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Awards and Decisions of ICSID Tribunals in 2006

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A. Introduction

This report covers publicly available awards and decisions of arbitral tribunals constituted under the auspices of the International Centre for Settlement of Investment Disputes (ICSID), which have been rendered between December 2005 and November 2006, and have been published or made available to the authors.[1] This is the fourth report in this series, following directly upon the report published in this *Yearbook* last year.[2]

2006 has been another busy year for ICSID, although the number of new cases has decreased slightly. Twenty-one new cases were filed with ICSID and its Additional Facility in 2006 (there were 26 in 2005), bringing the total number of pending registered disputes to 108 at press time. For the first time in several years, no new cases were filed against Argentina. The cases are geographically spread over several continents: three cases against Ecuador, two cases each against Romania, Turkey and Azerbaijan, and one new case each against Bangladesh, Bolivia, the Czech Republic, Estonia, the Kyrgyz Republic, Nicaragua, Panama, Peru, the Slovak Republic, Togo, Ukraine and Uzbekistan.

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[1] Unless otherwise stated, the awards and decisions covered in this report are available online *via* the ICSID website: http://www.worldbank.org/icsid/cases or the private websites: http://www.investmentclaims.com or http://ita.law.uvic.ca.

[2] *Richard Happ/Noah Rubins,* Awards and Decisions of ICSID Tribunals in 2005 GYIL 48 (2005), 581.

It is notable that several cases instituted between 2003 and 2005 were settled by agreement of the parties during this year.

The large number of decisions and the limited space available here make it impossible to cover every award. The authors 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: *Salini v. Jordan* (B.), *Continental Casualty v. Argentina* (C.), *El Paso v. Argentina* (D.), *Metalpar v. Argentina* (E.), *Suez et al v. Argentina* (F.), *Jan de Nul v. Egypt* (G.), *LESI v. Algeria* (H.), *Azurix v. Argentina* (J.), *Pan American v. Argentina* (K.), *Inceysa v. El Salvador* (L.), *Suez v. Argentina* (M.), *Telenor v. Hungary* (N.), *ADC v. Hungary* (O.), *LG&E v. Argentina* (P.), *World Duty Free v. Kenya* (Q.), *Champion Trading v. Egypt* (R.), *Bayindir v. Pakistan* (S.). In all of these cases except for one, the jurisdiction of the arbitration tribunals was based on bilateral investment treaties ("BITs").[3] In *World Duty Free,* the tribunal was formed on the basis of an ICSID arbitration clause in a contract.

B. Salini Construttori S.p.A. and Italstrade S.p.A. *v.* Hashemite Kingdom of Jordan (Case No. ARB/02/13)

The award was rendered on 31 January 2006.[4] The Tribunal consisted of Judge *Gilbert Guillaume,* Mr. *Bernardo Cremades* and *Sir Ian Sinclair.*

I. The Dispute

The facts of the case were described in the 2004 GYIL report.[5] The dispute arose out of a contract signed between the two companies as contractor and the *Ministry of Water and Irrigation – Jordan Valley Authority* ("*JVA*") as employer. The parties were in dispute as to the amount payable by the *JVA* for certain works undertaken.

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[3] Unless otherwise stated, all bilateral investment treaties can be obtained *via* the UNCTAD treaty database, available at: http://www.unctadxi.org/templates/DocSearch.aspx?id=779.

[4] *Salini Construttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan,* Case No. ARB/02/13, Award of 31 January 2006 (*Salini v. Jordan (Merits)*).

[5] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan,* Decision on Jurisdiction of November 2004, summarized in: *Richard Happ/Noah Rubins,* Awards and Decisions of ICSID Tribunals in 2004, GYIL 47 (2004), 878, 917–920.

In December 2001, the Claimants notified Jordan that they considered it to be in breach of the BIT between Italy and Jordan. On 8 August 2002, they filed a request for arbitration with ICSID. In November 2004, the Tribunal rendered its decision on jurisdiction, dismissing all claims that were based upon alleged contractual breaches. Jurisdiction was upheld only with respect to the claim that Jordan had breached its obligation under the BIT by not submitting the dispute to arbitration pursuant to an alleged oral agreement between Italy and Jordan.

II. The Decision

The Tribunal began by recalling the "well established principle that it is for a Claimant to prove the facts on which it relies in support of his claim."[6] It noted that the Claimants relied on an oral agreement. While authorities accept that States may enter into international agreements orally, the Tribunal noted that this is seldom the case, and that it must be proven that the agreement so reached was of a legally binding character.[7] The arbitrators reviewed the evidence provided by the Claimants[8] and concluded that they had failed to prove that a binding agreement had been concluded orally between Italy and Jordan.[9] Consequently, it was not necessary to consider whether Jordan had breached its obligations under the BIT by not submitting to arbitration. It dismissed the claims and ordered each party to bear its own costs and half of the Tribunal costs and expenses.

C. Continental Casualty Company *v.* the Argentine Republic (Case No. ARB/03/9)

The decision on jurisdiction was rendered on 22 February 2006.[10] Professor *Giorgio Sacerdoti* was President of the Tribunal, with Mr. *V.V. Veeder* and Lic. *Michell Nader* as members of the Tribunal.

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[6] *Salini v. Jordan (Merits)* (note 4), paras. 70–75.

[7] *Ibid.*, paras. 76–80

[8] *Ibid.*, paras. 81–85.

[9] *Ibid.*, paras. 86–100.

[10] *Continental Casualty Company v. the Argentine Republic,* Case No. ARB/03/9, Decision on Jurisdiction of 22 February 2006 (*Continental Casualty (Jurisdiction)*).

I. The Dispute

The dispute is one of the many discussed in this report that arose out of the Argentine economic crisis that began in 2000 and culminated in early 2002. Beginning in December 2001, Argentina devaluated its currency, the peso, and instituted a series of other regulatory changes, ostensibly in response to an economic crisis. These measures culminated in the forced conversion of all contracts denominated in dollars into devaluated pesos at a rate of one-to-one. The Claimant is a US corporation and the sole shareholder of an Argentine insurance company. The local company maintained a portfolio of investment securities, primarily Argentine treasury bills and government bonds, most of which were denominated in US dollars. The Claimant alleged that, as a result of the measures Argentina undertook in reaction to the economic crisis, it suffered damage to its investments. *Continental Casualty* filed a request for arbitration pursuant to the United States-Argentina BIT on 17 January 2003.

II. The Decision

Argentina submitted five objections to the jurisdiction of the Tribunal. The Tribunal first noted that it would consider only objections relating directly to the jurisdictional requirements of the BIT and Art. 25 of the Washington Convention[11]. It further held that the relevant standard for determining whether these requirements were fulfilled was a *prima facie* analysis, as the *Impregilo* tribunal had held.[12] The arbitrators emphasized that the relevant facts were undisputed, and that Argentina contested neither the relief sought by the Claimant nor that it was a US company.

Argentina first argued that the dispute was not legal in nature. The Tribunal rejected this argument, considering the Claimant's allegations of treaty breach to be sufficient for establishing the existence of a "legal" dispute.[13] The second objection related to the requirement that the dispute arise directly out of an in-

[11] Convention on the Settlement of Investment Disputes between States and Nationals of other States, 18 March 1965, UNTS 575, 159 (Washington Convention).

[12] *Continental Casualty (Jurisdiction)* (note 10), paras. 57–62. *Cf. Impregilo S.p.A. v. The Islamic Republic of Pakistan,* Case No. ARB/03/3, Decision on Jurisdiction of 22 April 2005, summarized in the 2005 report (note 2), 596–601.

[13] *Continental Casualty (Jurisdiction)* (note 10), paras. 60–69.

vestment. The Tribunal rejected Argentina's interpretation that only measures directed specifically against the Claimant's investment are subject to ICSID jurisdiction.[14] Neither the Washington Convention nor State practice would require such targeted action. Argentina next alleged that the Claimant lacked *ius standi,* because it was only a shareholder, and could not recover damages for harm suffered by its subsidiary.[15] The Tribunal found that the protection afforded to shareholdings by investment treaties is "not limited to the free enjoyment of the shares," but also extends "to the standards of protection spelled out in the BIT with regard to the operation of the local company that represents the investment."[16] However, according to the arbitrators, not every harm inflicted upon the assets of a subsidiary is subject to compensation. Rather, the damage to assets must be in breach of the treaty obligations owed by the host State to the Claimant-investor itself.[17] The Tribunal then rejected the further objections of the Respondent, in particular the assertion that the claim was not ripe, because the quantum of damages had not yet crystallized in light of ongoing negotiations between the parties.[18]

Having dismissed all of Argentina's objections, the Tribunal concluded that it had jurisdiction over the dispute.

D. El Paso Energy International Company *v.* The Argentine Republic (Case No. ARB/03/15)

The decision on jurisdiction was rendered on 27 April 2006 by a tribunal composed by Professor *Lucius Caflisch* as President and Professors *Brigitte Stern* and *Piero Bernardini* as members of the Tribunal.[19]

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[14] *Ibid.,* paras. 70–75.

[15] *Ibid.,* paras. 76–90.

[16] *Ibid.,* para. 79.

[17] *Ibid.,* para. 89.

[18] *Ibid.,* paras. 91–94.

[19] *El Paso Energy International Company v. The Argentine Republic,* Case No. ARB/03/15, Decision on Jurisdiction of 27 April 2006 (*El Paso (Jurisdiction)*).

I. The Dispute

El Paso Energy is a US corporation that owned indirect controlling and non-controlling shareholdings in several Argentine companies. In 2003, the company initiated arbitration against Argentina pursuant to the US-Argentina BIT, alleging that the measures Argentina enacted during the 2000–2002 economic crisis caused severe damage to its shareholdings and to the companies themselves. Two weeks after launching the ICSID arbitration, *El Paso Energy* sold its stake in two companies for a loss.

II. The Decision

Argentina filed several objections to jurisdiction. At the outset, the Tribunal held that its analysis was limited to determining whether the Claimant's allegations, if proven correct, would fulfill the jurisdictional requirements of the BIT and the Washington Convention.[20] Argentina's first objection, that the dispute was not of a legal nature, was based on three different arguments: that the dispute was not about the determination of legal rights and duties; that the dispute was purely contractual and commercial; and that the BIT's "umbrella clause" did not transform contractual claims into treaty claims. The Tribunal quickly rejected the first argument, noting that it was sufficient for jurisdictional purposes that the Claimant had formulated its pretensions in legal terms.[21] The Tribunal stated clearly that it had jurisdiction only over treaty claims.[22] It then examined the "umbrella clause" in more detail, taking into account recent ICSID jurisprudence.[23] The *El Paso* arbitrators rejected the liberal interpretation of such clauses, adopted by the *SGS v. Philippines* tribunal,[24] considering that such a view of the clause would render all other BIT provisions useless.[25] They concluded instead that the BIT's "umbrella clause" could not raise breaches of

[20] *Ibid.*, para. 45. This seems to be identical with the "*Salini* test" adopted by other tribunals.

[21] *Ibid.*, para. 62.

[22] *Ibid.*, para. 65.

[23] *Ibid.*, paras. 67–82.

[24] *SGS Société Générale de Survaillance S.A. v. Republic of the Philippines,* Case No. ARB/02/06, Decision on Jurisdiction of 29 January 2004 (*El-Kosheri, Crawford, Crivellaro*) (*SGS v. Philippines*), summarized in the 2004 report (note 5), 885–891.

[25] *El Paso (Jurisdiction)* (note 19), para. 76.

"ordinary contracts" to the level of international law, but applied only to breaches of "investment agreements." Breaches of "ordinary" contracts could only be within the Tribunal's jurisdiction insofar as they also constituted independent breaches of treaty standards.[26]

Argentina next argued that the dispute did not arise directly out of an investment, since the measures were of general application, and not directed specifically at the Claimant. The Tribunal agreed that general measures of economic policy were outside the scope of its jurisdiction, but held that jurisdiction was proper insofar as those measures might violate the State's treaty obligations.[27] Argentina's third objection was that the BIT excluded tax measures from the Tribunal's jurisdiction. The Tribunal disagreed, since the BIT's requirements were fulfilled *prima facie,* but noted that a final determination of the issue would come only during the merits phase of the proceedings.[28] Argentina finally argued that *El Paso Energy* had no *ius standi* because it had ceased to be a shareholder in the companies in question, and that in any event it had never been anything more than an indirect minority shareholder. The Tribunal rejected both arguments. Neither the BIT, nor the Washington Convention, nor relevant jurisprudence required continuous ownership of the investment throughout the proceedings. After all, the arbitrators reasoned, an investor must have the possibility to sue even if his investment has been taken from him.[29] With respect to the argument that the Claimant was only an indirect minority shareholder, the Tribunal relied on the jurisdictional decision in *LG&E v. Argentina*[30], holding that indirectly owned minority shares constitute an investment for purposes of a BIT.[31] Consequently, the Tribunal decided that the dispute fell within the scope of its jurisdiction.

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[26] *Ibid.,* paras. 84–86.

[27] *Ibid.,* para. 97.

[28] *Ibid.,* paras. 110, 112 and 115.

[29] *Ibid.,* para. 135.

[30] *LG&E Energy Corp. and Others v. Argentine Republic,* Case No. ARB/02/1, Decision on Jurisdiction of 30 April 2004, summarized in the 2004 report (note 5), 895–897.

[31] *El Paso (Jurisdiction)* (note 19), para. 138.

E. Metalpar S.A. y Buen Aire S.A. *v.* The Argentine Republic (Case No. ARB/03/5)

The Tribunal in *Metalpar S.A. y Buen Aire S.A. v. The Argentine Republic*[32] rendered its decision on jurisdiction on 27 April 2006. The Tribunal consisted of Mr. *Rodrigo Oreamuno* as President and Messrs. *Duncan H. Cameron* and *Jean Paul Chabaneix* as members of the Tribunal.

I. The Dispute

Metalpar and *Buen Aire* were both Chilean companies; *Metalpar* was dedicated to the construction of public service vehicles, while *Buen Aire* focused its business on the development of investments. *Metalpar* and *Mercobus S.A.* jointly owned *La Loma S.A.*, an Argentinean company. In May 1997, *La Loma* acquired a local company that eventually became known as *Metalpar Argentina S.A.* In 2000, *Metalpar* transferred its *La Loma* shares to a Chilean company, *Inversiones Metalpar S.A.*, and, in 2002, *Mercobus S.A.* transferred its *La Loma* shares to *Buen Aire. Metalpar* and *Buen Aire* alleged that their investment suffered significant losses due to Argentina's measures adopted during the economic crisis of 2000–2002. In 2003, they submitted their claim to ICSID pursuant to the Chile-Argentina BIT.

II. The Decision

The Tribunal first considered Argentina's objection that the Claimants had not proven their status as qualifying foreign investors, in part due to their indirect ownership of the relevant investments. The arbitrators held that the Chile-Argentina BIT did not require that investment be direct. The Tribunal added that numerous other ICSID panels have confirmed shareholders' right to raise claims for harm suffered by the investments of the companies in which they participate.[33]

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[32] *Metalpar S.A. y Buen Aire S.A. v. The Argentine Republic,* Case No. ARB/03/5, Decision on Jurisdiction of 27 April 2006 (*Metalpar*).

[33] *Enron Corporation y Ponderosa Assets, L.P v. The Argentine Republic* (additional claim), Case No. ARB/01/3, Decision on Jurisdiction of 2 August 2004, summarized in the 2004 report (note 5), 883–885; *Camuzzi International S.A. v. The Argentine Republic,* Case No. ARB/03/7, Decision on Jurisdiction of 11 May 2005, summarized in the 2005 report (note 2), 609–613.

Furthermore, according to the Tribunal, for jurisdictional purposes it is sufficient to demonstrate an "immediate – as opposed to remote – relationship between the prejudice to the investment and the actions that produce it."[34] In this case, the arbitrators found that such a relationship existed.

The Tribunal then turned to the issue of Argentina's consent to arbitrate. The arbitrators found that, through Arts. 2 and 3 of the BIT, Argentina had consented to the arbitration of disputes arising out of qualifying investments. The Tribunal rejected Argentina's argument that the Claimants should have exhausted available remedies in the Argentinean courts before submitting a claim under the BIT. The arbitrators noted that the relevant treaty contained no such restriction on the Claimants' right to bring a claim before an ICSID tribunal.[35]

Finally, the Tribunal rejected Argentina's contention that the dispute was merely contractual in nature. The arbitrators held that the real issue in dispute was whether the Claimants were entitled to compensation for the economic prejudice caused by Argentina's regulatory actions.

Having rejected all of Argentina's objections, the Tribunal affirmed jurisdiction over the dispute submitted.[36]

F. Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Services Integrales de Agua S.A. *v.* The Argentine Republic (Case No. ARB/03/17)

The decision on jurisdiction in this case was rendered on 16 May 2006.[37] The Tribunal was composed of Professor *Jeswald W. Salacuse* as President and Professors *Gabrielle Kaufmann-Kohler* and *Pedro Nikken* as members of the Tribunal.

[34] *Metalpar* (note 32), para. 95.

[35] *Ibid.*, para. 104.

[36] *Ibid.*, para. 128.

[37] *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Services Integrales de Agua S.A. v. The Argentine Republic,* Case No. ARB/03/17, Decision on Jurisdiction of 16 May 2006 (*Suez (I) v. Argentina (Jurisdiction)*). There are two more *Suez* cases pending before ICSID, one of them is covered in this report (see *infra*, Section M.).

I. The Dispute

The Claimants are nationals of France and Spain. They are shareholders in an Argentine company that held a 30-year water concession in the Argentine Province of Santa Fe. The dispute arose as a consequence of the measures taken by Argentina within the context of its economic crisis. Having failed to reach a negotiated settlement, the Claimants submitted their dispute to ICSID in April 2003, pursuant to the terms of Argentina's BITs with France and Spain.

II. The Decision

The Tribunal examined the six jurisdictional objections filed by the Respondent. It noted that there was a dispute as to whether Argentina had violated its obligations towards the Claimants under the BITs, and whether that dispute arose directly out of an investment.[38] The Tribunal thus found that the dispute was of a "legal nature" and rejected Argentina's objection.[39] The next jurisdictional objection was already moot by the time the decision was rendered. Initially, the Argentine concession holder had participated in the proceedings, but withdrew when Argentina argued – successfully – that that company was not a "foreign investor" within the definition set forth in the BITs. The Respondent further argued that the dispute settlement clause in the concession prevented the shareholders from bringing claims before an ICSID panel. The Tribunal noted that the contractual arbitration clause did not refer to treaty claims, and concluded that the contractual parties did not intend to waive ICSID arbitration.[40] Argentina's next objection related to the standing of the Claimants as mere shareholders. Argentina contended that they had no standing to bring claims for damage incurred by the concession holder. The Tribunal noted that the Claimants were "investors" within the meaning of the BITs, and thus found they had standing to bring claims.[41] The Tribunal's

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[38] *Ibid.*, paras. 27–32. The Tribunal expressly relied on *CMS Gas Transmission v. Argentina*, Case No. ARB/01/8, Decision on Jurisdiction of 17 July 2003, summarized in: *Richard Happ*, Awards and Decisions of ICSID Tribunals in 2003, GYIL 46 (2003), 711, 731–733. It rejected the Respondent's contention that a State measure is only subject to ICSID jurisdiction if aimed "directly" at an investment.

[39] *Suez (I) v. Argentina (Jurisdiction)* (note 37), paras. 33–37.

[40] *Ibid.*, paras. 41–45.

[41] *Ibid.*, paras. 46–51. It specifically rejected Argentina's argument that the *Barcelona Traction* case (ICJ, Judgment of 5 February 1970, ICJ Reports 1970, 3) might be

decision regarding the final objection is of particular interest. Argentina argued that the Spanish Claimants had failed to comply with the treaty provision requiring prior submission of the dispute to local courts. In response, the Claimants argued that the most favored nation ("MFN") clause contained in that treaty allowed them to rely on the dispute settlement clause found in the French-Argentine BIT, which included no such "local remedies" clause. The Tribunal noted that the MFN clause applied to "all matters," and concluded that it also applied to dispute settlement.[42] The arbitrators refused to interpret the MFN clause narrowly, seeking support in previous ICSID cases, in particular *Maffezini v. Spain.*[43] The Tribunal also reviewed the decision in *Plama v. Bulgaria* and found it to be distinguishable on the facts at hand.[44] The panel then concluded that the Spanish Claimants could rely on the MFN clause, and therefore were not required to submit the dispute to local courts before initiating arbitration. Having rejected all of Argentina's jurisdictional objections, the Tribunal affirmed its jurisdiction to decide the case.

G. Jan de Nul N.V. and Dredging International N.V. *v.* Arab Republic of Egypt (Case No. ARB/04/13)

The decision on jurisdiction was rendered 16 June 2006.[45] The Tribunal consisted of Professor *Gabrielle Kaufmann-Kohler* as President and Professors *Pierre Mayer* and *Brigitte Stern* as members of the Tribunal.

I. The Dispute

The dispute arose out of a contract that the Claimants entered into in 1992 with an Egyptian State agency, the *Suez Canal Entity* ("*SCA*") for the widening

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controlling for this arbitration, and found support for its conclusion in previous ICSID decisions relating to cases against Argentina.

[42] *Ibid.*, paras. 55 and 57.

[43] *Ibid.*, paras. 59–61. *Cf. Maffezini v. Spain,* Case No. ARB/97/7, Rectification of Award of 31 January 2001.

[44] *Ibid.*, paras. 62–65. *Cf. Plama Consortium Limited v. Bulgaria,* Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005 (*Salans, van den Berg, Veeder*), summarized in the 2005 report (note 2), 590–596.

[45] *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt,* Case No. ARB/04/13, Decision on Jurisdiction of 16 June 2006 (*Jan de Nul (Jurisdiction)*).

and deepening of parts of the Suez Canal. Shortly after the beginning of the works, the Claimants alleged that *SCA* misrepresented the conditions under which the contract was to be performed. In 1993, they brought proceedings before local administrative courts and special investment dispute committees, without success. In December 2003, while appeal proceedings were still pending, the Claimants instituted ICSID proceedings against Egypt pursuant to the 1977 and 2002 BITs between the Belgo-Luxembourg Economic Union and Egypt.

II. The Decision

The decision focused upon the interaction between the two BITs. The first treaty (BIT 1977) remained in force until May 2002, when it was replaced by another treaty (BIT 2002). The BIT 2002 expressly stated that it "shall not be applicable to disputes having arisen prior to its entry into force." The Tribunal noted that both parties had agreed that the *Oil Platforms* test would determine whether the arbitrators had jurisdiction over the dispute.[46] It then reviewed the requirements of Art. 25 of the Washington Convention. The Tribunal held that a legal dispute existed,[47] because the parties' differences involved the nature and scope of the Claimants' rights, and that the Claimants had submitted treaty claims, rather than contract claims.[48] With respect to the requirements that the dispute arise out of an "investment," the Tribunal applied the test enunciated in *Salini,* concluding that since the contract had a duration of more than three years, it qualified as an "investment."[49] The dispute was therefore found to arise out of an investment.[50] The Tribunal further concluded that the contract was also an "investment" within the meaning of both the 1977 BIT and the 2002 BIT.[51]

The Respondent also objected that it had not given consent to arbitrate this dispute. It argued that the consent set forth in the 1977 BIT had lapsed, and that

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[46] *Ibid.,* paras. 69 *et seq.*

[47] *Ibid.,* paras. 74–78.

[48] *Ibid.,* para. 79. It is to be noted that Egypt seemed to have accepted the distinction between the two types of claims.

[49] *Salini v. Morocco,* Case No. ARB/00/4, Decision on Jurisdiction of 23 July 2001 (*Briner, Cremades, Fadlallah*) (*Salini v. Morocco*).

[50] *Ibid.,* paras. 90–96.

[51] *Ibid.,* paras. 97–106.

the 2002 BIT was not applicable. In the Respondent's opinion, the dispute predated the entry into force of the BIT 2002, since the Claimants in 1993 had brought proceedings before local courts. The Tribunal examined this objection and concluded that the dispute submitted to the local courts and the dispute submitted to it (after the entry into force of the BIT 2002) were different disputes. It justified this conclusion not only on the basis of the difference between treaty claims and contract claims, but also due to the fact that the court proceedings formed an important part of the treaty claims.[52] It distinguished the *Lucchetti* award, on which the Respondent had relied, on the facts[53] and held that the "investment" need not continue to exist at the time of the entry into force of the BIT, as long as the dispute arose out of it.[54] It thus concluded that it had jurisdiction to decide the dispute under the 2002 BIT.

H. L.E.S.I., S.p.A. and ASTALDI, S.p.A. *v.* People's Democratic Republic of Algeria (Case No. ARB/05/3)

The decision on jurisdiction was rendered on 12 July 2006, by a tribunal composed by Professor *Pierre Tercier* as President and Professor *Emmanuel Gaillard* and Mr. *André Faurès* as members of the Tribunal.[55] On 3 February 2003, the consortium *Groupement LESI-DIPENTA* had filed a first request for arbitration with ICSID against Algeria on the basis of the ICSID arbitration clause contained in the BIT between Italy and Algeria. On 10 January 2005, the Arbitral Tribunal in this first case declined jurisdiction on the ground that the consortium lacked standing.[56] Following the Tribunal's award, *LESI* and *ASTALDI* (the owner of *DIPENTA* since 1999)[57] filed a new request for arbitration with ICSID.

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[52] *Ibid.*, paras. 114–122.

[53] *Ibid.*, paras. 123–131. *Cf. Lucchetti, S.A. and Lucchetti Peru, S.A. v. Peru,* Case No. ARB/03/4, Award of 7 February 2005, summarized in the 2005 report (note 2), 588–589.

[54] *Salini v. Morocco* (note 49), paras. 134–136.

[55] *L.E.S.I., S.p.A. and ASTALDI, S.p.A. v. People's Democratic Republic of Algeria,* Case No. ARB/05/3, Decision on Jurisdiction of 12 July 2006 (*L.E.S.I. v. Algeria (Jurisdiction)*).

[56] *Consortium Groupement L.E.S.I.-DIPENTA v. Algeria,* Case No. ARB/03/8, Decision on Jurisdiction of 10 January 2005, summarized in the 2005 report (note 2), 582–588.

[57] *L.E.S.I. v. Algeria (Jurisdiction)* (note 55), paras. 43–56.

I. The Dispute

LESI and *ASTALDI* are Italian corporations forming a consortium that was granted a concession in December 1993 by Algeria's *Agence nationale des barrages* (*ANB*) for the construction of a dam.[58] According to the Claimants, the concession encountered problems due to a lack of security in the region. In 1997, the *ANB* modified the project and requested a new type of dam, which required additional financing. In 2001, the *ANB* terminated the concession agreement for *force majeure. ANB* agreed to offer compensation to the consortium, but the parties failed to agree on the amount. The Claimants brought arbitration on grounds that Algeria had breached its obligations under the BIT by not promoting, protecting and affording security to their investment; by applying discriminatory measures; and by illegally expropriating their investment.

II. The Decision

Algeria raised objections to both jurisdiction and admissibility.

With respect to the objection that the requirements of Art. 25 para. 1 of the Washington Convention were not satisfied, the Tribunal examined the four conditions set forth in that provision, *i.e.*, that (i) there was a legal dispute; (ii) arising directly out of an investment; (iii) between a Contracting State and a national of another Contracting State, and (iv) that there was consent in writing of the parties to ICSID jurisdiction. First, the Tribunal decided that the dispute concerned the amount of compensation, and that this constituted a legal dispute.[59] The Tribunal then held that investments may include contributions other than financial commitments, and that such contributions need not be made exclusively within the territory of the host State.[60] With respect to the involvement of a Contracting State in the arbitration, the Tribunal concluded that the dispute was indeed against a State, because the Algerian government had participated indirectly in the negotiations of the disputed contract.[61] Finally, the Tribunal ruled that Algeria had given written consent covering the investment at issue. In this regard, the arbitra-

[58] *Ibid.*, para. 8.

[59] *Ibid.*, paras. 63–68.

[60] *Consortium RFCC v. Morocco,* Case No. ARB/00/6, Decision on Jurisdiction of 16 July 2001.

[61] *L.E.S.I. v. Algeria (Jurisdiction)* (note 55), paras. 75–79.

tors declined to consider additional requirements for the creation of an "investment" contained in Algerian law. However, noting the absence of an "umbrella clause" in the relevant treaty, the Tribunal concluded that Algeria's consent was limited to measures that could constitute a breach of the BIT's provisions, and did not include claims for breach of contract.[62]

Having concluded that the dispute was within its jurisdiction, the Tribunal turned to Algeria's objection to admissibility. Algeria contended that *ASTALDI* lacked standing, because only *LESI* and *DIPENTA* had signed the 1993 tender offer and concession contract. The Tribunal rejected this objection since, as a result of a 1999 merger-acquisition, *DIPENTA* ceased to exist and *ASTALDI* had acquired *DIPENTA*'s assets, liabilities and powers. The arbitrators concluded that *ASTALDI* had acquired the status of a contracting party to the concession, and was therefore bound under Italian law by the contract upon which the claim was based.[63]

Having concluded that *ASTALDI* had standing to maintain its claims, the Tribunal held that the request for arbitration submitted jointly by the Claimants was admissible, and that the Arbitral Tribunal would proceed to consider the merits of the dispute.

J. Azurix Corp. and Others *v.* The Argentine Republic (Case No. ARB/01/12)

The Award was dispatched to the parties on 14 July 2006.[64] The Tribunal consisted of Dr. *Andrés Rigo Sureda* as President and the Hon. *Marc Lalonde* and Dr. *Daniel Hugo Martins* as members of the Tribunal.

I. The Dispute

In 1996, the US company *Azurix* participated in a tender for the privatization of water supply for the Province of Buenos Aires. It ultimately acquired the con-

[62] *Ibid.*, paras. 80–85.

[63] *Ibid.*, paras. 92–93.

[64] *Azurix Corp. v. The Argentine Republic,* Case No. ARB/01/02, Award of 14 July 2006 (*Azurix (Merits)*).

cession to operate the drinking and sewage water supply for the Province with a bid of nearly US$ 440 million. To carry out its concession in compliance with local regulations, *Azurix* established two Argentine operating companies, *OBA* and *AAS. Azurix* owned *OBA* indirectly through two tiers of Cayman Islands subsidiaries, while it owned *AAS* indirectly through a US subsidiary.

In 2000 and 2001, *Azurix* experienced difficulties in maintaining the requisite water pressure and quality. At the same time, *Azurix* complained that Argentina had prevented it from charging rates for water service reflecting the contractually-specified tariff, and that the State had failed to deliver necessary infrastructure. These two factors, the company contended, affected its ability to raise financing and to serve its customers.

In September 2001, *Azurix* filed a claim against Argentina under the United States-Argentina BIT, claiming violation of a number of substantive protections. Argentina raised objections to the Tribunal's jurisdiction. On 8 December 2004, the Tribunal issued its decision, upholding its jurisdiction, and ordering that the proceedings continue to adjudication of the merits.[65]

II. The Decision

Azurix argued that the conduct of the Province of Buenos Aires violated the BIT clause requiring fair and equitable treatment and constituted arbitrary and discriminatory treatment. *Azurix* also contended that Argentina's actions in breaching the concession agreement constituted expropriation, breached the treaty's "umbrella clause," and violated the treaty standard of full protection and security.

The Tribunal first examined *Azurix*'s claim that its investment, the concession contract, had been subjected to "measures tantamount to expropriation." The Tribunal found that contractual breaches by a State do not normally amount to expropriation. The Tribunal further noted that the breach of contract did not affect *Azurix*'s ownership and control of *ABA.* Although the Tribunal agreed that the Province's actions affected the management of *ABA,* the impact was deemed insufficient to constitute expropriation.

[65] *Azurix. Corp. v. Argentine Republic,* Case No. ARB/01/12, Decision on Jurisdiction of 8 December 2003, summarized in the 2004 report (note 5), 879–882.

The Tribunal then considered the alleged violation of the fair and equitable treatment standard. It found that the standard protects the investor's legitimate expectations, ensures a stable investment framework, and entails "a favorable disposition towards foreign investment, in fact, a pro-active behavior of the State to encourage and protect it."[66] The Tribunal found that the Province had unreasonably refused to accept *ABA*'s termination notice, and unreasonably assumed that the concession had been abandoned. The Tribunal further held that impending elections had influenced the Province's conduct *vis-à-vis* the concession tariff regime. Finally, the Tribunal reflected disapprovingly upon the conduct of provincial officials, who publicly encouraged customers to withhold water service payments to *ABA*. In light of these observations, the Tribunal found that Argentina had violated the fair and equitable treatment standard.

Next, the Tribunal turned to whether Argentina's actions violated the "umbrella clause" of the treaty. Noting that "none of the contractual claims as such refer to a contract between the parties to the [ICSID] proceedings," the Tribunal found that "there is no undertaking to be honored by Argentina to Azurix, other than the obligations under the BIT."[67] This claim was therefore dismissed.

The Tribunal then considered whether the actions taken by the Province and Argentina amounted to arbitrary and discriminatory measures. The Tribunal observed that measures need only be arbitrary, and not necessarily *also* discriminatory, to constitute a violation of such a BIT provision. In light of this determination, the Tribunal observed that the provincial authorities had encouraged the non-payment of bills, threatened members of the competent regulatory authority for having allowed *ABA* to resume billing, prevented *ABA* from adjusting its tariffs, prevented *ABA* from collecting payments from its customers, and denied the company access to legal documents. The Tribunal found these actions to be arbitrary, since they were without basis in either local law or the concession contract.

Finally, the Tribunal assessed whether there had been a violation of the treaty's full protection and security standard. The arbitrators cited *Occidental v. Ecuador*[68] for the proposition that "full protection and security may be breached

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[66] *Azurix (Merits)* (note 64), para. 372.

[67] *Ibid.*, para. 384.

[68] LCIA, *Occidental Exploration and Production Company v. Ecuador*, Case No. UN 3467, Award of 1 July 2004, para. 187.

even if no physical violence or damage occurs."[69] The Tribunal found that Argentina had failed to provide full protection and security for reasons analogous to those underlying the decision regarding fair and equitable treatment.

Having established Argentina's liability for breach of the BIT, the arbitrators turned to the quantum of compensation due to *Azurix*. For the Tribunal, the proper standard for assessing damages was "fair market value," even absent a finding of expropriation. The Tribunal further decided to determine fair market value using the "actual investment" method, rather than the "book value" method. The Tribunal then determined that *Azurix* had overpaid significantly for the concession, and adjusted compensation accordingly. *Azurix* was awarded US$ 60 million, less than one-fifth of the amount requested.

K. Pan American Energy LLC and Others *v.* The Argentine Republic (Case No. ARB/03/13 and ARB/04/8)

Here, two cases were consolidated[70] and heard by a single tribunal, consisting of Professor *Lucius Caflisch* as President and Professors *Brigitte Stern* and *Albert Jan van den Berg* as members of the Tribunal. The decision on jurisdiction was issued on 27 July 2006. This decision bears some resemblance to the decision in *El Paso v. Argentina*[71], in which two of the *Pan American* arbitrators (Professors *Caflisch* and *Stern*) were also members of the Tribunal.

I. The Disputes

Both disputes arose out of a similar set of facts. The US Claimants are the sole shareholders of the Argentine Claimants, which hold hydrocarbon development concessions. The Claimants allege that the measures enacted by Argentina within the context of the economic crisis in 2000–2002 violated Argentina's obligations

[69] *Azurix (Merits)* (note 64), para. 406.

[70] *Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic,* Case No. ARB/03/13 and *BP American Production Company, Pan American Sur SRL, Pan American Fueguina, SRL and Pan American Continental SRL v. The Argentine Republic,* Case No. ARB/04/8, Decision on Jurisdiction of 27 July 2006 (*BP and others (Jurisdiction)*).

[71] *El Paso (Jurisdiction)* (note 19), discussed *supra,* Section D.

under the US-Argentina BIT. They submitted their requests for arbitration in May and December 2003. In March 2004, the proceedings were consolidated.

II. The Decision

The Tribunal noted at the outset that an ICSID Claimant must demonstrate that his claims, as formulated, fall within the jurisdictional scope of both the BIT and the Washington Convention.[72] Argentina first objected that the dispute did not arise directly out of an investment as required by Art. 25 of the Convention, since the disputed measures were measures of general economic policy.[73] The Tribunal rejected this argument. Relying on the decision in *CMS v. Argentina*[74], the arbitrators held that general measures can have a specific effect if they violate obligations of the State under a BIT. For the jurisdictional phase, the Tribunal considered it sufficient that the Claimant made contentions to that effect.[75] Argentina next argued that the dispute was not of a legal nature. As in *El Paso,* the objection was presented with three separate aspects: that the dispute related only to commercial flows but not to legal rights; that it was purely contractual in nature; and that the BIT's "umbrella clause" could not transform mere contractual claims into treaty claims.[76] The Tribunal observed that the Claimants based their claims on alleged breaches of the BIT, and concluded that the dispute must therefore relate to legal rights. The arbitrators further opined that the characterization of a dispute as contractual would not render it "non-legal," but that nevertheless the Tribunal's jurisdiction under the BIT was limited to treaty claims. The panel then analyzed the effect of the "umbrella clause" on claims relating to Argentina's alleged breach of contracts with the Claimants.[77] Reviewing prior ICSID decisions, it adopted the holding set forth in *SGS*

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[72] *BP and others (Jurisdiction)* (note 70), para. 50.

[73] *Ibid.,* paras. 55–70.

[74] *CMS Gas Transition Company v. Republic of Argentina,* Case No. ARB/01/8, Decision on Jurisdiction of 17 July 2003 (*Vicuna, Lalonde, Rezek*), summarized in the 2003 report (note 38), 731–733.

[75] *BP and others (Jurisdiction)* (note 70), para. 68.

[76] *Ibid.,* paras. 71–116.

[77] *Ibid.,* paras. 96–116.

v. Pakistan[78], that only breaches of "investment agreements" could be elevated to the international law level by an "umbrella clause."[79]

Argentina's next objection concerned the scope of the Tribunal's jurisdiction to adjudicate tax matters. The Tribunal examined the provisions of the BIT and concluded it had jurisdiction, although limited in scope. Argentina also claimed that according to the doctrine of estoppel, the Claimants could not refuse to accept the courts of Argentina as the exclusive forum for the resolution of their investment disputes. One of *Pan American*'s subsidiaries had instituted proceedings before Argentine courts, waiving its right to turn to any other forum. The Tribunal held that those proceedings did not constitute forum selection *vis-à-vis* the parties to the ICSID dispute, since there was neither identity of parties nor of causes of action. In any event, the requirements for estoppel were not satisfied in the case at hand. The Tribunal also rejected Argentina's objection that the dispute was merely hypothetical, since the amount of damages remained unclear. For the purposes of determining the extent of its jurisdiction, the Tribunal considered it sufficient that the Claimants had clearly suffered some damage. Argentina's final objection related to the Claimants' *ius standi* as shareholders. The Tribunal found that the Claimants had established their status as qualifying "investors" in accordance with the definition contained in the BIT, and that current international law upholds the claims of shareholders pertaining to injury inflicted on companies in which they hold shares. The Tribunal dismissed this objection and affirmed its jurisdiction to adjudicate the dispute.

L. Inceysa Vallisoletana, S.L. *v.* Republic of El Salvador (Case No. ARB/03/26)

The award was rendered on 2 August 2006.[80] The Tribunal consisted of Mr. *Rodrigo Oreamundo Blanco* as President and Mr. *Burton A. Landy* and Mr. *Claus von Wobeser* as members of the Tribunal.

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[78] *SGS Société Générale de Survaillance S.A. v. Islamic Republic of Pakistan,* Case No. ARB/01/13, Decision on Jurisdiction of 6 August 2003 (*Feliciano, Faurès, Thomas* QC), summarized in the 2003 report (note 38), 734–738.

[79] *BP and others (Jurisdiction)* (note 70), paras. 110–113.

[80] *Inceysa Vallisoletana, S.L. v. Republic of El Salvador,* Case No. ARB/03/26, Decision on Jurisdiction of 2 August 2006 (*Inceysa (Jurisidiction)*).

I. The Dispute

The dispute arose out of a service contract for the installation, management and operation of mechanical inspection stations for vehicles and their emissions. *Inceysa* had won a public bid for that contract. The contract was negotiated and concluded in 2000 between the Claimant and a State ministry. In 2001, several problems arose between the parties. On 21 July 2003, *Inceysa* filed a request for arbitration with ICSID, claiming contractual breach and expropriation under the BIT between Spain and El Salvador.

II. The Decision

The Respondent raised two different objections to the jurisdiction of the Tribunal. First, it asserted that the Claimant had acted fraudulently during the bid, that the BIT protected only legitimate investments, and that it had never consented to arbitrate disputes arising out of illegal investments. Second, El Salvador argued that it had never consented to arbitrate purely contractual disputes before ICSID, and that the contract contained a separate arbitration clause to which the ICSID Tribunal should give effect.

Before turning to the first objection, the Tribunal considered the various arguments of the parties as to whether the Claimant had acted fraudulently during the bidding procedure. It reviewed the bidding process as well as the Claimant's statements, and concluded that *Inceysa* had presented false information and violated the bidding process. Having concluded that the Claimant had indeed acted fraudulently, the Tribunal analyzed the Respondent's first objection, that the alleged investment was not protected under the BIT.[81] The BIT defined "investments" as those "made in accordance with the laws in force in each Contracting Party." The Tribunal considered it necessary to interpret this provision according to the will of the parties, without applying any presumption in favor of or against jurisdiction. Reviewing the *travaux préparatoires* of the BIT, the Tribunal concluded that it was the clear intent of the parties to exclude from the protection of the BIT investments not made in accordance with the laws of the host State.[82] Thus, any investment made in contravention of the laws of El Salvador would fall outside the protection of the BIT. It is notable that the Supreme Court

[81] *Ibid.*, paras. 132 *et seq.*

[82] *Ibid.*, para. 195.

of El Salvador, in a proceeding brought by the Claimant's local subsidiary, had held that the contract was awarded lawfully. The Tribunal did not consider these proceedings to be *res judicata,* as there was neither identity of parties nor of claims. The arbitrators also reasoned that the BIT itself is part of the laws of El Salvador, and instructs the Tribunal to apply its provisions as well as general principles of international law before resorting to national law.[83] Since the BIT does not contain rules governing the legality of the Claimant's investment, the Tribunal resorted to general principles of law. It concluded that the investment violated several principles, including good faith, international public policy, and unjust enrichment,[84] as well as the investment law of El Salvador. Consequently, it held that the investment was excluded from the scope of the BIT, and that its jurisdiction could not be based on the BIT nor on the investment law, which also provided for ICSID arbitration.[85] Lastly, the Tribunal rejected the Claimant's argument that jurisdiction could be derived from the service contract between *Inceysa* and El Salvador, or on miscellaneous provisions of El Salvadoran law.

The Tribunal thus decided that it had no jurisdiction. Concerning costs, it decided that the Claimant should bear the fees and expenses of the arbitrators, as well as the administrative fees of ICSID, but that each party should bear its own legal costs.[86]

M. Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. *v.* The Argentine Republic (Case No. ARB/03/19)

The decision on jurisdiction in this case was rendered on 3 August 2006.[87] The Tribunal was composed of Professor *Jeswald W. Salacuse* as President and Professors *Gabrielle Kaufmann-Kohler* and *Pedro Nikken* as members of the Tribunal.

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[83] *Ibid.*, para. 224.

[84] *Ibid.*, paras. 229–257.

[85] *Ibid.*, paras. 257 and 264.

[86] *Ibid.*, para. 338.

[87] *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. The Argentine Republic,* Case No. ARB/03/19, Decision on Jurisdiction of 3 August 2006 (*Suez (II) v. Argentina (Jurisdiction)*). It is noteworthy that with the decision, the Tribunal also rendered its decision on jurisdiction in the UNCITRAL arbitration case *AWG Group Ltd. v. Argentine Republic.* That case is administered by ICSID.

I. The Dispute

The Claimants are companies of France and Spain. They are shareholders of an Argentine company which held a 30-year water concession for the city of Buenos Aires. The concessionaire suffered significant losses as a result of the measures Argentina took within the context of the 2000–2002 economic crisis. In April 2003, having negotiated fruitlessly with the Argentine government, the Claimants submitted their dispute to ICSID arbitration in accordance with the BITs Argentina had concluded with Spain and France.

II. The Decision

The decision is similar to the decision rendered in the other *Suez v. Argentina* case dealt with in this report.[88] Argentina filed the same objections: that (i) the dispute did not arise directly out of an investment,[89] (ii) the dispute was not legal in nature,[90] (iii) the Argentine concession holder was not entitled to bring a claim, (iv) that the dispute settlement clause in the concession contract prevented the Claimants from bringing a claim,[91] (v) that shareholders are not entitled to bring claims for injuries done to the daughter company,[92] and (vi) that the Claimants had not complied with the BIT provision requiring them to submit the dispute to local courts first.[93] The Tribunal rejected all of these objections. In addition, the panel permitted the Claimants to rely upon the most-favored-nation clause of their respective BITs to override the procedural requirement that they litigate disputes in local courts before initiating arbitration. The arbitrators concluded that they had jurisdiction to decide the case.

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[88] *Supra*, Section F.

[89] *Suez (II) v. Argentina (Jurisdiction)* (note 87), paras. 25–32.

[90] *Ibid.*, paras. 32–37.

[91] *Ibid.*, paras. 41–45.

[92] *Ibid.*, paras. 46–51.

[93] *Ibid.*, paras. 52–69.

N. Telenor Mobile Communications A.S. *v.* the Republic of Hungary (Case No. ARB/04/15)

In the case of *Telenor Mobile Communications A.S. v. The Republic of Hungary,* the decision on jurisdiction was dispatched to the parties on 13 September 2006.[94] The Tribunal consisted of Professor *Sir Roy Goode* as President and Mr. *Nicholas W. Allard* and Mr. *Arthur L. Marriott* as members of the Tribunal.

I. The Dispute

The dispute arose out of a 1993 concession agreement between Hungary and the *GSM Consortium* for the provision of public mobile radiotelephone services in Hungary. *Pannon,* a wholly owned subsidiary of *Telenor* (75 % of which is owned in turn by the Kingdom of Norway), subsequently acquired all of the *GSM Consortium*'s rights and obligations under the agreement.

Under the agreement, *Pannon* undertook to provide mobile telephone services, and to cooperate with other public telecommunications operators to ensure interconnection with their networks. Hungary undertook to treat telecommunications operators equally and to ensure that regulatory and administrative proceedings in the telecommunications industry would be impartial, transparent and controllable. Between 2001 and 2003, Hungary took certain regulatory steps aimed at achieving compliance with European Union standards. As part of this initiative, Hungary demanded that all telecommunications providers pay a portion of their revenues to support a "universal service" program designed to subsidize low-cost, fixed-line service to customers in poor and rural areas. *Telenor* alleged that these steps unfairly forced mobile service operators to fund fixed-line service operators, at least one of which was also *Telenor*'s competitor in the mobile telecommunications market. Accordingly, *Telenor* claimed losses for expropriation of its investment without compensation and failure of Hungary to accord its investment fair and equitable treatment and protection, pursuant to Arts. VI and III of the Hungary-Norway BIT.

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[94] *Telenor Mobile Communications A.S. v. the Republic of Hungary,* Case No. ARB/04/15, Decision on Jurisdiction of 13 September 2006 (*Telenor*).

II. The Decision

The Tribunal first considered whether *Telenor* had asserted facts showing a *prima facie* case of expropriation within the meaning of the BIT. Citing *S.D. Myers v. Canada*[95], *Tecmed v. Mexico*[96] and *Pope and Talbot v. Canada*[97], the arbitrators noted that the various phrases used to describe indirect expropriation in different BITs are of equivalent effect. The Tribunal also cited *Feldman v. Mexico*[98] for the proposition that not all regulatory impediments to investment constitute expropriation, and articulated an "impact" standard for determining "whether, viewed as a whole, the investment has suffered substantial erosion of value"[99] for a finding of expropriation.

Applying this test, the Tribunal held that *Telenor* had failed to make a *prima facie* case for expropriation. *Telenor* had not mentioned expropriation in either the request for arbitration or its memorial, and had failed to provide information about the magnitude of *Telenor*'s loss in relation to its overall investment, leaving the Tribunal with insufficient information to posit a *prima facie* case for expropriation. The Tribunal also considered the fact that other States had established similar "universal service" arrangements, and that the investor's competitors operated under the same restrictions. Also important to the Tribunal's decision was that the company's management was left intact, the concession agreement remained in full force, *Pannon* had maintained access to its assets and revenues and even increased its profits, and there was no evidence of government interference with business operations aside from the regulatory levy.

The Tribunal next turned to Hungary's objection that jurisdiction under the BIT did not extend beyond expropriation claims. Distancing itself from prior decisions allowing investors to "import" more favorable dispute resolution

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[95] NAFTA Arbitration, *S.D. Myers, Inc. v. Government of Canada,* First Partial Award of 13 November 2000, reprinted in: ILM 40 (2001), 1408, para. 285.

[96] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States,* Case No. ARB (AF)/00/2, Award of 29 May 2003, para. 114, summarized in the 2003 report (note 38), 724–728.

[97] NAFTA Arbitration, *Pope and Talbot, Inc. v. Canada,* Interim Award of 10 April 2001, reprinted in: ILR 122, 352, para. 104.

[98] *Feldman v. United Mexican States,* Case No. ARB(AF)/99/1, Award of 16 December 2002, summarized in the 2003 report (note 38), 712–717.

[99] *Telenor* (note 94), para. 67.

clauses from other BITs,[100] the Tribunal likened *Telenor*'s claim to that in *Plama v. Bulgaria*[101], where the arbitrators denied the Claimant's request to adjudicate a claim that the contracting parties had expressly excluded from consent to arbitration in the applicable BIT. The Tribunal therefore declined to assume jurisdiction over *Telenor*'s claims under Art. III of the BIT.

O. ADC Affiliate Limited and ADC & ADMC Management Limited *v.* Republic of Hungary (Case No. ARB/03/16)

The *ADC* Tribunal rendered its award on 2 October 2006.[102] The Tribunal consisted of the Mr. *Neil Kaplan*, QC as President and the Hon. *Charles Brower* and Professor *Albert Jan van den Berg* as members of the Tribunal.

I. The Dispute

The dispute in *ADC v. Hungary* arose out of a series of contracts between *ADC* and the *Air Traffic and Airport Administration* (*ATAA*) of Hungary, relating to the renovation, expansion, and operation of a State-owned airport near Budapest (the "Airport Project"). Pursuant to a master agreement, *ADC* formed a wholly-owned subsidiary (the "project company") to manage the financial aspects of the venture and manage the terminal operations.[103]

ADC then incorporated an affiliate in Cyprus, which was to make its cash contributions to the project company.[104] *ADC Financial Ltd.* contributed US$ 6.767 million and *ADC & ADMC* (another Cypriot subsidiary of *ADC*) contributed US$

[100] *Emilio Augustin Maffezini v. Kingdom of Spain,* Case No. ARB/97/7, Decision on Jurisdiction of 25 January 2000; *Siemens A.G. v. Argentine Republic,* Case No. ARB/02/8, Decision on Jurisdiction of 3 August 2004, summarized in the report 2004 (note 5), 910–913; *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic,* Case No. ARB/03/17, Decision on Jurisdiction of 16 May 2006 (see *supra,* Section F.).

[101] *Plama Consortium Ltd. V. Republic of Bulgaria,* Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005, summarized in the 2005 report (note 2), 590–596.

[102] *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary,* Case No. ARB/03/16, Award of 2 October 2006 (*ADC v. Hungary*).

[103] *Ibid.,* 18–19, paras. 113–118.

[104] *Ibid.,* 22–25, paras. 131–145.

10 million to the *ADC* affiliate to be used to fund the project company. Pursuant to the Terminal Management Agreement, *ADC & ADMC* agreed with the project company to receive 3 % of net Airport Project revenues in exchange for management expertise.[105] The Terminal Management Agreement was to begin before and continue after the operations commencement date. On 19 December 1996, the project company and the *ATAA* entered into a turnkey contract for construction of Terminal 2/B. The Terminal was transferred to the Hungarian government on or about 25 December 1998 and opened to the public on or about 19 December 1998. After construction, the project company was to perform entrepreneurial operations and was entitled to collect the resulting revenues, including passenger terminal usage fees, aircraft parking fees, ground handling fees, revenues from advertising, *etc.* The Terminal manager (*ADC & ADMC*) was given the responsibilities of overseeing the project company's entrepreneurial activities.

On 14 April 2001, the Hungarian government passed legislation pursuant to which a new company was to succeed the *ATAA* in its duties. A decree was subsequently passed on 20 December 2001, which prohibited the transfer by the *ATAA* (or its successor) of the activities of the type performed by the project company and the Terminal manager to any third party.[106] Pursuant to the decree, *Hungaro Control* took on the management duties (previously held by *ADC & ADMC*) and *Budapest Airport Rt.* ("*BA Rt.*") took on the operational duties (previously held by the project company). *BA Rt.* was subsequently privatized and 75 % sold to a British company.

After the decree, the Claimants received no payments from the project company.[107] In November and December 2005, the project company commenced four arbitration proceedings against the legal successor to the *ATAA*.[108] The Claimants then initiated arbitration against Hungary pursuant to the Cyprus-Hungary BIT.

II. The Decision

Before addressing the objections made by Hungary, the Tribunal found it necessary to identify the law applicable to the dispute. In doing so, it rejected

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[105] *Ibid.*, 26–27, paras. 146–152.

[106] *Ibid.*, 31–35, paras. 172–190.

[107] *Ibid.*, 35, para. 191.

[108] *Ibid.*, 38, paras. 210–213.

Hungary's request for the application of Hungarian law to the merits of the dispute. Citing *MTD v. Chile*[109], the Tribunal stated that the parties' consent to the BIT entailed their consent to the provisions in the treaty pertaining to international law.[110]

1. Jurisdiction

The Respondent made four jurisdictional objections, all of which were rejected. First, the Tribunal addressed whether the dispute arose under the contract or the BIT. It concluded that the claim arose under the latter, in that the Claimants' claim arose directly from the assertion that they lost their rights and had their legitimate expectations thwarted by the Hungarian legislation.[111] The loss, moreover, was not compensated and the issue was thus one of expropriation.

The Tribunal then turned to whether the Claimants had made an investment within the definition of the BIT and the Washington Convention. Although the Tribunal ultimately rejected the Respondent's arguments that there was no investment, it did not agree with the Claimants that the BIT was the sole point of reference for ascertaining the existence of an investment for the purposes of ICSID arbitration. Instead, the Tribunal relied on what it termed the "'substance' approach" to defining investment, an apparent reference to an objective standard for ascertaining the existence of an investment.[112] The Tribunal also had regard to all the relevant agreements in determining the amount of the investment, which it deemed to be the full US$ 16.765 million claimed.[113] In addition, the Tribunal found that both the BIT and the Washington Convention protected the management-related aspects of the project.

The Respondent raised a third set of objections as to whether the dispute arose directly out of an investment as required by Art. 25 para. 1 of the Convention. The Tribunal rejected the Respondent's argument that the commercial nature of the contract and the obligations of the *ATAA* precluded the Claimants

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[109] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile,* Case No. ARB/01/7, Award of 25 May 2004 (*Sureda, Lalonde, Blanco*), para. 87, summarized in the 2004 report (note 5), 901–903.

[110] *ADC v. Hungary* (note 102), 49, para. 290.

[111] *Ibid.*, 57, para. 304.

[112] *Ibid.*, 61, para. 325.

[113] *Ibid.*

from bringing a treaty claim. Instead, the arbitrators concluded that the claim was based on the effects of legislation upon the Claimants' investment, rather than alleged acts of the *ATAA* in particular, and that the commercial complexity of the matter did not detract from the fact that the Claimants had invested US$ 16.765 million in the Airport Project.[114] The Tribunal also stated that the existence of the project company as a conduit did not undermine the directness of the investment. The Master Agreement clearly envisioned an investment in the project, and the subsequent project agreements – which had been modified at the Respondent's request – existed under the "umbrella" of the Master Agreement.[115]

The Tribunal next addressed whether the dispute involved "investors" of appropriate nationality within the definition of the BIT and the Washington Convention. It held that the ultimate Canadian source of investments did not prevent the application of the Cyprus-Hungary BIT. The Tribunal further rejected the Respondent's argument for piercing the corporate veil, as Hungary was fully aware of the use of Cypriot entities and "manifestly approved it."[116] The Tribunal then denied the Respondent's assertion that the BIT imposed a "genuine link" requirement: there was no evidence of such a requirement in the applicable treaty text, although Hungary had implemented activity requirements in other BITs it had signed.[117] The Respondent also invoked Professor *Weil*'s dissenting opinion in *Tokios Tokeles v. Ukraine* to stress the importance of the origin of corporate capital.[118] The Tribunal noted that the *Tokios* majority decision represented the state of international law, and also opined that the facts of that case differed significantly from those in the case at hand – the claimant companies were not here owned and controlled by nationals of the host State.[119] Finally, the Tribunal ruled that the Claimants' earlier appeal for assistance from the Canadian government did not prevent them from asserting rights under the BIT and the Washington Convention.

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[114] *Ibid.*, 62–63, para. 331.

[115] *Ibid.*

[116] *Ibid.*, 68, para. 358.

[117] *Ibid.*, 68, para. 359.

[118] *Ibid.*, 68–69, para. 360.

[119] *Ibid.*

2. Expropriation

The Tribunal divided its discussion of expropriation into seven parts. First, it rejected the Respondent's contentions that regulatory measures fell outside the scope of the BIT, holding that the State's right to regulate is not unlimited.[120] Second, the Tribunal ruled that Hungary's measures fell within the scope of Art. 4 of the BIT, and that the use of the word "deprivation" instead of "expropriation" in the treaty was of no import.[121] Third, the Tribunal rejected the Respondent's argument that the acts were justified because they were taken in the "public interest." Fourth, the Tribunal held that the taking had not been carried out with due process of law, since Hungary had provided no legal procedure through which the Claimants could have opposed the State's actions. "If no legal procedure of such nature exists at all, the argument that 'the actions are taken under due process of law' rings hollow."[122] The Tribunal further rejected the Respondent's claims that the Claimants knew or should have known about the taking in advance, noting that even many government representatives lacked knowledge of the impending expropriation.[123] Fifth, the Tribunal agreed with the Claimants that Hungary's measures were discriminatory in nature, because the new airport operator named by the State received superior treatment. Sixth, the Tribunal stated unequivocally that the Claimants had not received just compensation. Finally, the Tribunal found that the Respondent had breached Art. 3 of the BIT, which requires "fair and equitable treatment" and "full security and protection," and prohibits "unreasonable or discriminatory measures."[124]

3. Miscellaneous Claims Concerning the Invalidity of the Agreements

The Respondent challenged the validity of the various agreements concluded in relation to the investment. All of the challenges were rejected by the Tribunal.

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[120] *Ibid.*, 78, para. 423.

[121] *Ibid.*, 78, para. 426.

[122] *Ibid.*, 79, para. 435.

[123] *Ibid.*, 79–80, para. 436.

[124] *Ibid.*, 81, para. 445.

4. Damages

The Tribunal noted that the BIT designated Hungarian law as governing the assessment of damages only in the case of a *lawful* expropriation.[125] Given that the expropriation in this instance had been *unlawful* (*i.e.* discriminatory and without due process of law), the Tribunal decided to apply customary international law to determine the quantum of appropriate compensation. The Tribunal cited a series of BIT cases supporting its decision, as well as recent ICJ decisions re-affirming the *Chorzów Factory* standard as the proper measure of damages in customary international law.[126] Concerning the proper date for assessment of damages, the Tribunal selected the date of the award, rather than the date of the expropriation, because "this is what is necessary to put the Claimants in the same position as if the expropriation had not been committed."[127] It cited several awards and judgments in support of its decision on this point.

Concerning the fair market value of the expropriated investments, the Tribunal chose to assess the value of the Claimants' loss using the discounted cash flow ("DCF") method, because the "balancing payment" method proposed by the Respondent "does not [sufficiently] take into account [...] the remaining term of the investments."[128] The Tribunal also rejected the Respondent's various contentions that the Claimants' expert on quantum had incorrectly applied the DCF method in determining the amount of damages. The Tribunal essentially adopted the figures put forward by the Claimants' expert, and awarded US$ 76.2 million against Hungary. As regards costs, it considered that Hungary should reimburse the Claimants for their costs and expenses, including legal fees and the sums paid to ICSID for the fees and expenses of the Arbitral Tribunal.

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[125] *Ibid.*, 89, para. 481.

[126] ICJ, *Gabčíkovo-Nagymaros Project* (Hungary *v.* Slovakia), Judgment of 25 September 1997, ICJ Reports 1997, 7, para. 152; *id.*, *LaGrand* (Germany *v.* United States), Judgment of 27 June 2001, ICJ Reports 2001, 466, para. 125; *id.*, *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo *v.* Belgium), Judgment of 14 February 2002, ICJ Reports 2002, 3, para. 125; *id.*, *Avena and Other Mexican Nationals* (Mexico *v.* United States), Judgment of 31 March 2004, ICJ Reports 2004, 12, paras. 119–121; *id.*, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, 136, para. 152.

[127] *ADC v. Hungary* (note 102), 93, para. 497.

[128] *Ibid.*, 95, para. 503.

P. LG&E Energy Corp. and Others *v.* Argentine Republic (Case No. ARB/02/1)

The Tribunal in the case of *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic* rendered its decision on liability on 3 October 2006.[129] The Tribunal consisted of Ms. *Tatiana B. de Maekelt* as President and Judge *Francisco Rezek* and Professor *Albert Jan van den Berg* as members of the Tribunal.

I. The Dispute

The three Claimants ("*LG&E*") were US companies that acquired shares in three gas distribution companies in Argentina during the privatization of the country's energy sector in the early 1990s. The dispute arose out of the measures adopted by Argentina during the economic crisis of 2000–2002.

The Claimants filed a request for ICSID arbitration on the basis of the US-Argentina BIT on 21 December 2001. This request was supplemented on 24 January 2002, asserting further violations of the BIT as a result of the enactment of additional "emergency" legislation. On 30 April 2004, the Tribunal issued its decision, upholding its jurisdiction.[130]

II. The Decision

The Tribunal first examined whether the measures implemented by Argentina violated Argentina's obligation under the BIT to accord fair and equitable treatment to *LG&E*'s investment. In defining the standard, the Tribunal stated: "[T]he fair and equitable standard consists of the host State's consistent and transparent behavior, free of ambiguity that involves the obligation to grant and maintain a stable and predictable legal framework necessary to fulfill the justi-

[129] *LG&E Energy Corp. and others v. Argentine Republic,* Case No. ARB/02/1, Decision on Liability of 3 October 2006 (*LG&E Liability*).

[130] *LG&E Energy Corp. and others v. Argentine Republic,* Case No. ARB/02/1, Decision on Objections to Jurisdiction of 30 April 2004, summarized in the 2004 report (note 5), 895–897.

fied expectations of the foreign investor."[131] According to the Tribunal, the abrogation of specific government guarantees, such as the calculation of tariffs in US dollars and conversion into pesos, violated the stability and predictability underlying *LG&E*'s investment. The Tribunal also found that Argentina acted prematurely by abandoning tariff adjustments and freezing tariffs before the onset of the economic crisis in December 2001, as well as when it refused to resume adjustments after conditions had normalized in April 2003, when it forced licensees to renegotiate their public service contracts. Argentina was therefore found liable for breach of the fair and equitable treatment standard.

The Tribunal dismissed *LG&E*'s claims that its investments were subject to arbitrary and discriminatory treatment, since it found that the measures had not been specifically aimed at foreign investments. The Tribunal then turned to *LG&E*'s claim under the "umbrella clause," and concluded that the provisions of the gas law and its regulation, which set and regulated the tariff scheme, were specific legal obligations made in relation to the Claimants' investment. Thus, the abrogation of the guarantees under this statutory framework amounted to a violation of the Treaty's "umbrella clause." Turning to *LG&E*'s claim of indirect expropriation, the Tribunal found that such a claim could only succeed if there was a "permanent, severe deprivation of *LG&E*'s rights with regard to its investment, or almost complete deprivation of the value of *LG&E*'s investment."[132] It reasoned that there could be no expropriation in this case, because the Claimants still enjoyed their investment, maintained control over it, there had been no permanent effect on the value of the shares, and the investment still existed.

After considering *LG&E*'s claims, the Tribunal proceeded to consider Argentina's defense of necessity. In a departure from the decision in *CMS v. Argentina*[133], the Tribunal was persuaded that the economic crisis in Argentina threatened the total collapse of the government and the Argentine State. The Tribunal found that the crisis required that the government act to maintain public order and protect its essential security interests, triggering the exception to protection contained in Art. XI of the BIT. The Tribunal held further that Art. XI of the BIT was not applicable solely with respect to physical threats, and concluded

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[131] *LG&E Liability* (note 129), para. 131.

[132] *Ibid.*, para. 200.

[133] *CMS Gas Transmission Company v. The Republic of Argentina,* Case No. ARB/01/08, Award of 12 May 2005, summarized in the 2005 report (note 2), 601–609. Note that *Francisco Rezek* was also a member of the *CMS* tribunal.

that Argentina was absolved of liability from 1 December 2001 (when Argentina announced restrictions on withdrawals from Argentinean bank accounts) to 26 April 2003 (when President *Kirchner* was elected). The Tribunal agreed with Argentina that a State may have several possible policy options at its disposal to protect its essential security interests, and that the measures introduced need only be necessary and legitimate to fall within the scope of the necessity defense under the BIT. The Tribunal found that the measures implemented by Argentina were both necessary and legitimate, given the circumstances.

The Tribunal found that during this period Argentina also met the requirements to sustain a "state of necessity" defense under customary international law. It held that the government had not contributed to the crisis, and determined that "an economic recovery package was the only means to respond to the crisis" and that an across-the-board response was necessary.[134] Finally, it concluded that Art. XI of the BIT exempted Argentina from any responsibility for measures enacted during the state of necessity, and therefore no damages could be awarded to *LG&E* for the period of necessity. The calculation of damages was reserved for later proceedings on this basis.

Q. World Duty Free Company Limited *v.* The Republic of Kenya (Case No. ARB/00/7)

The *World Duty Free Company* Tribunal dispatched its final award to the parties on 4 October 2006.[135] H.E. Judge *Gilbert Guillaume* was President, and Hon. *Andrew Rogers* and Mr. *V. V. Veeder,* QC served as members of the Tribunal. It is notable that Kenya initially appointed Professor *James Crawford,* who later voluntarily resigned under ICSID Arbitration Rule 8 para. 2 (after protest from the Claimant) and was replaced by Mr. *Veeder.*

I. The Dispute

The dispute arose out of an agreement that Kenya concluded in 1989 with *House of Perfume,* which was later assigned to *World Duty Free Ltd.,* a com-

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[134] *LG&E Liability* (note 129), para. 257.

[135] *World Duty Free Company Limited v. The Republic of Kenya,* Case No. ARB/00/7, Award of 4 October 2006.

pany incorporated on the Isle of Man. The contract called for the construction, maintenance and operation of a duty-free shop complex at the Nairobi and Mombassa Airports. In order to carry out the agreement, the Kenya *Airports Authority* and *World Duty Free* concluded a lease in 1995. *World Duty Free* maintained that Kenya had breached the 1989 agreement, expropriated its property, and undermined its rights under the agreement, and initiated ICSID arbitration against Kenya pursuant to the arbitration clause in the agreement.

In response, Kenya raised the preliminary objection that Mr. *Nassir Ibrahim Ali* of *World Duty Free* had secured the agreement through bribes paid to the then-President of Kenya, *Daniel arap Moi.* The Tribunal's award dealt predominantly with these allegations of bribery.

II. The Decision

The Tribunal's first concern was to determine whether *World Duty Free* had paid a bribe "and whether the 1989 Agreement has been procured as a result of such a payment."[136] The parties agreed that Mr. *Ali* had made a payment to President *Moi;* in fact, the Claimant submitted witness evidence confirming this. The parties disagreed only as to the nature of the payment made. The Tribunal acknowledged that, in relations with heads of State, "gifts are often exchanged as a matter of protocol," but rejected the Claimant's arguments that the payment was not a bribe.[137] "Those payments were made not only to obtain an audience with President *Moi* (as the Claimant asserted), but above all to obtain during that audience the agreement of the President on the contemplated investment."[138]

After classifying the payment to President *Moi* as a bribe, the Tribunal turned to the consequences of such corruption as a matter of international law. Relevant in this regard were considerations of public policy under Kenyan law, municipal law in other African countries, a range of international conventions on corruption, and the decisions of international tribunals, including arbitration under the International Chamber of Commerce rules. The Tribunal found that the acceptance of bribery as a fact of life in a particular country could not

[136] *Ibid.*, para. 129.

[137] *Ibid.*, para. 134.

[138] *Ibid.*, para. 136.

change "the legal consequences dictated by the prohibition of corruption."[139] The Tribunal found bribery to be in violation of international public policy as expressed in domestic legal systems throughout the world. As a result, the Tribunal held that it could not enforce contracts secured by corruption.

Next, the Tribunal examined the effect of corruption under English and Kenyan law, which it found to establish identical rules on the subject. The arbitrators first divided the issue into "the 'procedural' issue of public policy" and the "'substantive' contractual issue of avoidance." According to the Tribunal, the payment from Mr. *Ali* to President *Moi* was covert, and could not be seen as consideration for the contract. The panel therefore held that the acceptance of the contract by President *Moi* was corrupt, and could not be imputed to the Kenyan State. The Tribunal further rejected the Claimant's assertion that the payment was severable from the 1989 agreement. The Tribunal thus rejected *World Duty Free*'s explanations for its payment, and applied the principle *ex turpi causa non oritur actio.*

The Tribunal then proceeded to apply the doctrine of avoidance under English and Kenyan law. Kenya's avoidance of the contract, announced shortly after its application to dismiss *World Duty Free*'s claims, was found to be both timeous and explicit, satisfying the requirements of English and Kenyan law. The Claimant's defense of estoppel was vitiated by the corruption of President *Moi.* The Tribunal therefore dismissed the claims of *World Duty Free.*

R. Champion Trading Company and Ameritrade International, Inc. *v.* Arab Republic of Egypt (Case No. ARB/02/9)

The Tribunal rendered its award on 27 October 2006.[140] The panel consisted of Mr. *Robert Briner* as President and Mr. *Yves Fortier,* QC and Professor *Laurent Aynès* as members of the Tribunal.

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[139] *Ibid.,* para. 156.

[140] *Champion Trading Company and Ameritrade International, Inc. v. Arab Republic of Egypt,* Case No. ARB/02/9, Award of 27 October 2006 (*Champion Trading (Merits)*).

I. The Dispute

The dispute arose out of Egypt's restructuring of its cotton sector. The Claimants originally included the corporate and individual shareholders of an Egyptian cotton company, *NCC*. These Claimants asserted that after they had created and funded *NCC* as an independent cotton trading enterprise, the Egyptian government had implemented measures restricting their ability to buy and sell cotton, to the benefit of Egyptian-owned trading houses. According to the Claimants, these actions constituted violations of the US-Egypt BIT. The Claimants filed a request for arbitration on 29 May 2002.

On 21 October 2003, the Tribunal rendered its decision on jurisdiction, dismissing the claims of all individual Claimants, on grounds that they also held Egyptian citizenship, in contravention of Art. 25 para. 2 of the Washington Convention.[141] Subsequently, the remaining corporate Claimants narrowed the scope of their substantive claims against Egypt. The Tribunal therefore adjudicated only two claims on the merits: that the measures were discriminatory, and that the lack of transparency with which they had been implemented violated the BIT's guarantee of treatment in accordance with international law.

II. The Decision

Concerning the claim of discrimination, the Tribunal found that *NCC* and the Egyptian-owned companies were not in like circumstances.[142] As a result, it could not be established that the difference in treatment was unjustified and in violation of the BIT standard.

With respect to the Claimants' second claim, the Tribunal seems to have agreed that transparency constitutes a principle of international law. However, the arbitrators did not accept the claim on the facts, noting that the relevant Egyptian laws and decrees were publicly available, and that the "Claimants were in a position to know beforehand all rules and regulations that would govern their investments in the respective season to come."[143]

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[141] *Champion Trading Company and Ameritrade International, Inc. v. Arab Republic of Egypt,* Case No. ARB/02/9, Decision on Jurisdiction of 21 October 2003.

[142] *Champion Trading (Merits)* (note 140), paras. 125–156.

[143] *Ibid.,* paras. 157–164.

The Tribunal thus dismissed remaining the claims in their entirety. The Tribunal held that the Claimants should bear all of the Tribunal's costs and expenses. The Claimants were also ordered to reimburse the Respondent for one half of its legal fees and expenses.[144]

S. Bayindir Insaat Turizim Ticaret Ve Sanayi A.S. *v.* Islamic Republic of Pakistan (Case No. ARB/03/29)

The decision on jurisdiction of 14 November 2005[145] was rendered by Professor *Gabrielle Kaufmann-Kohler* as President and *Sir Franklin Berman* and Professor *Karl-Heinz Böckstiegel* as members of the Tribunal.

I. The Dispute

The Claimant, *Bayindir,* is a Turkish company. The dispute arose out of a 1993 contract for the construction of a six-lane motorway in Pakistan, concluded between the Claimant and the Pakistani National Highway Authority ("*NHA*"). Several contractual disputes arose, which were eventually settled. Between 1999 and 2001, the Claimant submitted claims to the contractual dispute resolution forum, primarily for extensions of the time for completion. Those claims were granted only in part. In April 2001, the *NHA* notified the Claimant that the contract would be terminated. The Pakistani army surrounded the construction site, and the Claimant's personnel were evacuated. In December 2002, the *NHA* concluded a contract for completion of the works with a Pakistani consortium.

After the termination, the Claimant announced its intention to commence contractual arbitration, but never did so. Between 2001 and 2003, *NHA* raised a series of claims against *Bayindir,* and served a notice of arbitration. Contractual arbitration did not proceed, however, and in April 2002 the Claimant submitted a request for arbitration to ICSID pursuant to the Turkey-Pakistan BIT.

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[144] *Ibid.*, paras. 177–178.

[145] *Bayindir Insaat Turizim Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan,* Case No. ARB/03/29, Decision on Jurisdiction of 14 November 2005 (*Bayindir v. Pakistan (Jurisdiction)*). While this decision falls outside the temporal scope of this report, the authors have decided to include it due to its interesting conclusions.

The *NHA* then agreed not to proceed with the contractual arbitration until the Tribunal's decision on jurisdiction was issued.

II. The Decision

The Tribunal started by examining Pakistan's objection that the Claimant had failed to comply with the required six-month negotiation period prior to initiating ICSID arbitration.[146] *Bayindir* had not sent any correspondence that was explicitly termed a "notice of dispute." The Tribunal analyzed the relevant provision of the BIT and, relying on several prior ICSID decisions, concluded that the notice and negotiation requirement was not a prerequisite for jurisdiction. This conclusion was strengthened by the finding that Pakistan never intended to negotiate with the Claimant. The Tribunal next considered whether the Claimant had made an investment under the BIT and under Art. 25 para. 1 of the Washington Convention. The BIT definition for "investment" was qualified to cover assets "in conformity with the hosting Party's laws and regulations." The Tribunal rejected Pakistan's argument that this provision limited treaty protection to investments formally accepted pursuant to Pakistani law. The arbitrators preferred the approach adopted in *Salini v. Morocco:*[147] the investment in question would be excluded from the Tribunal's jurisdiction only if it violated Pakistani law, which the Respondent had never alleged.[148] The panel then analyzed *Bayindir*'s contributions to the project in question, and found that it owned an "investment" within the meaning of the BIT. To determine whether *Bayindir*'s investment could also be considered an investment within the meaning of Art. 25 of the Washington Convention, the Tribunal adopted the *Salini* multifactor test,[149] and concluded that these requirements were fulfilled.[150]

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[146] *Ibid.*, 88–103. Pakistan itself agreed that the notice requirement could not constitute a prerequisite for jurisdiction where "the necessary steps could not be taken," *ibid.*, para. 99.

[147] *Ibid.*, para. 109. *Cf. Salini v. Morocco* (note 49).

[148] *Bayindir v. Pakistan (Jurisdiction)* (note 145), para. 110.

[149] *Ibid.*, para. 130.

[150] *Ibid.*, para. 138. In its consideration of the issue, the Tribunal also relied on the decisions in *Autopista Concesionada de Venezuela, C.A v. Venezuela,* Case No. ARB/00/5, Award of 23 September 2003 and *Impregilo v. Pakistan* (note 12). The *Impregilo v. Pakistan* decision was summarized in the 2005 report (note 2), 596–601.

Pakistan further objected that *Bayindir*'s treaty claims were in fact mere contract claims, and that the Tribunal had no jurisdiction to adjudicate contractual disputes – particularly in light of the arbitration clause contained in the parties' agreement.[151] The Tribunal emphasized the *Vivendi Annulment* decision as establishing the clear distinction between treaty claims and contract claims, and confirming the relevance of contractual dispute settlement clauses.[152] However, the Tribunal reviewed the specific circumstances of the case at hand, and concluded that the essential basis of the claims was not contractual.[153] Pakistan also argued that the conduct complained of by the Claimant was commercial in nature, and therefore not attributable to the State. The arbitrators considered that this observation would be relevant for jurisdictional purposes only if *Bayindir* relied upon contractual breach, which it did not. Whether the actions complained of indeed amounted to sovereign acts or not was to be resolved on the merits.[154]

The Tribunal further assessed *Bayindir*'s claims against the *Impregilo* test (also known as the *Oil Platforms* test): whether the Claimant's factual contentions, if true, would constitute treaty violations imputable to the State and subject to compensation.[155] With regard to the expropriation claim, the Tribunal noted that the question whether Pakistan had acted in the exercise of *puissance publique* should be reserved for the merits phase of the arbitration.[156] The panel found that all of *Bayindir*'s claims were sufficiently substantiated, and affirmed its jurisdiction. As a final question, the arbitrators considered Pakistan's request to stay the ICSID proceedings until the contractual arbitration was complete.[157] The Tribunal considered the decision of the *SGS v. Philippines* panel[158] to take

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[151] *Bayindir v. Pakistan (Jurisdiction)* (note 145), paras. 149–151.

[152] *Ibid. Cf. Compania des Aguas de Aconquija S.A. and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentina,* Case No. ARB/97/3, Decision of 3 July 2002 (*Fortier/Crawford/Rozas*), reprinted in: ILM 41 (2002), 1135, paras. 97–102 ("In a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract").

[153] *Bayindir v. Pakistan (Jurisdiction)* (note 145), paras. 152–167.

[154] *Ibid.*, paras. 180–184.

[155] *Ibid.*, paras. 193–262. The *Impregilo v. Pakistan* decision (note 12) was summarized in the 2005 report (note 2), 596–601.

[156] *Bayindir v. Pakistan (Jurisdiction)* (note 145), paras. 259–260.

[157] *Ibid.*, paras. 264–273.

[158] *SGS v. Philippines* (note 24) summarized in the 2004 report (note 5), 885–891.

such a step, but concluded that staying the proceedings in the given circumstances would entail considerable difficulties.

T. Concluding Remarks

2006 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. For example, it appears to have become uncontroversial that shareholders (including minority shareholders) are entitled to claim compensation for damages resulting from harm inflicted upon the company they own. The distinction between contract claims and treaty claims has become somewhat clearer, although tribunals appear rarely to dismiss claims on the basis of that distinction. An increasing number of ICSID decisions support a *prima facie* review of the facts alleged by the Claimant *at the jurisdictional phase,* to determine whether these allegations could constitute violations of the relevant treaty. This practice, more properly related to *admissibility* than *jurisdiction,* approximates the "summary judgment" procedure incorporated into the new United States investment treaties.

Of additional interest is the series of awards on the *merits,* a number of which resulted in substantial awards to Claimants. These decisions are providing important new jurisprudence on the contours of regulatory expropriation and fair and equitable treatment, two closely related substantive treaty standards that have received considerable attention in scholarly commentary, but had been applied in practice in only a handful of cases to date.

There are currently 108 cases pending before ICSID. While ICSID tribunals render some ten to fifteen decisions each year, over twenty new cases are registered over the same time. As a result, the flow of decisions is likely to increase next year, and it is difficult to deduce from this year's decisions the developing forms that international law is taking.