunal assembled a number of objective criteria to be satisfied.[12] The first condition is that the party must have made contributions that have an economic value in the host country. Such contributions were not limited to finance capital, but could also include loans, materials, work carried out, and services rendered in the host country, and also any expenses incurred in pursuing an economic goal. Hence, investments did not necessarily have to be made in the host country, as long as they were made in the context of the project that was to be realized in the host country.[13] Secondly, any contributions must have been committed for a certain period of time. Moreover, the contributions should have had a substantial economic value, sufficient to be properly characterized as promoting the economy and the development of the host country.[14] Finally, the party must have undergone a certain degree of risk in making the contributions. The Tribunal concluded in applying the above tests that there was an investment in this case.

Algeria further objected that the dispute did not directly involve the Algerian State. Thus, it argued, the dispute was not between "a Contracting State and a national of another Contracting State." The Tribunal stated that it would be inappropriate at the jurisdictional stage of the proceedings to address whether the State could be held liable.[15] The fact that the submissions of the investor were directed against a State should be conclusive, *prima facie.* The Tribunal noted, however, that this formalistic approach should be abandoned if the State concerned had no link with the contract in question, as a resulting ICSID claim would be abusive. Such would be the case, for example, where the contract was concluded with a company divorced from the State's activity and not under its influence at all.[16]

The Tribunal relied on a number of previous ICSID awards,[17] and observed that although the contract was signed by the *ANB,* which was an independent

[9] *Dipenta* (note 4), Part 2, para. 3.

[10] *Id.,* Part 2, para. 4.

[11] *E.g., Salini Construttory S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco,* ARB/00/4, Decision on Jurisdiction of 23 July 2001 (*Briner, Cremades, Fadlallah* as members of the Tribunal), reprinted in: ILM, vol. 42, 2003, 609. *Cf.* also *Noah Rubins,* The Notion of 'Investment' in International Investment Arbitration, in: *Norbert Horn* (ed.), Arbitrating Foreign Investment Disputes, 2004, 283.

[12] *Dipenta* (note 4), Part 2.2, para. 13.

[13] *Id.,* Part 2.2, para. 14(i).

[14] *Id.,* Part 2.2, para. 14(ii).

[15] *Id.,* Part 2.3, para. 19(i).

[16] *Id.,* Part 2.3, para. 19(ii).

[17] *Emilio Augustin Maffezini v. Kingdom of Spain,* ARB/97/7, Decision on Jurisdiction of 25 January 2000 (*Orrego Vicuña, Buergenthal, Wolf* as members of the Tribunal), reprinted in: ILR, vol. 124, 2003, 6 (*Maffezini Jurisdiction*); *Consortium R.F.C.C. v. Kingdom of Morocco,* ARB/00/6, Decision on Jurisdiction of 16 July 2001 (*Briner, Cremades, Fadlallah* as members of the Tribunal), available at: http://www.worldbank.org/icsid/cases/rfcc-decision.pdf (*R.F.C.C. v. Morocco*).

Algerian body with legal personality separate from the State, it was clear from the outset that Algeria had indirectly participated in the project, at least in pre-contractual negotiations, that it had substantial influence within the *ANB,* and that it may have played a role in the deterioration of the parties' relations. The Tribunal therefore held that the third condition under Article 25 para. 1 of the Washington Convention was satisfied, without prejudice to a finding on the merits.

In order to determine whether the dispute fell within the scope of Algeria's consent to ICSID arbitration contained in the treaty, the Tribunal examined the jurisdictional provisions of the BIT. It first rejected Algeria's argument that there was no investment within the meaning of the BIT. The Tribunal held that it saw no reason why "investment" should be interpreted differently in a BIT and in the Washington Convention.[18] Algeria had argued that a project could only be considered an investment if it was implemented in accordance with specific Algerian procedures. The Tribunal rejected this position as well, reasoning that an international treaty should not be interpreted in the light of one of the contracting parties' domestic laws.[19]

With regard to the scope of Algeria's consent to ICSID arbitration, the Tribunal held that jurisdiction could only extend to matters that would amount to a breach of the BIT.[20] This conclusion might have been different, the arbitrators noted, if the applicable treaty contained an 'umbrella clause' (or *pacta sunt servanda* clause), absent from the Italy/Algeria BIT. Therefore, a mere breach of contract that did not in itself violate any treaty provisions fell outside the Tribunal's jurisdiction.

The Tribunal therefore concluded that, *prima facie,* it had jurisdiction to determine any issues raised by the Claimant pertaining to violations of the BIT.[21]

2. Admissibility

The Tribunal then proceeded to examine Algeria's objections to admissibility. It first considered the merits of the argument that the Claimant had not

[18] *Dipenta* (note 4), Part 2.4, para. 24(ii).

[19] *Id.*, Part 2.4, para. 24(iii).

[20] *Id.*, Part 2.4, para. 25.

[21] *Id.*, Part 2.5, para. 27.

complied with the pre-arbitration procedure under Article 8 of the BIT, which required the Claimant to attempt to amicably resolve the dispute for six months before initiating arbitration. The Tribunal held that the six-month negotiation period should be calculated from the date of the Claimant's first official request to settle the matter amicably.[22] The arbitrators emphasized that there was no strict rule as to the details that should be included in such a request, but that it should be made officially, should convey the Claimant's intention to obtain payment, and should give a general explanation of the context of the dispute.[23] The Tribunal came to the conclusion that the Claimant had complied with Article 8 of the BIT. It added, as *obiter dictum,* that the six-month negotiation period was not an absolute condition for admissibility, and could be dispensed with where it was clear from the other party's behavior that negotiation was doomed to failure.[24]

Finally, the Tribunal addressed the issue of the Claimant's standing, noting that this question went not only to admissibility, but was also relevant to jurisdiction.[25] The arbitrators observed that the concession agreement had been signed by an informal consortium between the two Italian companies, which had no legal personality of its own, but instead was based upon the distinct legal personalities of the component companies. The request for arbitration, meanwhile, had been filed by *Consorzio Groupement L.E.S.I. – DIPENTA,* which was incorporated and enjoyed legal personality of its own under Italian law.[26] This new, formal consortium had been formally registered only *after* the concession agreement was signed.

The Tribunal went on to note that the relevant issue was not whether the Claimant had the capacity to act, which it clearly did. Rather, the real question was whether the Claimant itself had a direct connection to the original transaction.[27] Any assignment of contractual rights between the two different consortia required the express approval of the *ANB.* Although the contractual documents constituting the formal consortium had been communicated to the *ANB,* the Tribunal held that the substitution of the consortiums had not been sufficiently

[22] *Id.*, Part 3.1, para. 32(ii).

[23] *Id.*, Part 3.1, para. 32(iii).

[24] *Id.*, Part 3.1, para. 33.

[25] *Id.*, Part 3.2, para. 34.

[26] *Id.*, Part 3.2, para. 37; see also *id.*, Part 3.2, para. 39.

[27] *Id.*, Part 3.2, para. 37(iii).

brought to *ANB*'s attention. *ANB* therefore could not have expressly or implicitly agreed to the switch.[28] Hence, the claim was inadmissible due to the Claimant's lack of standing. It also followed that the Claimant could not qualify as an "investor" within the meaning of Article 25 para. 1 of the Washington Convention.[29] The Tribunal recognized that its decision caused some inconvenience to the Claimant. It implied that a new request for arbitration had to be sent by the two Italian companies in their own name, as separate investors in the original consortium. However, the arbitrators considered that a contrary decision would be at risk of annulment.[30]

In light of its conclusion, the Tribunal considered it unnecessary to deal with the complaint by the Respondent that the Claimant had initiated parallel proceedings against *ANB* before the administrative courts of Algeria, in breach of Article 26 of the Washington Convention.[31] The Tribunal ordered that the costs be equally split between the parties.[32]

C. Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. *v.* Republic of Peru (Case No. ARB/03/4)

The Tribunal rendered its award on 7 February 2005.[33] Judge *Thomas Buergenthal* was President, and Mr. *Bernardo Cremades* and Mr. *Jan Paulsson* were members of the Tribunal. The case was based on the bilateral investment treaty between Chile and Peru.[34]

[28] *Id.*, Part 3.2, para. 38.

[29] *Id.*, Part 3.2, para. 40(ii).

[30] *Id.*, Part 3.2, para. 40(i). Note that the two Italian companies subsequently started ICSID arbitration proceedings before an identically constituted tribunal in *LESI, S.p.A. and Astaldi, S.p.A. v. Algeria,* ARB/05/3.

[31] *Dipenta* (note 4), Part 3.3, para. 42.

[32] *Id.*, Part 4, para. 43.

[33] *Empresa Lucchetti, S.A. and Lucchetti Peru, S.A. v. Republic of Peru*, ARB/03/4, Decision of 7 February 2005, available at ICSID homepage (note 2) (*Lucchetti*).

[34] Convenio entre el Gobierno de la Republica de Chile y el Gobiereno de la Republica del Peru para la Promocion y Proteccion Reciproca de las Inversiones, 2 February 2000, available at: http://www.cinver.cl/archivos/peru.html.

I. The Dispute

The dispute arose out of the construction and operation of a pasta factory. That factory was owned by the second Claimant, a company owned in turn by the first Claimant, a national of Chile.

The source of the dispute was that the plant had been constructed near a protected wetland. Already in 1997–1998, the Peruvian authorities had annulled the permits for the construction of the plant on the ground of alleged environmental problems. *Lucchetti Peru* initiated judicial proceedings, which were concluded in its favor. However, in August 2001, the operating license for *Lucchetti Peru* was revoked again for ecological reasons.

II. The Decision

The Respondent objected to the jurisdiction *ratione temporis* of the Tribunal on grounds that the dispute arose in 1997, before the BIT entered into force in August 2001, and was therefore outside the scope of the BIT.[35]

The Tribunal examined in detail the history of the dispute between the parties. It concluded that the "present dispute had crystallized by 1998," and that the revocation of the license in 2001 "merely continued the earlier dispute.[36] It is important to note that the Tribunal based this conclusion on an identity of the subject-matter in dispute, and rejected the Claimant's argumentation that the BIT dispute in 2001 was different from the municipal law dispute in 1998.[37] In conclusion, the Tribunal held that it had no jurisdiction to hear the merits of the dispute, and dismissed the claim.

[35] Art. 2 clause 2 of the BIT reads as follows: "It shall not, however, apply to differences or disputes that arose prior to its entry into force."

[36] *Lucchetti* (note 33), para. 53.

[37] *Id.*, para. 59.

D. Plama Consortium Limited *v.* Republic of Bulgaria (Case No. ARB/03/24)

The decision on jurisdiction was rendered on 8 February 2005.[38] The Tribunal consisted of Mr. *Carl Salans* as Chairman and Mr. *Jan van den Berg* and Mr. *V.V. Veeder* as members of the Tribunal.

I. The Dispute

The dispute arose out of the Claimant's purchase of nearly 97 percent of shares of *Nova Plama AD,* a Bulgarian company that owned an oil refinery in Bulgaria. The Claimant was a Cypriot company. The award only briefly mentions the facts giving rise to the dispute. The Claimant contended that the Bulgarian government (and other public authorities) deliberately created numerous grave problems for *Nova Plama AD,* which amounted to a breach of Bulgaria's obligations towards the Claimant under the Energy Charter Treaty (ECT)[39] and the Cypriot-Bulgarian BIT[40].

[38] *Plama Consortium Limited v. Republic of Bulgaria*, ARB/03/24, Decision on Jurisdiction of 10 February 2005, available at ICSID homepage (note 2) (*Plama Jurisdiction*). It needs to be noted that, subsequently, the Claimant filed a request for provisional measures, which the Tribunal dismissed in its entirety with order of 6 September 2005.

[39] The Energy Charter Treaty, Annex 1 to the Final Act of the European Charter Treaty Conference (17 December 1994, reprinted in: ILM, vol. 34, 1995, 381) is a multilateral treaty with 46 contracting parties which, *inter alia,* protects investments in the energy sector. It has a dispute settlement clause (Art. 26), which is comparable to those of modern bilateral investment treaties. For an overview of the investment protection provisions and the dispute settlement mechanism, see *Richard Happ,* Dispute Settlement under the Energy Charter Treaty, GYIL, vol. 45, 2002, 331.

[40] Agreement between The Government of the people's Republic of Bulgaria and The Government of the Republic of Cyprus on Mutual Encouragement and Protection of Investments, 12 November 1987, available at UNCTAD homepage (note 7).

II. The Decision

In its decision, the Tribunal addressed two main issues: whether it had jurisdiction under the ECT (1.)[41] and/or under the BIT by virtue of its 'most favored nation' (MFN) clause (2.).[42]

1. Jurisdiction under Article 26 ECT

The Tribunal had no difficulty concluding that the main jurisdictional requirements of Article 26 ECT[43] were fulfilled. It found that there was a dispute between a contracting party and an investor of another contracting party. It rejected Bulgaria's objection that there was no investment due to an alleged misrepresentation, noting that the charges of misrepresentation could not affect the arbitration agreement constituted by Bulgaria's offer in the ECT and the Claimant's acceptance, made effective when it submitted its claim.[44] It further held that for finding jurisdiction, it was sufficient that the Claimant alleged violations of the provisions of the ECT by Bulgaria. It did not require the Claimant to prove those violations.[45] Further discussion was dedicated to the question whether *Nova Plama AD* validly gave its consent to arbitration, since Bulgaria disputed that the persons acting for it had been entitled to do so. The Tribunal rejected that objection.

The main issue in dispute between the parties was whether Article 17 para. 1 ECT constituted an obstacle to the jurisdiction of the Tribunal.[46] Article 17

[41] *Plama Jurisdiction* (note 38), paras. 121–182.

[42] *Id.,* paras. 183–227.

[43] Art. 26 para. 1 ECT reads as follows: "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."

[44] *Plama Jurisdiction* (note 38), paras. 129–132. It seems that the Tribunal relied on the generally accepted principle of the separability of the arbitration clause.

[45] The Tribunal thus adopted the test used by Judge *Higgins* in ICJ, *Case concerning Oil Platforms* (Islamic Republic of Iran *v.* United States of America), Preliminary Objections, Judgment of 12 December 1996, ICJ Reports 1996, 803, 810. This approach is in line with the jurisprudence of other ICSID tribunals, *cf. Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ARB/02/13, Decision on Jurisdiction of 9/12/15 November 2004 (*Guillaume, Cremades, Sinclair* as members of the Tribunal), paras. 137–152, available at ICSID homepage (note 2) (*Salini v. Jordan*).

[46] *Plama Jurisdiction* (note 38), paras. 143 *et seq.*

para. 1 ECT is contained in Part III of the ECT, which contains the provisions on investment protection, and reads as follows:

> 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.

Bulgaria claimed that it had validly exercised its right under Article 17 para. 1 ECT to deny the advantages of ECT Part III to the Claimant by means of its letter to ICSID of 18 February 2003. Bulgaria argued that, there being no obligations owed to the Claimant under Part III, there could also be no dispute relating to an alleged breach of those obligations under Article 26 ECT. The Tribunal rejected this argument. It noted that Article 17 para. 1 ECT, unlike other denial-of-benefits clauses,[47] referred not to the whole treaty, but only to Part III. If Article 17 ECT were to operate as a bar to jurisdiction, the Tribunal reasoned, an investor would be left without any remedy should the application of Article 17 ECT be placed in doubt: "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?"[48] Holding that a State could not act as justice in its own cause, the Tribunal concluded that Article 17 para. 1 ECT could not support an objection to jurisdiction.[49]

Both parties asked the Tribunal to decide on the application of Article 17 para. 1 ECT even if the issue was determined to relate not to the Tribunal's jurisdiction but to the merits of the dispute. Therefore, the Tribunal went on the examine the application of Article 17 ECT and its effect upon the merits. It held that the "right" mentioned in Article 17 required an exercise of that right.[50] It concluded that Bulgaria had only exercised this right in 2003 (after the dispute had arisen). Thus, it was necessary to analyze whether the exercise had retrospective effect to 1998 (when the investment was made), or only prospective effect, from 2003 onwards. As it found the wording of Article 17 ECT to be ambiguous, it relied primarily upon the object and purpose of the ECT.[51] It considered that a putative investor "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."[52] In the Tribunal's opinion, retrospective effect of Article 17 ECT would not be consistent with this principle: "such an interpretation of the ECT would deprive the Investor of any certainty as to its rights and the host country's obligations when it makes the investments and must be rejected."[53]

It thus concluded that the exercise of the right under Article 17 ECT had only prospective effect from the date of the exercise onwards.[54]

The Tribunal then turned to the issue of whether Article 17 ECT was applicable at all. The Claimant had conceded during the hearings that it did not have any substantial business activities in Cyprus. The decisive question thus was whether the Claimant was owned or controlled "by citizens or nationals of a third state," *i.e.* a non-contracting party to the ECT. According to the Claimant's submissions, it was at all times indirectly controlled and owned by Mr. *Jean-Christophe Vautrin,* a French national, who had testified concerning his ownership of *Plama.* Although the Tribunal noted that the available documentation partially contradicted that testimony, it "would not wish to reject his evidence as false at this stage of the proceedings."[55] The arbitrators considered that the issue of factual ownership might overlap with the merits of the case, and thus reserved the decision concerning the ownership and control of the Claimant for a later stage of the proceedings. It then rejected Bulgaria's request to

[47] *Cf., inter alia,* the analysis of the Tribunal of the "denial of benefits provision" of the Ukraine-Lithuania BIT in *Generation Ukraine, Inc. v. Ukraine,* ARB/00/9, Award of 16 September 2003 (*Paulsson, Salpius, Voss* as members of the Tribunal), 46–48, available at: http://www.asil.org/ilm/Ukraine.pdf.

[48] *Plama Jurisdiction* (note 38), para. 149. It is unclear whether the Tribunal considered the principle of *Kompetenzkompetenz* not to apply in this case.

[49] *Id.,* para. 151.

[50] *Inter alia,* the Tribunal compared Art. 17 ECT with other denial-of-benefits clauses, such as Art. VI of the ASEAN Framework Agreement on Services, 15 December 1995, available at: http://www.aseansec.org/2208.htm.

[51] *Plama Jurisdiction* (note 38), para. 161. The object and purpose of the ECT, as stated in its Art. 2, is "to promote long-term co-operation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter."

[52] *Plama Jurisdiction* (note 38), para. 161.

[53] *Id.,* para. 163. It should be noted that the argumentation of the Tribunal seems to presuppose that a State is aware of all the investments made in its territory. Only if this is so can the State exercise its right before a dispute arises. As to this, see also *Anthony Sinclair,* Investment Protection for "Mailbox Companies" under the 1994 Energy Charter Treaty, Transnational Dispute Management, vol. 2, 2005/5, available at: http://www.transnational-dispute-management.com.

[54] *Plama Jurisdiction* (note 38), para. 165.

[55] *Id.,* para. 178.

suspend the arbitral proceedings in light of pending litigation in the Swiss courts relating to the ownership of the Claimant. Bulgaria argued that there might be a risk of redundant litigation if, after the end of these proceedings, the Swiss courts decided that the Claimant was owned by someone else. The Tribunal considered that the issue of the Claimant's ownership would be *res judicata* between the parties, and that there was therefore no risk of double jeopardy.[56]

2. *Jurisdiction under the BIT*

As a subsidiary argument, the Claimant contended that the Tribunal had jurisdiction under the Bulgaria-Cyprus BIT through the BIT's MFN provision. The BIT's dispute resolution clause appeared by its terms to permit only claims related to the amount of compensation for expropriation, but the Claimant insisted that the MFN provision in the BIT applied to permit the importation of dispute settlement provisions from other bilateral investment treaties, *inter alia,* the Bulgaria-Finland BIT[57], which provides consent to ICSID arbitration of a broad range of investment disputes.

Similar arguments have been made in a number of recent ICSID cases, such as *Maffezini v. Spain*[58], *Siemens v. Argentinia*[59] and *Salini v. Jordan*[60]. The Tribunal, reviewing all these decisions and also several cases decided by the International Court of Justice (ICJ), rejected the Claimant's position. It concluded that the MFN provision of the Bulgaria-Cyprus BIT could not be interpreted as providing consent to submit a dispute to ICSID arbitration. It started its analysis by noting that the wording was ambiguous. While the context might support the Claimant's argument, the Tribunal considered such considerations

[56] *Id.,* paras. 180–181. From the reasoning it is unclear whether the Tribunal considered the possible effect of such change of ownership on the application of Art. 17 ECT.

[57] Agreement between the Government of the Republic of Finland and the Government of the Republic of Bulgaria on the Promotion and Protection of Investments, 3 October 1997, available at UNCTAD homepage (note 7).

[58] *Maffezini Jurisdiction* (note 17).

[59] *Siemens A.G. v. The Argentine Republic,* ARB/02/08, Decision on Jurisdiction of 3 August 2004 (*Sureda, Brower, Janeiro* as members of the Tribunal), available at: http: www.asil.org/ilib/Siemens_Argentina.pdf (*Siemens Jurisdiction*).

[60] *Salini v. Jordan* (note 45).

insufficient to support the contested interpretation.[61] Nor were the object and purpose of the BIT of any avail, since related statements were only of a general nature. Lastly, the Tribunal noted that Bulgaria and Cyprus had negotiated a revision of the BIT in 1998, which included modifications to the dispute settlement provisions. Although the negotiations failed, the Tribunal inferred that the two States believed that the MFN clause did not extend to dispute settlement provisions in other BITs.

The Tribunal supported its conclusion with considerations of a more general nature. It recalled the well-established principle that an arbitration agreement should be clear and unambiguous. Where an arbitration agreement should be considered incorporated into a contract by reference, that reference should also be clear and unambiguous.[62] In its opinion, MFN clauses typically did not contain such a clear and unambiguous reference to dispute settlement provisions of a BIT.[63] It noted that

> 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.[64]

Examining the *Maffezini* decision in detail, it agreed that "treaty shopping" should be avoided, and concluded that:

> an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.[65]

[61] *Plama Jurisdiction* (note 38), para. 193: "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 to which Bulgaria (and Cyprus for that matter) is a Contracting Party."

[62] *Id.,* paras. 198–202.

[63] The Tribunal pointed to the fact that in the UK Model BIT, the drafters had "for avoidance of doubt" specified expressly that the treatment also related to the dispute settlement provision.

[64] *Plama Jurisdiction* (note 38), para. 207.

[65] *Id.,* para. 223.

In light of these considerations, the arbitrators decided not to analyze *Tecmed v. Mexico*[66] or *Siemens v. Argentina*[67], since both decisions were based on the *Maffezini* decision.[68]

The Tribunal then dealt with some minor procedural issues before deciding to uphold its jurisdiction and to move on to the second phase of the arbitration.

E. Impregilo S.p.A. *v.* Islamic Republic of Pakistan (Case No. ARB/03/3)

The decision on jurisdiction was rendered on 22 April 2005.[69] The Tribunal consisted of Judge *Gilbert Guillaume,* Mr. *Bernardo M. Cremades* and Mr. *Toby T. Landau.* The case arose on the basis of the bilateral investment treaty between Italy and Pakistan.[70]

I. The Dispute

The dispute arose out of two contracts, concluded in 1995 between a joint venture called *Ghazi-Barotha Contractors* (*GBC*) and the Pakistan Water and Power Development Authority (*WAPDA*). *GBC* was an unincorporated joint venture established under the laws of Switzerland. Its partners were *Impregilo S.p.A., Ed. Züblin AG* of Germany, *Campenon Bernard SGE* of France, and

[66] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ARB(AF)/00/2, Award of 29 May 2003 (*Grigera Naon, Ferandez Rozas Bernal Vera* as members of the Tribunal), available at ICSID homepage (note 2).

[67] *Siemens Jurisdiction* (note 59).

[68] It further noted (*Plama Jurisdiction* (note 38), para. 226) that: "Actually, the *Siemens* decision illustrates the danger caused by the manner in which the *Maffezini* decision has approached the question: the principle is retained in the form of a 'string citation' of principle and exceptions are relegated to a brief examination, prone to falling soon into oblivion."

[69] *Impregilo S.p.A. v. The Islamic Republic of Pakistan,* ARB/03/3, Decision on Jurisdiction of 22 April 2005, available at ICSID homepage (note 2) (*Impregilo Jurisdiction*).

[70] Agreement between the Government of the Islamic Republic of Pakistan and the Government of the Italian Republic on the Promotion and Protection of Investments, 19 July 1997, available at UNCTA homepage (note 7).

Saadullah Khan & Brothers and *Nazir & Company* of Pakistan. The Claimant, *Impregilo,* was the leader of the joint venture.

The contracts related to the construction of hydroelectric power facilities in Pakistan. The performance of the contracts was to be controlled by Pakistan Hydro Consultants, acting as agent for *WAPDA.* Both contracts included dispute settlement clauses (calling for domestic arbitration in Lahore) and set certain deadlines for the completion of the projects.

The core of this dispute stems from *WAPDA*'s refusal to accede to *GBC*'s request for extensions to the contractual deadlines and the payment of compensation for delays which, in *Impregilo*'s view, were caused by (i) unforeseen geological circumstances and (ii) by obstacles created by the various organs of the government of Pakistan, including *WAPDA. Impregilo* asserted that the denial of *GBC*'s request constituted both a breach of the contractual provisions between *WAPDA* and *GBC* and a breach by Pakistan of its obligations under the BIT. *Impregilo* filed its second request for arbitration (the first one had been withdrawn in 2002 during settlement talks) in January 2003.

II. The Decision

Pakistan objected to the Tribunal's jurisdiction on a number of grounds.[71] First, it argued that the Tribunal lacked jurisdiction *ratione materiae.* With regard to the claims for breach of the contracts, the Respondent observed that *WAPDA,* and not Pakistan, had signed the contracts. As for the claims for breach of the BIT, Pakistan argued that these claims were essentially contractual in nature, and thus fell outside the scope of the Tribunal's jurisdiction. Second, Pakistan objected to jurisdiction *ratione personae.* It argued that *Impregilo* had no *locus standi* to claim on behalf of the joint venture *GBC.* Lastly, Pakistan submitted that the Tribunal lacked jurisdiction *ratione temporis* with regard to any acts that occured before the BIT came into force in 2001.

1. Jurisdiction Ratione Personae

The arbitrators first addressed the issue of *Impregilo*'s standing to bring a claim, either on behalf of *GBC,* on behalf of the other joint venture partners, or

[71] *Impregilo Jurisdiction* (note 69), paras. 60 *et seq.*

on its own account.[72] The Tribunal determined that *Impregilo* could not pursue claims on behalf of *GBC*. As a mere joint venture, *GBC* had no legal personality under either Swiss or Pakistani law, and enjoyed no capacity to act in legal proceedings. Thus, *GBC* was held not to be a "national" within the sense of Article 25 para. 2 lit. b of the ICSID Convention.[73] The Tribunal expressly noted that although *Impregilo* was contractually authorized by its partners to represent *GBC*, "the scope of the BIT cannot be expanded by a municipal law contract to which Pakistan is not a party."[74] The arbitrators then analyzed whether *Impregilo* could bring a claim on behalf of its partners, and here also upheld Pakistan's objection: "Pakistan has consented to the resolution by ICSID of disputes arising out of investment made by Italian nationals in Pakistan. There is nothing in the BIT to extend this to claims of nationals of any other states, even if advanced on their behalf by Italian nationals."[75] *Impregilo* had further argued that due to certain contractual arrangements requiring it to share any proceeds with its partners, it could require compensation in respect of *GBC*'s total losses (and not just *Impregiio*'s *pro rata* share). The Tribunal rejected this argument, noting that a tribunal "has no means of compelling a successful Claimant to pass on the appropriate share of damages to other shareholders or participants."[76] Finally, it found its conclusions to be in line with a number of decisions of other ICSID tribunals.[77]

However, Pakistan was not able to persuade the Tribunal with its argument that *Impregilo* had no standing to maintain a claim for recovery of its own share of *GBC*'s losses.[78] While the joint venture partners might have acted collectively in the past, the Tribunal held that there was no principle of law requiring them to continue to do so indefinitely. Also, *Impregilo* had asserted claims for breach of the BIT, which could only belong to *Impregilo* and not to the Joint Venture itself or the other partners. That *Impregilo* had not yet specified any damage it might have suffered individually was held to be a question of merits and not of jurisdiction.[79]

[72] *Id.*, paras. 111–174.

[73] *Id.*, paras. 131–139.

[74] *Id.*, para. 136.

[75] *Id.*, para. 149.

[76] *Id.*, para. 152.

[77] *Id.*, paras. 153–155.

[78] *Id.*, paras. 165–174.

[79] *Id.*, para. 172 *cf. Maffezini Jurisdiction* (note 17), para. 69.

2. Jurisdiction Ratione Materiae

The Tribunal then addressed the objection that it lacked jurisdiction *ratione materiae* over the contract and treaty claims submitted by *Impregilo*.[80] The arbitrators first turned to the contract claims. Recapitulating the main positions of the parties, they identified three issues to be analyzed: whether the dispute settlement clause in Article 9 of the BIT[81] also covered disputes arising out of the contract (to which neither Claimant nor Respondent was a party); if not, whether the MFN clause in Article 3 of the BIT had any effect; and, if jurisdiction existed, whether the jurisdiction clauses in the contracts undermined this jurisdiction, or rendered the claims inadmissible. Since the contracts were concluded with *WAPDA* and not with Pakistan, the Tribunal first determined the status of *WAPDA* under Pakistani law. The arbitrators came to the conclusion that *WAPDA* was an autonomous corporate body and legally distinct from Pakistan, and rejected the idea that responsibility for breach of the contract could be attributed to the State of Pakistan:

> [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).[82]

The Tribunal relied in part upon the *Vivendi Annulment* decision, where the *ad hoc* Committee had held that a 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."[83]

With regard to the wording of Article 9 of the BIT, the Tribunal noted that the text was limited to disputes between investor and State. Relying upon *Salini*

[80] *Impregilo Jurisdiction* (note 69), paras. 185 *et seq.*

[81] Art. 9 of the BIT has (in excerpts) the following wording: "any dispute arising between a Contracting Party and the investors of the other." Art. 9 of the BIT is thus a 'wide' dispute settlement clause. In contrast, 'narrow' dispute settlement clauses require explicitly that the dispute relates to an alleged breach of the respective BIT, *cf. e.g.* Art. 26 ECT.

[82] *Impregilo Jurisdiction* (note 69), para. 210.

[83] *Compania des Aguas de Aconquija S.A. and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentina*, ARB/97/3, Decision of 3 July 2002 (*Fortier, Crawford, Rozas* as members of the Committee), reprinted in: ILM, vol. 41, 2002, 1135, para. 96 (*Vivendi Annulment*).

Construttori SpA v. Kingdom of Morocco[84], the Tribunal concluded that Pakistan's offer to arbitrate contained in Article 9 of the BIT did not extend to breaches of a contract to which an entity other than the State was a party.[85] The Tribunal thus held that it had no jurisdiction to consider the contract claims. As a result, it declined to consider whether an umbrella clause could be imported into the BIT by virtue of an MFN clause, as well as the effect that contractual jurisdiction clauses would have on its jurisdiction.[86]

Turning to *Impregilo*'s treaty claims, the Tribunal considered it necessary to "satisfy itself that it has jurisdiction over the dispute, as presented by the Claimant. This has been recognised both by the ICJ and by arbitral tribunals in many cases."[87] Reviewing those cases, the Tribunal determined that the respective test was "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."[88] Since some of the treaty claims coincided with contract claims (over which the Tribunal had no jurisdiction), the Tribunal further recalled that in order for a breach of an investment contract to be regarded as a breach of a BIT, the State must have acted in the exercise of sovereign power, and not as an ordinary contracting party.[89] The Tribunal then analyzed the treaty claims,[90] excluding part of the complaints of unfair and inequitable treatment and expropriation.[91] With respect to a large part of those claims, the Tribunal considered that the evidence was insufficient to decide whether Pakistan's conduct went beyond that of a normal contracting party. The arbitrators concluded that it could only decide upon this aspect of its jurisdiction in the course of their review of the merits. The Tribunal then addressed the much-disputed issue as to the effect of contractual jurisdiction clauses upon the treaty claims. In *SGS v.*

[84] *Supra* (note 11).

[85] *Impregilo Jurisdiction* (note 69), para. 214. The Tribunal noted that its conclusion was consistent with a number of precedents, *e.g. R.F.C.C. v. Morocco* (note 17).

[86] *Impregilo Jurisdiction* (note 69), paras. 220–225.

[87] *Id.*, para. 237.

[88] *Id.*, para. 254. See also the *Plama Jurisdiction* decision, where the Tribunal adopted the same test, *supra* (note 38).

[89] *Impregilo Jurisdiction* (note 69), para. 260, referring *inter alia* to *R.F.C.C. v. Marocco* (note 17).

[90] *Impregilo Jurisdiction* (note 69), paras. 263–285.

[91] Regarding the claim for expropriation, the Tribunal considered that the breach of contract by a State while acting as contractual partner could not amount to government interference with the contract, *id.*, para. 278.

Philippines,[92] the Tribunal had stayed ICSID proceedings until the local courts (selected by the parties in their contract as the appropriate *forum* for dispute resolution) had rendered a decision about related contract claims. The *Impregilo* Tribunal held that to stay the proceedings would be inappropriate, since the treaty claims were distinct and separate from the contract claims,[93] and since the parties to the two types of disputes were distinct.[94]

3. Jurisdiction Ratione Temporis

The Tribunal upheld Pakistan's jurisdictional objection as to jurisdiction *ratione temporis.* It considered that the acts complained of had no continuing character within the meaning of Article 14 of the International Law Commission's (ILC) Articles on State Responsibility.[95] Since the BIT could not be applied retrospectively, the Tribunal found that its jurisdiction was limited to acts that occurred after the BIT entered into force, on 22 June 2001.

F. CMS Gas Transmission Company *v.* Republic of Argentina (Case No. ARB/01/8)

The *CMS v. Argentina Case* provides us with the first final award[96] to emerge from dozens of investment disputes that arose out of the Argentine financial crisis of 2001–2002. The Tribunal, consisting of *Francisco Orrego Vicuña* as President, *Marc Lalonde* and *Francisco Rezek* as arbitrators, issued its jurisdic-

[92] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines,* ARB/02/6, Decision on Objection to Jurisdiction of 29 January 2004 (*El-Kosheri, Crawford, Crivellaro* as members of the Tribunal), available at ICSID homepage (note 2) (*SGS v. Philippines Jurisdiction*).

[93] This appears consonant with *SGS v. Philippines,* because in that case treaty claims were essentially contractual in nature. *Cf.* summary of that decision in *Happ/Rubins* (note 1), 885 *et seq.*

[94] *Impregilo Jurisdiction* (note 69), para. 289.

[95] ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/10 (2001).

[96] *CMS Gas Transmission Company v. The Republic of Argentina,* ARB/01/08, Award on the Merits of 12 May 2005, available at ICSID homepage (note 2) (*CMS Award*).

tional decision in favor of the Claimant on 17 July 2003.[97] The final award on liability and damages was dispatched to the parties on 25 April 2005.

I. The Dispute

CMS, a US corporation, made investments in the Argentine gas transportation industry, participating in the privatization of that sector undertaken by the Argentine government in 1989. *CMS* ultimately acquired a 29.42 percent stake in an Argentine corporation, *Transportadora de Gas del Norte* (*TGN*), which had obtained a license for the transportation of gas in 1992. Under the regulatory regime put in place during and after privatization, transportation tariffs were to be calculated in US dollars and expressed in pesos at the exchange rate at the time of billing (until early 2002, the peso was fixed to the US $ at an exchange rate of one-to-one). Tariffs were also to be adjusted periodically on the basis of the US Producer Price Index (PPI).

The dispute arose as a result of various measures that Argentina enacted in response to economic difficulties it faced beginning in 1999, which eventually led to the abolition of PPI indexing, the devaluation of the Argentine currency, and the 'pesification' of private contracts. This meant that gas transportation tariffs would be paid in devalued pesos, at an artificial exchange rate of one-to-one. After the abolition of PPI indexing, the freezing of tariffs, and the pesification of contracts, *TGN*'s earnings became drastically diminished. *CMS* claimed that these measures constituted a breach of the substantive protections of the US-Argentina BIT. In particular, *CMS* claimed that the measures were arbitrary and discriminatory, amounted to a violation of the fair and equitable treatment standard, and constituted expropriation without compensation, among other violations of the BIT.

II. The Decision

On the merits, Argentina raised a range of defenses to the Claimant's factual assertions, as well as to points of law. Argentina's factual objections centered upon the argument that any damages *TGN* and *CMS* may have suffered were the result of unfortunate business decisions, and therefore fell within the sphere of their own commercial risks. In terms of the law, Argentina argued that the transportation and distribution of gas was a national public service, and that the State was under an obligation to take into account the interests of society at large when considering changes to pertinent regulations. According to Argentina, the economic and currency policy of a government cannot be subject to private claims, since it lies within the public domain, and belongs to the State's sovereign discretion. Argentina argued that the government's actions were inevitable in the circumstances of an economic and financial crisis, which created a 'state of necessity.' Argentina argued further that none of the measures it had taken were arbitrary, discriminatory, unfair or inequitable, and that the measures did not satisfy the criteria for indirect expropriation under international law.

The Tribunal followed the trend of recent ICSID jurisprudence in concluding that both Argentine and international law would be applicable to the merits of the parties' dispute to the extent that these systems contained relevant rules, and proceeded to address the arguments of the parties.

1. The Nature of Argentina's Commitments

A significant portion of the award dealt with the precise nature of guarantees provided by the government of Argentina. In Argentina's view, it had offered no guarantee that gas tariffs would continue to be calculated in US dollars, and that this regime was necessarily dependant on the currency exchange policy in force at any particular time. While agreeing that Argentina retained the right to devalue its currency, the Tribunal disagreed with the Respondent's legal conclusion and decided, on the basis of the license terms and a range of government actions and declarations, that Argentina had committed itself to maintaining a stable tariff regime.[98] This meant that Argentina was obligated to ensure the payment of tariffs in US dollars, adjusted in accordance with US PPI, and to allow tariffs to fluctuate in light of the new peso exchange rate should the peso-dollar parity policy be abandoned.[99]

[97] *CMS Gas Transmission Company v. The Republic of Argentina*, ARB/01/08, Decision on Jurisdiction of 17 July 2003, available at ICSID homepage (note 2) (*CMS Jurisdiction*); summarized in *Richard Happ*, Awards and Decisions of ICSID Tribunals in 2003, GYIL, vol. 46, 2003, 711, 731.

[98] *CMS Award* (note 96), para. 134.

[99] *Id.*, paras. 133 and 161.

2. Change of Circumstances

Having examined the doctrine of '*imprévision*' as applied under Argentine law and in international practice, the Tribunal concluded that a change in circumstances could not justify Argentina's actions, even under the conditions of a severe economic crisis. First, the Tribunal pointed out that the change of circumstances that occurred could not be considered unforeseen.[100] Second, the Tribunal reasoned that Argentina should have negotiated with *TGN* or resorted to the courts to adjust the license provisions, rather than taking unilateral action as it did.[101] Finally, the arbitrators noted that the State's actions had effectively shifted the full burden of the economic crisis onto the foreign investors, while the cost of recovery should have been more equitably shared.[102]

At the same time, the Tribunal confirmed that investment protection under BITs is "not an insurance policy against business risks,"[103] that some of the effects of the crisis on *CMS*'s business fell within the scope of commercial risk, and that the reality of the crisis could not be ignored.[104] The Tribunal therefore considered the host State's level of economic development in determining if it had treated the foreign investor consistently with international law standards, a factor rejected by certain other tribunals.[105] Nevertheless, the Tribunal held that Argentina had violated the commitments it had undertaken under its own legislation (and under the BIT).[106]

3. Expropriation

The Tribunal next considered the Claimant's assertion that the harm done to *TGN* constituted indirect expropriation of its investment without compensation. The arbitrators enunciated criteria for indirect expropriation with reference to

[100] *Id.*, paras. 225 and 227.

[101] *Id.*, paras. 234, 238 and 245.

[102] *Id.*, para. 244.

[103] *Id.*, para. 248.

[104] *Id.*, paras. 154 and 240.

[105] For more on this, see *Nick Gallus,* The Influence of the Host States Level of Development on International Investment Treaty Standards of Protection, The Journal of World Investment and Trade, vol. 6, 2005, 711.

[106] *CMS Award* (note 96), para. 252.

awards rendered in the *CME,*[107] *Metalclad*[108] and *Pope & Talbot*[109] arbitrations. Although the Tribunal rejected Argentina's position that expropriation can only occur where the State has benefited, it agreed with the Respondent that substantial deprivation of an investor's economic enjoyment of his investment is insufficient to make out expropriation.[110] In particular, the Tribunal noted that *CMS* remained in control of its *TGN* shares, that the government had not taken over the day-to-day operations of the company, and that *TGN* otherwise continued to enjoy independent management as before. Therefore, the Tribunal ruled the enjoyment of the property had not been "effectively neutralized."[111] In this sense, the arbitrators departed from the 'effects test' of the *Starrett Housing* and *Metalclad* decisions, opting for the stricter view of indirect expropriation expressed in *Pope & Talbot.*[112]

4. Fair and Equitable Treatment

The next claim addressed by the Tribunal was whether Argentina's change in the regulatory regime governing *CMS*'s investment resulted in a breach of the fair and equitable treatment standard of the BIT. Argentina argued that 'fair and equitable treatment' was too vague a standard to afford the Claimant any higher level of protection than the minimum standard of treatment of aliens' property required by customary international law. Argentina submitted that this standard would otherwise be used to paralyze the State, preventing it from exercising its

[107] *CME Czech Republic B.V. v. Czech Republic,* UNCITRAL Arbitration, Partial Award of 13 September 2001 (*Kühn, Schwebel, Handl* as members of the Tribunal), available at: www.investmentclaims.com.

[108] *Metalclad Corporation v. United Mexican States,* ARB(AF)/97/1, Award of 30 August 2000 (*Lauterpacht, Civiletti, Siqueiros* as members of the Tribunal), available at ICSID homepage (note 2).

[109] *Pope & Talbot, Inc. v. Canada,* UNCITRAL Arbitration, Interim Award of 26 June 2000 (*Lord Dervaird, Greenberg* QC, *Belman* as members of the Tribunal), available at: www.investmentclaims.com.

[110] *CMS Award* (note 96), paras. 262–264.

[111] *Id.*, paras. 258 and 262. On the 'effects doctrine' in establishing regulatory expropriation see *Noah Rubins/Jack Coe,* Regulatory expropriation and the Tecmed case: context and contributions, in: *Weiler* (note 8), 597.

[112] On the *CMS* Tribunal's view of expropriation in light of prior jurisprudence, see *Noah Rubins/Stephan Kinsella,* International Investment, Political Risk and Dispute Resolution, 2005, 214–216.

legislative prerogative to safeguard public welfare. The Respondent also contended that the Claimant could not establish a breach of the standard without demonstrating an intention to harm or bad faith on the part of the State.

The Tribunal rejected these arguments, noting that the primary aim of the 'fair and equitable treatment' standard was to ensure a stable and predictable business environment for the investor. The obligation to act fairly and equitably also ensures that the legislative process would not breach previous State commitments to investors.[113] The arbitrators further held that 'fair and equitable treatment' is an objective requirement, unrelated to any determination of intent or bad faith.[114] The Tribunal declined to address the question whether 'fair and equitable treatment' generally implies a level of treatment superior to that guaranteed by the customary international law minimum standard, since in the case at hand "the Treaty standard [...] 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."[115]

5. Arbitrary and Discriminatory Measures

With regard to the Claimant's allegation that Argentina's dismantling of the regulatory regime violated the BIT provision prohibiting the arbitrary or discriminatory "impairment" of investments, the Tribunal was not persuaded that the adverse effects of the government's measures amounted to "impairment," or that *CMS* had demonstrated that it had been treated in discriminatory fashion *vis-à-vis* other investors in like circumstances.[116] Nevertheless, the Tribunal noted that agreements had been reached to alleviate the effects of government measures in certain sectors, while regulatory conditions in the gas transport sector remained unchanged. This, the arbitrators concluded, reinforced their decision regarding unfair and inequitable treatment.[117]

[113] *CMS Award* (note 96), paras. 276–277.

[114] *Id.*, para. 280.

[115] *Id.*, para. 284.

[116] *Id.*, para. 292.

[117] *Id.*, para. 294.

6. Umbrella Clause

The last substantive claim examined by the Tribunal was that Argentina's measures had violated the BIT's 'umbrella clause,' which required the government to observe investment-related undertakings. In this regard, the Tribunal agreed with Argentina that the umbrella clause could not have the effect of raising every breach of a State contract to the level of a treaty violation. Purely "commercial" aspects of contract rights, the arbitrators opined, would not be covered by the umbrella clause, and would therefore not necessarily be protected by the BIT.[118] The Tribunal did not provide any criteria for distinguishing "commercial" from "governmental" undertakings, but concluded that in the case at hand, Argentina's commitments to *TGN* were public in nature.[119] In particular, the Tribunal referred to the stabilization clause contained in the license, by which Argentina had guaranteed that the economic equilibrium of the gas transport tariffs would not be altered without *TGN*'s written consent.

7. State of Necessity Defense

Argentina raised a twofold defense on the merits based upon the international law concept of necessity. First, it claimed that liability was precluded under customary international law, because the measures in question were taken in the context of a state of economic emergency.[120] Second, Argentina relied upon an "emergency clause" contained in the BIT as Article XI.[121]

The Tribunal considered that customary international law regarding the state of necessity defense was accurately reflected in Article 25 of the ILC Articles on State Responsibility, which described the state of necessity as a narrow exception to the general rules on State responsibility.[122] Applying this principle to

[118] *Id.*, para. 299.

[119] *Id.*, para. 301.

[120] ICJ, *Gabčikovo-Nagymaros Project* (Hungary *v.* Slovakia), Judgment of 25 September 1997, ICJ Reports 1997, 7.

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

[122] *CMS Award* (note 96), para. 315.

the case at hand, the Tribunal concluded that Argentina had not satisfied the strict and cumulative conditions for such a defense. While tending to agree that the Argentine crisis was grave enough to jeopardize "an essential interest of the state," and noting that Argentina may have faced grave and imminent peril,[123] the Tribunal concluded that the government could have addressed the crisis with less restrictive regulatory solutions. Argentina's defense was therefore rejected, because the freezing and pesification of gas transportation tariffs were not the only means available to safeguard the legitimate interests at stake.[124]

The Tribunal next turned to the BIT's emergency clause. In the Tribunal's view, this clause was not "self-judging,"[125] and therefore had to be considered objectively, in the context of customary international law.[126] Although the wording of the clause did not exclude economic emergencies as excusing performance under the BIT, by examining State practice and the object and purpose of investment protection treaties, the Tribunal concluded that the situation in Argentina, although very serious, could not justify derogation from international contractual and treaty obligations under the emergency clause.[127]

8. Damages

Having established Argentina's liability for breach of the BIT, the arbitrators turned to an assessment of compensation due to *CMS*. The Tribunal's award on damages provides a relatively rare example of the analysis of quantum in the context of investment arbitration. Most importantly, the Tribunal decided that the lost value of *CMS*'s investment should be calculated by applying the 'discounted cash flow' (DCF) method, applied to yield the market value of the investment immediately before and after Argentina's measures were implemented.[128] The Tribunal appointed its own expert to assist in assessing the Claimant's DCF result of US $ 261.1 million. The Tribunal-appointed expert concluded that several of the assumptions *CMS* had made in its quantum calculation were over-optimistic, and as a result the Tribunal reduced the damages awarded to US $ 133.2 million.[129]

[123] *Id.*, paras. 320 and 323.

[124] *Id.*, paras. 323–324.

[125] *Id.*, paras. 370 and 373.

[126] *Id.*, para. 374.

[127] *Id.*, paras. 354, 355 and 391.

[128] *Id.*, paras. 411–412.

G. Camuzzi International S.A. *v.* The Argentine Republic (Case No. ARB/03/02)

This decision on objections to jurisdiction[130] was rendered concurrently with the parallel decision in *Sempra Energy International v. The Argentine Republic,* rendered by the same panel.[131] The Tribunal consisted of Professor *Francisco Orrego Vicuña* as President and Hon. *Marc Lalonde* and Dr. *Sandra Morelli Rico* as members of the Tribunal.

I. The Dispute

The dispute arose out of investments in the gas distribution sector made by *Camuzzi,* a Luxembourg corporation. *Camuzzi* owned 56.91 percent of the share capital of the Argentine companies *Sodiagas Sur* and *Sodias Pampeana,* with *Sempra* owning the remaining capital of the two enterprises. These companies, in turn, held majority stakes in *CGS* and *CGP,* respectively, companies that held licenses granted by the Argentine Republic to both supply and distribute natural gas in seven provinces of Argentina. The dispute was related to Argentina's suspension of the licensees' ability to raise gas distribution tariffs on the basis of the US PPI, and the subsequent forced conversion of these tariffs into pesos at an artificial one-to-one rate ('pesification'). In addition, *Camuzzi* asserted that the companies did not receive certain subsidies that they had been granted, and complained of certain taxes and other restrictions prejudicial to its investment.

[129] *Id.*, paras. 244 and 356.

[130] *Camuzzi International S.A. v. Argentine Republic,* ARB/01/3, Decision on Objections to Jurisdiction of 11 May 2005, available at ICSID homepage (note 2) (*Camuzzi Decision*).

[131] *Sempra Energy International v. Argentine Republic,* ARB/02/16, Decision on Objections to Jurisdiction of 11 May 2005, available at ICSID homepage (note 2) (*Sempra Jurisdiction*).

On 8 November 2002, *Camuzzi* submitted a request for arbitration under the ICSID Convention and the Belgo-Luxembourg/Argentina BIT.[132] On 29 and 30 November 2004, the Tribunal held a hearing on jurisdiction in Paris.

II. The Decision

Before addressing the objections made by the Argentine Republic, the Tribunal found it necessary to identify the law applicable to the decision on jurisdiction.[133] The Argentine Republic argued that since the parties had not specifically agreed upon any applicable law, the domestic law of Argentina and international law must both apply.[134] *Camuzzi* argued that it was rather the Washington Convention and the BIT that should apply, but not Argentine law.[135] The Tribunal reaffirmed the conclusion reached in *Azurix* and a number of other arbitration cases involving Argentina, where it was established that Article 25 of the Washington Convention and the relevant treaty provisions are the only sources of applicable rules in determining jurisdiction in an ICSID arbitration.[136]

The Argentine Republic raised several objections to the jurisdiction of the Tribunal, for the most part identical to those interposed in the string of other ICSID cases it has defended over the past three years.

The Republic first argued that *Camuzzi* could not meet the personal jurisdiction requirements of the Washington Convention and the treaty, because it was merely a non-controlling shareholder (due to joint control arrangements in the relevant shareholders' agreements) in the Argentine companies that invested in *CGS* and *CGP,* and therefore enjoyed no standing of its own. In this regard, the Respondent asserted that Article 25 para. 2 lit. b of the Washington Convention established a requirement that a foreign entity control a local enterprise in order

[132] Treaty between the Argentine Republic and the Belgo-Luxembourg Economic Unit on the Promotion and Reciprocal Protection of Investments, 28 June 1990, available at: http://www.unctadxi.org/templates/DocSearch.aspx?id=779.

[133] *Camuzzi Decision* (note 130), para. 15.

[134] *Id.*, para. 15.

[135] *Id.*, para. 16.

[136] *Id.*, para. 17. *Azurix Corp. v. the Argentine Republic,* ARB/01/12, Decision on Jurisdiction of 8 December 2003 (*Rigo Sureda, Lauterpacht, Martins* as members of the Tribunal), reprinted in: ILM, vol. 43, 2004, 262 (*Azurix Jurisdiction*).

to qualify as a foreign investor.[137] The Tribunal rejected this position, and held that Article 25 para. 2 lit. b of the Washington Convention created an additional option by which to establish *in personam* jurisdiction (by foreign control of a local company), rather than limiting the rights of a foreign investor in any way.[138] Although it was unnecessary to the result, the Tribunal also concluded that "control" of a local entity could be established by examining the combined participation of several foreign shareholders (in this case, *Camuzzi* and *Sempra*), particularly if joint control was the intent of the investment process.[139]

The second objection was that *Camuzzi* could only validly maintain a claim under the treaty if it could establish that Argentina had violated a legal right that *Camuzzi* owned as a shareholder, thus causing a direct loss.[140] The Tribunal found that there were two aspects to this specific objection: the existence of a legal dispute, and whether it arises directly from *Camuzzi*'s investments.[141] Evidently, the Tribunal held that there was indeed a legal dispute, since there was a difference in position between the parties concerning the nature and extent of their respective rights.[142] The Tribunal also held that the dispute arose out of an investment, since *Camuzzi* had invested in *Sodiagas Sur* and *Sodias Pampeana* for the purpose of channeling capital to the licensees. To hold otherwise, the arbitrators reasoned, would be to deprive the treaty of any effect, since it was concluded with the broad purpose of securing foreign investment.[143] Thus, the Tribunal concluded that *Camuzzi* could also assert claims for indirect losses resulting from damage to the company.

The Argentine Republic next objected on the base of lack of *jus standi.* It argued that to qualify for protection under the treaty the investor must own the operating companies directly or indirectly, and that *Camuzzi* did not own or

[137] *Camuzzi Decision* (note 130), para. 19. Art. 25 para. 2 lit. b of the Washington Convention states that "national of another Contracting States" is "any juridical person who [...] has the nationality of a contracting State different from the State that is a party in the dispute" or "having [...] the nationality of the State that is a party in the disputes [...] and should, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for purposes of this Convention."

[138] *Id.*, para. 32

[139] *Id.*, paras. 38–43.

[140] *Id.*, para. 45.

[141] *Id.*, para. 54.

[142] *Id.*, para. 55.

[143] *Id.*, para. 56.

control any of the licensee companies.[144] Although the Tribunal held that this issue was related to the merits of the case rather than to jurisdiction, it addressed the issue whether the treaty allowed a minority shareholder to bring a claim, and whether *Camuzzi*'s cause of action arose out of the treaty, the license, or both.[145] The Tribunal relied upon the broad definition of "investment" contained in Article I para. 1 lit. a of the BIT to find that indirect ownership of shares in the licensee companies gave *Camuzzi* standing to arbitrate. Furthermore, the Tribunal held that *Camuzzi*'s claim was founded upon both the license and the treaty, and that this mixed basis could not prevent the claim from going forward.

Next, the Argentine Republic argued that *Camuzzi*'s claim was not ripe for resolution, since the matter was still subject to a renegotiation process between the licensees and the government.[146] The Tribunal relied upon the *CMS* decision[147] in holding that it was not the task of the Tribunal to take a position on the renegotiation process in Argentina, which remained within the exclusive purview of the parties. Argentina's fifth objection to jurisdiction was that *Camuzzi* had not established its status as an investor with appropriate corporate documents.[148] After having reviewed the pertinent documents, the Tribunal rejected this objection.[149]

The Argentine Republic next argued that since the dispute had been submitted to the Argentine courts on the basis of contractual *forum* selection clauses, the Tribunal had no jurisdiction.[150] The arbitrators disagreed, holding that just as a dispute that is purely contract-related may be resolved in accordance with the jurisdiction designated in the contract itself, so a dispute arising out of a treaty remains subject to the dispute resolution provisions contained therein.[151] "If the contrary were true," the Tribunal reasoned, "the contract would nullify the provisions of the treaty."[152]

[144] *Id.*, para. 68.

[145] *Id.*, para. 78.

[146] *Id.*, para. 92.

[147] *CMS Jurisdiction* (note 97). Both Mr. *Orrego Vicuña* and Mr. *Lalonde* were arbitrators in the *CMS Case*.

[148] *Camuzzi Decision* (note 130), para. 103.

[149] *Id.*, para. 104.

[150] *Id.*, para. 105.

[151] *Id.*, para. 106.

[152] *Id.*, para. 112.

Based on all the arguments above, the Tribunal affirmed its jurisdiction and ordered that the proceedings continue to an examination of the merits.

H. Sempra Energy International *v.* Argentine Republic (Case No. ARB/02/16)

This decision on objection to jurisdiction[153] was rendered concurrently with the decision in *Camuzzi International S.A. v. Argentine Republic.*[154] As in *Camuzzi,* the Tribunal consisted of Professor *Francisco Orrego Vicuña* as President and Hon. *Marc Lalonde* and Dr. *Sandra Morelli Rico* as members of the Tribunal.

I. The Dispute

The dispute in *Sempra* was identical to that in the *Camuzzi Case.* Here, *Sempra* owned 43.09 percent of the share capital of the two Argentine holding companies, which in turn owned dominant shareholdings in local companies licensed to distribute gas in seven provinces in Argentina. On 11 September 2002, *Sempra* submitted a request for arbitration under the Washington Convention and the US-Argentina BIT.[155] On 29 and 30 November 2004, the Tribunal held a hearing on jurisdiction in Paris.

II. The Decision

As in *Camuzzi,* the Tribunal held that Article 25 of the Washington Convention and the relevant BIT provisions were the only sources of rules applicable to deciding issues of jurisdiction in the case at hand.[156]

Argentina raised essentially identical objections to those interposed against *Camuzzi,* and the arbitrators dealt with them in practically identical terms. One

[153] *Sempra Decision* (note 131).

[154] *Camuzzi Decision* (note 130).

[155] Treaty between the United States and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, 14 November 1991, available at UNCTAD homepage (note 7).

[156] *Sempra Decision* (note 131), para. 27.

difference in analysis between *Sempra* and *Camuzzi* was that *Camuzzi* faced the additional challenge that it lacked standing because it was a minority shareholder in the investment vehicle companies.[157] However, the Tribunal ruled that the Washington Convention did not limit arbitral jurisdiction to cases involving foreign-controlled entities. Under Article 25 para. 2 lit. b[158] of the Washington Convention, the arbitrators concluded, *Sempra* had the option to submit a claim in its own right as a national of the United States, *or* on behalf of its Argentine investment vehicle, to the extent *Sempra* controlled it.[159] The objection based upon *Sempra*'s status as a minority shareholder therefore was denied.

The Tribunal dismissed Argentina's other objections – the lack of a legal dispute,[160] lack of standing due to indirect ownership of the licensee companies,[161] that the cause of action lay in the contract and not the BIT,[162] lack of ripeness,[163] and the submission of disputes to national courts[164] – based upon identical reasoning to that applied in the *Camuzzi* decision.

As a result, the Tribunal upheld its jurisdiction, and ordered the continuation of the proceedings.

I. Gas Natural SDG, S.A. *v.* Argentine Republic (Case No. ARB/03/10)

This decision on preliminary questions on jurisdiction[165] was issued 17 June 2005. The Tribunal consisted of Professor *Andreas F. Lowenfeld* as President and Mr. *Henri Álvarez* and Dr. *Pedro Nikken* as members of the Tribunal.

[157] *Id.*, para. 29.

[158] As to the wording of Art. 25 para. 2 lit. b of the Washington Convention, see, *supra*, note 137.

[159] *Sempra Decision* (note 131), para. 42.

[160] *Id.*, paras. 67–68.

[161] *Id.*, paras. 80–81.

[162] *Id.*, para. 95.

[163] *Id.*, paras. 108–109

[164] *Id.*, para. 123.

[165] *Gas Natural SDG, S.A. v. Argentine Republic*, ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction of 17 June 2005, available at: www.investmentclaims.com (*Gas Natural Decision*).

I. The Dispute

This dispute arose – like *CMS, Camuzzi* and *Sempra* – out of the measures that Argentina implemented during and after its financial and economic crisis at the end of the 1990s. In 1992, *Gas Natural* had entered into a consortium that acquired 70 percent of the shares of *BAN S.A.*, an Argentine corporation engaged in the production and distribution of natural gas for northern Buenos Aires province. *Gas Natural* claimed that the freezing and 'pesification' of gas tariffs led to a massive reduction of the value of *BAN S.A.* shares, resulting in an impairment of its investment and violation of various provisions of the Spain-Argentina BIT.[166]

II. The Decision

Argentina challenged the Tribunal's jurisdiction on three grounds. First, it argued that disputes arising out of measures of general economic policy, and not aimed directly at foreign investment, did not "arise directly out of an investment." Consequently, Argentina insisted, such claims fall outside the ambit of Article 25 of the Washington Convention and the Tribunal's jurisdiction. Second, Argentina relied upon Article X of the BIT, which required that the investor have recourse to national courts for eighteen months prior to arbitration. The final objection to jurisdiction related to *Gas Natural*'s status as an investor under the BIT, since it held the *BAN S.A.* shares, franchises and licenses only indirectly, through the consortium.

The Tribunal rejected all three objections. First, the arbitrators found that the Washington Convention covered all disputes concerning 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."[167] The dispute at hand related to such issues. The fact that the measures complained of were not directed expressly at the in-

[166] Acuerdo para la promocion y la protection reciproca de inversiones entre el Reino de España y la Republica Argentina, 3 October 1991, available at UNCTAD hompage (note 7).

[167] *Gas Natural Decision* (note 165), para. 20, citing the 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 of other States, 1965, para. 26; the Report is available at: http://www.worldbank.org/icsid/basicdoc/basic-en.htm.

vestment was deemed immaterial, since the claims of *Gas Natural* arose directly from investments and the effect that the measures had upon them.[168]

With regard to the second jurisdictional objection, the Claimant sought to avoid the requirement of Article X of the BIT by relying upon the Spain-Argentina BIT's MFN clause. Since the majority of Argentina's other BITs contain no requirement that claims be submitted to national courts before arbitration, *Gas Natural* insisted, the MFN offered Spanish investors the right to rely upon such other BITs as providing "more favorable" conditions to investors of other nationalities. Indeed, the same argument had been presented successfully in relation to the very same issue, under the same BIT, by the Argentine Claimant in *Maffezini v. Spain.*[169] As Spain had argued in *Maffezini,* Argentina asserted that the MFN clause could not apply to procedural matters, but only extended to substantive standards of protection. The Tribunal nevertheless adopted the Claimant's position, reiterating that the right to independent international arbitration of disputes between investors and States was the crux of effective and modern investment protection.[170] The arbitrators noted that the MFN clause in the treaty expressly applied to "all matters" governed by the BIT, apart from certain matters that were expressly excluded.[171] The dispute resolution clause was not excluded, the Tribunal concluded, and therefore was covered by the MFN clause. The Tribunal further rejected any public policy grounds for a narrower interpretation of the MFN clause, because most of Argentina's BITs lacked any requirement of prior resort to national courts.[172]

The Tribunal rejected Argentina's final objection to jurisdiction by reference to the clear wording of Article I para. 2 of the BIT, which defined "investment" to include shares and other interest in companies.[173]

After presenting these conclusions, the Tribunal offered a comprehensive overview of the ICSID case-law upon which it had relied. Having discussed the *CMS, Siemens, Maffezini, Salini v. Jordan,* and *Azurix* jurisdictional awards, the

[168] *Gas Natural Decision* (note 165), para. 21.

[169] *Maffezini Jurisdiction* (note 17).

[170] *Gas Natural Decision* (note 165), para. 29.

[171] *Id.*, para. 30.

[172] *Id.*

[173] *Id.*, paras. 33–34.

arbitrators concluded that their ruling was in conformity with the current state of international investment law and jurisprudence.[174]

J. Noble Ventures, Inc. *v.* Romania (Case No. ARB/01/11)

The *Noble Ventures* Tribunal rendered its award[175] on 12 October 2005. The Tribunal consisted of Professor *Karl-Heinz Böckstiegel* as President and *Sir Jeremy Lever* and Professor *Pierre-Marie Dupuy* as members of the Tribunal. The case was based on the US-Romania BIT.[176]

I. The Dispute

The dispute arose out of the privatization agreement concerning the acquisition of *Combinat Siderurgic Resita* (*CSR*), Romania's oldest steel plant. The agreement had been concluded in 2000 between the US Claimant, *Noble Ventures,* and the *Romanian State Ownership Fund* (*SOF*). *SOF* was a Romanian "Institution of the public interest," created in 1992 to oversee the privatization of Romanian State-owned enterprises. After the acquisition of *CSR* by the Claimant, a number of problems arose. The Claimant alleged, *inter alia,* that the Romanian authorities had engaged in misrepresentations during the tender process, had failed to protect *Noble Ventures* and *CSR* against labor unrest, had failed to fulfill their obligations towards the Claimant, including negotiation of external debt rescheduling, and had deprived *Noble Ventures* of its investment by instituting bankruptcy proceedings.

On 21 August 2001, *Noble Ventures* submitted its request for arbitration to ICSID, invoking Romania's consent to the BIT and alleging that Romania was in breach of several provisions of the BIT.

[174] *Id.*, para. 37 on *CMS Jurisdiction* (note 97); para. 41 on *Siemens Jurisdiction* (note 59); para. 45 on *Maffezini v. Spain* (note 17); para. 48 on *Salini v. Jordan* (note 45); para. 51 on *Azurix Jurisdiction* (note 136).

[175] *Noble Ventures, Inc. v. Romania,* ARB/01/11, Award of 12 October 2005, available at: http://www.investmentclaims.com/ (*Noble Ventures*).

[176] Treaty between the Government of the United States of America and the Government of Romania concerning the Reciprocal Encouragement and Protection of Investments, 28 May 1992, available at UNCTAD homepage (note 7).

II. The Decision

Since part of *Noble Venture*'s claims related to alleged breaches of the privatization agreement concluded with *SOF,* the Tribunal started by considering two preliminary issues: whether claims for breach of contract could be raised under the BIT, and whether acts of *SOF* and its successor *APAPS* were attributable to the Romanian State.[177] The Claimant had argued that Article II para. 2 lit. c of the BIT constituted an 'umbrella clause,' and that breaches of contract therefore constituted a breach of the BIT. The Tribunal considered that an umbrella clause constituted an exception to the "well established rule of general international law" that a breach of contract does not *per se* constitute a breach of international law.[178] It compared the wording of Article II para. 2 lit. c[179] with the interpretation given by the Tribunals in *SGS v. Pakistan*, *SGS v. Philippines* and *Salini v. Jordan* to similar clauses.[180] It considered that the term "obligations" could not refer to obligations under other international agreements, but to obligations under specific investment agreements concluded with investors. In the opinion of the Tribunal, such an interpretation was also supported by the object and purpose of the BIT. The arbitrators noted that it was not permissible to interpret BIT clauses exclusively in favor of investors,[181] but considered that not interpreting the Article as an umbrella clause would deprive it of meaning and content. They thus concluded that by virtue of Article II para. 2 lit. c of the BIT, they could consider the claims for breach of contract on the basis that they also constituted breaches of the BIT.[182] The Tribunal then turned to the Claimant's assertion that the actions of *SOF* and its successor *APAF* were attributable to the Romanian State. The arbitrators noted that the pertinent legal rules were the ILC Articles on State Responsibility. They rejected the Respondent's argument that for purposes of attribution, a distinction needed to be made between *acta iure*

[177] *Noble Ventures* (note 175), paras. 41–62.

[178] *Id.*, para. 53.

[179] Art. II para. 2 lit. c of the BIT reads as follows: "Each Party shall observe any obligation it has entered into with regard to investments."

[180] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ARB/01/13, Decision on Jurisdiction of 6 August 2003 (*Feliciano, Faurès, Thomas* as members of the Tribunal), available at: www.investmentclaims.com; summarized in *Happ* (note 97); *SGS v. Philippines Jurisdiction* (note 92); *Salini v. Jordan* (note 45).

[181] *Noble Ventures* (note 175), para. 52.

[182] *Id.*, para. 62.

imperii and *acta iure gestionis.*[183] Having analyzed the functions and legal framework of the two agencies, the Tribunal concluded that they acted in the exercise of governmental authority and that their conduct was thus attributable to Romania under Article 5 of the ILC Draft Articles on State Responsibility. Concerning the contracts, the Tribunal considered that *SOF/APAPS* had concluded them as representatives of Romania, and that the contracts had thus been concluded with the State.[184]

The Tribunal then addressed the several claims of *Noble Ventures.* It rejected the first two claims, which related to an alleged misrepresentation and breaches of an asserted obligation to achieve a debt rescheduling for *CSR.* It noted that the evidence submitted by the Claimant "does not satisfy, even on a balance of probabilities, that SOF was guilty of fraudulent misrepresentation"[185] and also did not find that *SOF* or *APAPS* had violated any contractual provisions.

In its third claim, *Noble Ventures* alleged that Romania had breached its obligation to provide full protection and security.[186] It based its claim on the assertion that from January 2001 onwards, demonstrations and protests of workers led to the occupation of *CSR* facilities and damage to property. The Tribunal considered that the "protection and security" formulation in the BIT could not be understood as being wider in scope than the corresponding customary international law duty, which was not a strict standard, but one requiring only due diligence on the part of the State. The arbitrators then compared the dispute with the *ELSI Case*[187] (decided by the ICJ) and noted that "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."[188] In the opinion of the Tribunal, the Claimant had also not proven any specific failure on the part of Romania, nor had it demonstrated that any losses could have been prevented. Consequently, the Tribunal dismissed the claim.

[183] *Id.*, para. 82. The award is a little bit unclear in this, as only some paragraphs before, the Tribunal analyzed whether the acts of *SOF* were in the exercise of governmental authority in order to attribute them pursuant to Art. 5 ILC Draft Articles on State Responsibility.

[184] *Id.*, para. 86.

[185] *Id.*, para. 101.

[186] *Id.*, paras. 160–167.

[187] ICJ, *Elettronica Sicula S.p.A. (ELSI)* (United States *v.* Italy), Judgment of 20 July 1989, ICJ Reports 1989, 15 (*ELSI Case*).

[188] *Noble Ventures* (note 175), para. 165.

The fourth claim concerned the legality of the judicial reorganization.[189] Since the rescheduling of the company's debts had failed, the creditors, most of which were government ministries, initiated bankruptcy proceedings. As a consequence, *CSR* was declared insolvent by the courts. *Noble Ventures* alleged that through these measures, Romania had breached a number of guarantees contained in Articles II para. 2 lit. a and b of the BIT, including arbitrary, discriminatory and unfair and inequitable treatment. The Tribunal also dismissed this claim. Relying, again, on the *ELSI Case,* it noted that the orderly institution of insolvency proceedings could not be considered arbitrary. It further held that the Claimant could not prove that the proceedings had been discriminatory. Concerning the assertion that the insolvency proceedings constituted a breach of fair and equitable treatment, the arbitrators considered that since the proceedings had been neither arbitrary nor discriminatory, "it remains difficult to see how the judicial proceedings can be regarded as a violation" of Article II para. 2 lit. a of the BIT.[190] Before turning to the claim of expropriation, the Tribunal dismissed also the fifth and sixth claims, which related to the alleged breach of certain contracts. With its seventh claim, the Claimant alleged that the effect of the insolvency proceedings was an expropriation of its investment. This argument did not convince the Tribunal. Noting the dire financial state of *CSR,* it held that the purpose of the judicial proceedings was to preserve rather then to destroy *CSR,* and "did not concern a viable company or valuable assets to be expropriated."[191] The Tribunal also dismissed the Claimant's last claim, that Romania had breached certain obligations resulting from internal legislation. No such obligations were found to exist.

Consequently, the Tribunal dismissed the claims in their entirety. Nevertheless, it split the costs between the parties, since it considered, *inter alia,* that the Claimant had succeeded on some points of argument.

[189] *Id.,* paras. 168–183.

[190] *Id.,* para. 182.

[191] *Id.,* para. 216.

K. Wena Hotels Ltd. *v.* Arab Republic of Egypt (Case No. ARB/98/4)

The decision on the application by *Wena Hotels Ltd.* (*Wena*) for interpretation of the arbitral award of 8 December 2000[192] is the first of its kind. The Tribunal consisted of Mr. *Klaus Sachs* as President and Prof. *Ibrahim Fadlallah* and Mr. *Carl Salans* as members of the Tribunal.

I. The Dispute

The dispute concerned the interpretation of an arbitral award rendered on 8 December 2000 in the arbitration proceedings between *Wena* and the Arab Republic of Egypt. The dispute underlying that award (the First Dispute) related to the seizure by Egyptian officials of two hotels in 1991, which were operated by *Wena* under lease agreements. In its award, the Tribunal in that case (the Original Tribunal) found, *inter alia,* that Egypt's actions amounted to expropriation without prompt, adequate and effective compensation, and thus breached the 1975 BIT[193] between Egypt and the United Kingdom.

In the interpretation proceeding, *Wena* asserted that despite the Original Tribunal's finding of an expropriation, certain of the Egyptian government's subsequent actions were motivated by an understanding that *Wena* still had a legal interest in the hotels. *Wena* requested that the panel clarify 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."[194]

[192] *Wena Hotels Ltd. v. Arab Republic of Egypt,* ARB/98/4, Decision on the Application by Wena Hotels Ltd. for Interpretation of the Arbitral Award dated December 8, 2000, 31 October 2005, available at: http://www.asil.org/pdfs/ilib/ilib0512011.pdf (*Wena Interpretation*). The Arbitral Award of 8 December 2000 is reprinted in: ILM, vol. 41, 2002, 896.

[193] Agreement for the Promotion and Protection of Investments between the United Kingdom and Egypt, 11 June 1975, available at: http://www.fco.gov.uk/Files/kfile/Print%20Egypt%206638.tif%20(8%20pages),0.pdf.

[194] *Wena Interpretation* (note 192), para. 33.

II. The Decision

The Tribunal started its analysis by noting that *Wena*'s application for interpretation was the first request of its kind received by ICSID. Thus, it could not rely on previous decisions of ICSID tribunals. However, in the course of its analysis it relied heavily on the interpretation of the pertinent rules by Professor *Schreuer,* as well as on decisions by the Permanent Court of International Justice (PCIJ) and the ICJ.

The basis for the Tribunal's competence to interpret the award in the First Dispute is found in Article 50 para. 1 of the ICSID Convention:

> If any dispute shall arise between the parties as to the meaning or scope of the award, either party may request interpretation of the award by application in writing addressed to the Secretary-General.

The Tribunal first considered which principles applied to its analysis of *Wena*'s request. It noted that the dispute must be "sufficiently concrete to be susceptible of a specific request for interpretation," must relate to the award's operative section and have a practical relevance to the award's implementation.[195] It further noted that this holding was in conformity with decisions of the PCIJ and the ICJ.

Having established those principles, the Tribunal confirmed that the first requirement for the admissibility of an application for interpretation was fulfilled: there was a dispute between the parties as to whether the expropriation had total and permanent effect.[196] The Tribunal then held that any request needed to be in conformity with the purpose of interpretation, *i.e.* "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."[197]

The first part of *Wena*'s request for interpretation concerned the question whether the expropriation found by the Tribunal was permanent. The Tribunal considered this issue to be within the scope of "interpretation," and thus admissible. It analyzed the holding of the award in light of the reasoning of the Tribunal and the submissions of the parties, and granted *Wena*'s request for interpretation. It held that the expropriation was total and permanent, and that

[195] *Id.*, para. 81–87

[196] *Id.*, paras. 93–102.

[197] *Id.*, para. 106.

Egypt was thus "precluded from legal actions that would presume the contrary of the Tribunal's determinations in the Award."[198] During the hearings, *Wena* developed a second aspect of its application, requesting that the Tribunal find that when a party loses a right through expropriation, it cannot incur any liability in connection with that right. The Tribunal found that this part of *Wena*'s application was outside the scope of the award in the First Dispute, since it was not discussed there. Consequently, the arbitrators held this part of the application to be non-admissible and dismissed it. The Tribunal then considered it reasonable to divide the costs equally between the parties.

L. Concluding Remarks

Like 2003 and 2004, 2005 has been an interesting year for observers and practitioners of ICSID arbitration. On the one hand, some "trends" identified in last year's report appear to have gained momentum. Many tribunals now accept that jurisdiction can be affirmed only if the Claimant alleges facts capable of constituting breaches of an applicable treaty. Likewise, it has become uncontroversial that shareholders (including minority shareholders) are entitled to claim compensation for indirect damages, *i.e.* that resulting from harm inflicted upon the company. At the same time, there still appears to be no consistent line of jurisprudence regarding the effect of contractual *forum-selection* clauses upon the jurisdiction of treaty-based arbitration tribunals.

While this report has yet to cover annulment proceedings under Article 52 of the Washington Convention, it is interesting also to note the emerging trend in this area. The initiation of annulment proceedings seems to have become increasingly routine over the last three years (primarily by Respondent States, but also occasionally by Claimants), At the same time, the frequency of successful annulment petitions has dropped sharply: no such action has been successful since the *Vivendi Annulment* decision was rendered in 2002.[199]

In any event, it is important to recall that there are currently 103 cases pending before ICSID. Perhaps ten to fifteen decisions and awards are rendered each

[198] *Id.*, para. 126.

[199] *Cf., inter alia, CDC Group v. Seychelles,* ARB/02/14, Decision on the Application for Annulment of 29 January 2005 (*Brower, Hwang, Williams* as members of the Tribunal), available at: http://www.investmentclaims.com/oa1.html#2005.

year, but twenty new cases are registered during the same time period. It is thus difficult to deduce from the decisions of one year a snapshot of the state of the international law on foreign investment protection, or even the direction in which it is developing. At the moment, the system of investment arbitration appears still to remain in adolescence.

Thus, 2006 will most certainly be as interesting as 2005. With all the jurisdictional decisions having been rendered in 2004 and 2005, a string of awards dealing with the merits of those cases is to be expected. Their reasoning will give much to discuss in next year's report.