KEY ISSUES AND RECENT DEVELOPMENTS IN INTERNATIONAL INVESTMENT TREATY ARBITRATION

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By Alexandre de Gramont and Maria Gritsenko[1]

I. INTRODUCTION

It was once a basic principle of customary international law that only a State could assert a claim against another State for a breach of its obligations to the first State's nationals. This principle was expressed by the International Court of Justice in *Barcelona Traction* as follows:

> The Court would here observe that, within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. <u>Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law</u> . . . .[2]

But in the past decade or so, more than 200 arbitration cases have been brought by foreign investors – whether individuals or legal entities – against the States in which the investments were made (the "host States"). Although the number of international treaty arbitration (ITA) cases has grown dramatically in recent years, the seeds of such arbitration were planted over forty years ago. In

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[2] *Case Concerning the Barcelona Traction, Light and Power Co. Ltd.*, (Belgium v. Spain), 1970 I.C.J. Reports, 3 ¶ 78

1965, the Executive Directors of the International Bank for Reconstruction and Development (i.e, the World Bank) submitted the Convention on the Settlement of Investment Disputes between States and Nationals of Other States to its member governments. The Convention (typically referred to as the "ICSID Convention" or "Washington Convention") entered into force on October 14, 1966, when it was ratified by 20 countries. In the following years, that number has increased more than seven-fold. As of December 15, 2006, there are 143 states that have ratified the ICSID Convention (and an additional 12 states that have signed but not yet ratified it).[3]

Among other things, the ICSID Convention established the International Centre for Settlement of Investment Disputes (ICSID), where many (but by no means all) ITA proceedings are held. Article 25(1) of the ICSID Convention provides that ICSID's jurisdiction extends "to any legal dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre." The investor's "consent" to arbitration is often found in the investor's Request for Arbitration. The host State's "consent" to the jurisdiction of ICSID is often found in a bilateral investment treaty (BIT) entered by the host State and the

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[3] *See* List of Contracting States and other Signatories of the Convention (as of December 15, 2006), available at www.worldbank.org/icsid/constate/constate.com; *see also* ICSID, ICSID CONVENTION, REGULATIONS AND RULES 5 (April 2006).

State in which the investor resides or is incorporated.[4] (The State parties to an investment treaty are typically referred to as the "contracting parties" or "contracting States"). Such a BIT typically provides that each contracting party guarantees investors of the other contracting party a variety of protections (*e.g.*, freedom from expropriation without just compensation, fair and equitable treatment, constant security and protection, *etc.*)[5] The BIT will often provide for ITA between the investor and host State in the event that a dispute arises out of the investment. The BIT will also often provide a specific forum, or a choice of fora, at which the arbitration proceedings will take place. Each BIT is different. Some allow for arbitration only at ICSID. Others allow for a choice among, for example, ICSID, the International Chamber of Commerce (ICC), the Stockholm Chamber of Commerce (SCC), or an ad hoc tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). In addition to BITs, there are several multilateral treaties, such as the North American Free Trade Agreement (NAFTA) and the Energy Charter Treaty (ECT), which provide for ITA. Consent to investor-state arbitration may also be found in

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4 As discussed below, the issue of who qualifies as an "investor" can involve a more complex analysis than simply where the investor resides or is incorporated – particularly when foreign subsidiaries are involved. The upstream ownership chain of a foreign investment – particularly if its links include entities in multiple States – can make the issue especially complex. *See* discussion *infra* at § II(A)(2).

5 *See* discussion *infra* § III.

an investment agreement between the investor and the host State, or in the host State's foreign investment legislation.[6]

According to data collected by the United Nations Conference on Trade and Development (UNCTAD), only 385 BITs had been concluded as of 1989. Only 14 cases had been brought at ICSID as of 1998. By the end of 2006, the number of BITs exceeded 2700 and 156 cases had been filed at ICSID – with approximately another 100 ITA cases filed in other fora.[7] In the words of Emmanuel Gaillard, a prominent arbitrator, practitioner, and professor, this extraordinary growth reflects "current commercial and geopolitical phenomena and is a sign of the times rather than a mere fluke."[8]

The number of cases, and of published decisions arising from such cases, has produced a growing and evolving body of ITA jurisprudence. Although decisions by one arbitral tribunal are not binding on another, they are considered persuasive authority. As one tribunal recently put it:

> The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to

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[6] In the absence of an investment treaty, however, the scope of available claims may differ considerably, depending on the contract provisions or terms of the applicable legislation. The focus of this paper, as the title suggests, is on claims brought pursuant to an investment treaty.

[7] *See* UNCTAD, INVESTOR-STATE DISPUTE SETTLEMENT AND IMPACT ON INVESTMENT RULEMAKING: THE ASIA-PACIFIC PERSPECTIVE (2006); UNCTAD, LATEST DEVELOPMENTS IN INVESTOR-STATE DISPUTE SETTLEMENT, IIA MONITOR No. 4 (2006). Interestingly, the number of cases appears to be the lowest filed since 2006. *Id*. at 2. However, since ICSID is the only facility to maintain a public registry of claims, it may be that more cases have been filed in other arbitral fora. *Id*.

[8] Emmanuel Gaillard, *The International Centre for Settlement of Investment Disputes*, 219 NEW YORK LAW JOURNAL 62 (1998).

> compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.[9]

It is fair to say that, with respect to a number of issues, "solutions" have been "established in a series of consistent cases." At the same time, there remain numerous open issues – both substantive and procedural – and practitioners and scholars in the field eagerly await each new decision to see if it casts light on any unresolved or novel matters.

This paper will review some of the basic jurisdiction and merits issues that often arise in arise in ITA, with a focus on recent cases, trends, and developments.[10]

II. JURISDICTION

Jurisdiction provides the "threshold" issue – or, more typically, set of issues – in ITA. The term "threshold" must be used advisedly. Although the jurisdictional requirements represent a "threshold" that typically must be crossed in order to reach the merits, the journey across it can be long and winding. In the past, arbitral tribunals have typically bifurcated jurisdiction from the merits, conducting, in effect, two separate arbitrations for each phase (although tribunals in a number of more recent cases have joined jurisdiction and the merits). At ICSID, the

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[9] *Saipem S.p.A. v. Bangladesh*, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, ICSID Case No. ARB/05/07, ¶ 67 (internal footnotes omitted).

[10] Separate panels at this Spring Meeting will be devoted entirely to the issues of, respectively, (1) damages and (2) the fair and equitable standard in ITA.

jurisdictional phase of a case has taken on average about two years to complete, with one case taking almost four years for the jurisdictional issues to be resolved.[11] Often, jurisdictional issues are as hard-fought as the merits. In a case in which a treaty violation is relatively easy to prove, the jurisdictional phase may be *more* important than the merits phase. Stated differently, there may be cases in which the respondent's strongest defenses are jurisdictional.

It should be noted at the outset that an investor who brings a BIT claim at ICSID must satisfy both the jurisdictional requirements of the BIT *and* the ICSID Convention, which are not always coterminous. As observed above, many BITs provide a choice of fora, typically including ICSID and several other possibilities. An investor who chooses a forum other than ICSID may have different jurisdictional requirements to meet than an investor who chooses ICSID.[12] But because many BITS provide ICSID as the sole forum for arbitration, and because most ITA claims to date have been brought at ICSID, the focus of this section is generally on establishing jurisdiction in a BIT proceeding at ICSID (though cases from other fora, where relevant, are also discussed).

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[11] *See* Alexandre de Gramont, *After the Water War: The Battle for Jurisdiction in Aguas del Tunari, S.A. v. Republic of Bolivia*, n.13 and accompanying text, 3 TRANSNATIONAL DISPUTE MANAGEMENT No. 5 (December 2006). In the interest of full disclosure, Mr. de Gramont represented Bolivia in the *Aguas del Tunari* case, which is also discussed elsewhere in this paper.

[12] Depending on the forum chosen (and, of course, the circumstances of the particular case), there may be fewer jurisdictional hurdles to clear if a forum other than ICSID is chosen. On the other hand, there are some fora where (again, depending on the particular case), jurisdiction might be more difficult to establish.

Stated broadly, there are three elements necessary to establish jurisdiction for ITA. ITA is available to (a) an investor of one contracting party, who has made (b) an investment in the territory of the other contracting party, (c) at the time when such investment was protected by the applicable treaty. Jurisdiction *ratione personae*, *ratione materiae*, and *ratione temporae* are discussed in turn.

A. Jurisdiction *Ratione Personae*: Who Qualifies as an Investor?

Whether a particular natural or juridical person qualifies as an "investor" who can invoke protections of an investment treaty, including the right to seek arbitration, has been one of the most hotly contested issues in establishing jurisdiction in ITA cases. Given the complex ownership structures often used for foreign investment, along with questions concerning the rights of shareholders (including non-controlling and indirect shareholders), the issue of who is a qualified investor under the applicable treaty terms is often thornier that it might at first appear.

1. Natural Persons

Because a "juridical person" can take many more forms and can usually be created far more quickly and easily than a "natural person," the determination of whether a natural person qualifies as an "investor" has generally been more straightforward than whether a juridical person qualifies. With respect to natural persons, Article 25(2)(a) of the ICSID Convention defines "National of another Contracting State" as:

> any natural person who had the nationality of a Contracting State other than the State party to the

> dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered [with ICSID], but does not include any person who on either date also had the nationality of the Contracting State party to the dispute . . . .

Although definitions vary from one BIT to another, the definition of "national" with respect to natural persons in the model BIT of The Netherlands is fairly typical:

> (b) the term "nationals" shall comprise with regard to either Contracting Party:
>
> > (i) natural persons having the nationality of that Contracting Party . . . . .[13]

Despite these seemingly straightforward formulations, some complexities have arisen based on dual or changing nationality of natural persons. When faced with such complexities, tribunals have looked to the law of the particular State whose nationality is at issue. In cases at ICSID, these issues can be dispositive of the claim, given Article 25(2)(a)'s prohibition of claims by natural persons who also had the nationality of the contracting party to the dispute at the relevant time(s).

For example, in *Champion Trading v. Egypt*,[14] the claimants included three individuals born in the United States, but who were sons of a father born in Egypt. Under Egyptian law, a child born of an Egyptian father (whether in Egypt or abroad) automatically acquires Egyptian nationality at birth. The three individual

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13 Netherlands Model Agreement, Article 1(b). To date, The Netherlands has entered over 90 BITs (including BITs not yet been ratified). It is therefore not surprising that a large number of ITA cases have involved Netherlands claimants. The availability of a large number of BITs – coupled with The Netherlands' reputation as a tax haven – provides substantial incentive for investors to channel their foreign investments through The Netherlands or similarly situated States.

14 Decision on Jurisdiction, 21 October 2003, ICSID Case No. ARB/02/9.

claimants argued that they never had any particular ties or relations with Egypt and that such "involuntary nationality" should not be considered in determining jurisdiction under the ICSID Convention. However, the tribunal relied on Egyptian law to conclude that the three individuals indeed held "the nationality of the Contracting Party to the dispute," as prohibited by Article 25(2)(a). Therefore, the tribunal held that it did not have jurisdiction to hear the three individuals' claims (but allowed the claims of the corporate claimant, a U.S. company, to proceed to the merits).

The case of *Soufraki v. United Arab Emirates*[15] presented the other side of the coin. While in *Champion Trading*, the tribunal looked to Egyptian law to determine if the claimants were citizens of Egypt, and therefore barred from asserting claims against Egypt under Article 25(2), the tribunal in *Soufraki* looked to Italian law to determine if the claimant was a citizen of Italy, and therefore able to assert a claim against the UAE under the BIT between Italy and the UAE. The claimant in *Soufraki* had been born in Italy but later moved to Canada and became a Canadian citizen. Under Italian law, Italian citizens acquiring another nationality and residing abroad automatically lose their Italian citizenship. Although Italian law permits former citizens to reacquire Italian nationality by taking up residence in Italy for a period of at least one year, the tribunal in *Soufraki* concluded that, based on Italian law, the claimant had lost his Italian nationality by becoming a Canadian citizen, and had not effectively demonstrated

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15 Award, 21 October 2003, ICSID Case No. ARB/02/7.

that he had complied with the residency requirements necessary to reestablish Italian citizenship. Accordingly, the tribunal held that it did not have jurisdiction over the individual's claims.

2. Juridical Persons

With respect to juridical persons, Article 25(2)(b) of the ICSID Convention defines "National of another Contracting State" as follows:

> any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

To use again the Model Netherlands BIT as an example of a BIT definition of a national with respect to juridical persons, that BIT provides:

> (b) the term "nationals" shall comprise with regard to either Contracting Party:
>
> > (i) natural persons having the nationality of that Contracting Party
> >
> > (ii) legal persons constituted under the law of the Contracting Party
> >
> > (iii) legal persons not constituted under the law of that Contracting Party but controlled, directly or indirectly, by natural persons as defined in (i) or by legal persons as defined in (ii) above . . .[16]

[16] Netherlands Model Agreement, Article 1(b).

In general, therefore, juridical persons who are constituted under the law of a contracting party are "nationals" who can assert claims against the other contracting party (again, assuming the other jurisdictional requirements are met). In addition, juridical persons who are nationals of the host State can bring a claim *against the host State* – if the contracting parties have agreed that such juridical persons should be treated as a national of the other contracting party "because of foreign control."

a. Constituted under the Law of the Other Contracting Party

ITA tribunals have traditionally applied the place of incorporation to determine corporate nationality (unless, of course, the parties have agreed to use a different test).[17] Moreover, the "constituted under the law of the other contracting party" formulation, or similar language, appears in many BITs. Tribunals have applied this test strictly, declining to look beyond the corporate form (so long as the corporate form has been duly established). A number of recent cases have reinforced this trend, confirming that holding companies – if duly incorporated under the laws of a contracting party – can assert ITA claims.

For example, in *Saluka Investments BV v. The Czech Republic*,[18] the Nomura Group, a large Japanese trading company, purchased stock in one of the largest banks in the Czech Republic. Nomura then transferred the stock to Saluka, a

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17 *See* Christoph H. Schreuer, THE ICSID CONVENTION: A COMMENTARY 547 (2001).

18 *Saluka Investments BV v. The Czech Republic*, Partial Award, 17 March 2006 (UNCITRAL).

wholly-owned holding company incorporated in The Netherlands. Saluka later initiated an arbitration (under the UNCITRAL Rules) against the Czech Republic, based on the BIT between The Netherlands and the Czech Republic. The Czech Republic, in objecting to jurisdiction, argued that "Saluka was, in effect, a mere surrogate for Nomura, and a claim under an investment treaty cannot be brought by an entity which, like Nomura, was not covered by the Treaty." The tribunal, however, concluded that the language of the BIT was dispositive:

> [T]he Tribunal must always bear in mind the terms of the Treaty under which it operates. Those terms expressly give a legal person constituted under the laws of The Netherlands – such as, in this case, Saluka – the right to invoke the protection of the Treaty. To depart from that conclusion requires clear language in the Treaty, but there is none. The parties to the Treaty could have included in their agreed definition of "investor" some words which would have served, for example, to exclude wholly-owned subsidiaries of companies constituted under the laws of third States, but they did not do so.[19]

Accordingly, the tribunal held that Saluka met the definition of "investor" under the BIT and concluded that it had jurisdiction to hear the case.

In *Tokios Tokelės v. Ukraine*,[20] a group made up predominantly of Ukrainians set up a holding company – Tokios Tokelės ("Tokios") – under the laws of Lithuania. Tokios, in turn, created Taki spravy ("Taki"), a wholly owned subsidiary created under the laws of Ukraine. When Ukraine allegedly undertook a series of adverse actions against Taki, Tokios initiated an arbitration against Ukraine at ICSID,

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[19] *Id.* ¶ 229.

[20] *Tokios Tokelės v. Ukraine*, Decision on Jurisdiction, 29 April 2004, ICSID Case No. ARB/02/18.

asserting claims under the Ukraine-Lithuania BIT. Ukraine argued that Tokios was not a "genuine entity" of Lithuania because Ukrainian nationals owned ninety-nine percent of its outstanding shares and comprised two-thirds of its management. Ukraine argued further that allowing Tokios' claims would be tantamount to allowing Ukrainians to assert international treaty claims against their own government in an international arbitration. But the tribunal, in a 2-1 decision, rejected all of Ukraine's arguments. The majority in *Tokios* observed that the Ukraine-Lithuania BIT defined "investor," with respect to Lithuania, as "any entity established in the territory of the Republic of Lithuania in conformity with its laws and regulations."[21] Tokios satisfied that definition. The majority declined to depart from the terms of the BIT, concluding that it had jurisdiction to hear the case. Professor Prosper Weil – the President of the tribunal – wrote a strongly worded dissent and then resigned from the tribunal. Professor Weil argued that to ignore the origin of capital when determining the nationality of the corporation would run against the "object and purpose of the ICSID Convention."

In *ADC Affiliate Ltd. v. Hungary*,[22] the tribunal held it had jurisdiction to hear claims brought under the Cyprus-Hungary BIT. The tribunal rejected Hungary's various arguments against jurisdiction, including the argument that claimant was a mere holding company and that none of the capital invested in Hungary originated in Cyprus. Hungary also relied on the dissenting opinion of

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21 *Id.* ¶ 28 (quoting Article 1(2)(b) of the Lithuania-Ukraine BIT).

22 Award, 2 October 2006, ICSID Case No. ARB/03/16.

Professor Prosper Weil in *Tokios*. But the tribunal in *ADC* "concur[red] with the majority in *Tokios Tokelės* and [held] that the origin of capital is not a relevant factor in determining the Claimants' nationality." The *ADC* tribunal stated further that "*Tokios Tokelės* still represents good international law."[23]

Depending on one's perspective, establishing a holding company to take advantage of a particular investment treaty can be characterized as either "treaty shopping" or a legitimate means of seeking investment protection. But in any event, it appears to be settled law that the jurisdiction in ITA cases can be based on the establishment of a holding company – including a holding company established only to obtain the protections of an investment treaty. As stated by the tribunal in *Aguas del Tunari v. Bolivia*,

> [I]t is not uncommon in practice, and – absent a particular limitation – not illegal to locate one's operations in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for example, of taxation or the substantive law of the jurisdiction, <u>including the availability of a BIT</u>.[24]

b. The "Control" Test

The phrase "because of foreign control" – as used in the second clause of Article 25(b)(2) of the ICSID Convention – has proved elusive of easy definition. According to Aron Broches, chairman of the consultative meeting for the negotiation of the ICSID Convention, and later the first Secretary-General of ICSID, the

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23 *Id.* ¶ 360.

24 Decision on Jurisdiction, 21 October 2005, ICSID Case No. ARB/02/3, ¶ 330(d) (emphasis added).

drafters of the Convention specifically declined to include a definition of "foreign control" in order "to give the greatest possible latitude to the parties to decide under what circumstances a company could be treated as a 'national of another Contracting State.'"[25]

Contracting parties have indeed used a variety of formulations to define "control" under their BITs, as is illustrated by examining, for example, several different BITs from The Netherlands. The definition of "nationals" in the Model Netherlands BIT is set forth supra. Many Netherlands BITs use the precise language of the Model BIT or highly similar language. But while the Model BIT does not define the term "controlled," a number of BITs entered by The Netherlands do provide a definition. For example, the BIT between The Netherlands and the Argentine Republic includes a Protocol stating that "[t]he following facts, inter alia, shall be accepted as evidence of the control":

> i. being an affiliate of a legal person of the Other Contracting Party;
>
> ii. having a direct or indirect participation in the capital of a company higher than 49% of the direct or indirect possession of the necessary votes to obtain a predominant position in assemblies or company organs.[26]

Similarly, the BIT between The Netherlands and Bosnia and Herzegovina contains a Protocol which states: "Indirect control of an investment means control in fact,

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[25] Aron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 136 RECUEIL DES COURS 331, 360 (1972-II).

[26] Protocol to Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of The Netherlands and the Argentine Republic (signed on 20 October 1994).

determined after an examination of the actual circumstances in each situation."[27] This Protocol states further that "[i]n any such examination, all relevant factors should be considered, including the investor's":

> (a) financial interest, including equity interest, in the investment;
>
> (b) ability to exercise substantial influence over the management and operation of the investment; and
>
> (c) ability to exercise substantial influence over the selection of members or any other managing body.[28]

And the BIT between The Netherlands and Poland defines "control" as follows:

> With respect to Article 1 "control" means having a substantial interest in or the ability to exercise substantial influence over the management and operation of an investment, provided that such influence will not be deemed to exist solely as result of a contractual relationship for the provisions of goods or services or the extension of commercial credits with such contracts.[29]

Notwithstanding the varying definitions of "control" in different BITs, tribunals have tended to interpret "control" broadly and in favor of finding jurisdiction. In *Aguas del Tunari v. Bolivia*,[30] the claimant ("AdT") asserted claims against Bolivia based on the Bolivia-Netherlands BIT. AdT had been established by its upstream owners in August 1999 for the purpose of holding the water concession

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[27] Protocol to Agreement on Encouragement and Reciprocal Protection of Investments Between Bosnia and Herzegovina and the Kingdom of The Netherlands (signed on 13 May 1998).

[28] *Id*.

[29] Protocol to Agreement Between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investments (signed on 7 September 1992).

[30] Decision on Respondent's Objections to Jurisdiction, 21 October 2005, ICSID Case No. ARB/02/3 ("*AdT* Decision").

in Bolivia's third largest city, Cochabamba. At the time of its creation, AdT did not have any upstream owners whose nationality would have allowed AdT to seek BIT protections (including international arbitration) against Bolivia. In December 1999, in the midst of protests against reported rate increases, and public calls for cancellation of AdT's concession agreement, AdT's owners quietly changed the ownership structure of the company – inserting Netherlands holding companies into AdT's intermediate ownership structure. The Bolivia-Netherlands BIT defines "nationals . . . with regard to either Contracting Party" as including "legal persons controlled directly or indirectly, by nationals of that Contracting Party, but constituted in accordance with the law of the other 'Contracting Party.'"[31]

AdT argued that majority shareholding (with majority voting rights) by the Netherlands holding companies was sufficient in itself to establish control under the Treaty. Bolivia countered that the plain meaning of the word "controlled" requires the actual exercise of control. In a 2-1 decision, the tribunal agreed with AdT. The majority reached its conclusion by considering the phrase "controlled" in its "context . . . and in light of the object and purpose of the BIT."[32] Based on the language of the BIT's preamble, the majority concluded:

> the object and purpose of the treaty is to "stimulate the flow of capital and technology" and the Contracting Parties explicitly recognize that such stimulation will result from "agreement upon the treatment to be accorded

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[31] Bolivia-Netherlands BIT, Art. 1(b)(iii).

[32] *AdT* Decision ¶ 240.

> to . . . investments" by "the national of one Contracting Party in the territory of the other Contracting Party."[33]

Tribunals have also found "control" with less than 50% ownership. In *International Thunderbird Gaming Corp. v. Mexico*,[34] the tribunal construed the meaning of the term "control" as used in Article 1117 of NAFTA. Article 1117 provides in relevant part:

> An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breach an obligation under [specified provisions of the treaty].

The investor in *Thunderbird* held only a minority ownership interest in three entities at issue (consisting, respectively, of 36.7%, 33.3%, and 40.1%). Mexico argued that Article 1117 requires "legal control" – *i.e.*, the legal capacity to control an entity. The tribunal rejected Mexico's argument, concluding that "effective" or "*de facto"* control could also satisfy Article 1117. According to the tribunal,

> The term "control" is not defined in the NAFTA. Interpreted in accordance with its ordinary meaning, control can be exercised in various manners. Therefore, a showing of effective or "*de facto*" control is, in the Tribunal's view, sufficient for the purposes of Article 1117 of the NAFTA. In the absence of legal control however, the Tribunal is of the opinion that *de facto* control must be established beyond any reasonable doubt.[35]

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33 *Id.* ¶ 241 (quoting Preamble to Bolivia-Netherlands BIT).

34 Award, 26 January 2006, UNCITRAL (NAFTA)

35 *Id.* ¶ 106.

In other words, an ownership interest of more than 50% (presumably with majority voting rights) would be sufficient by itself to establish "control" under Article 1117. But in the absence of majority ownership, other evidence could establish "control." According to the tribunal:

> It is quite common in the international corporate world to control a business activity without owning the majority voting rights in shareholder meetings. Control can also be achieved by the power to effectively decide and implement the key decisions of the business activity of an enterprise and, under certain circumstances, control can be achieved by the existence of one or more factors such as technology, access to supplies, access to markets, know how, and authoritative reputation. Ownership and legal control may assure that the owner or legally controlling party has the ultimate right to determine key decisions. However, if in practice a person exercises that position with an expectation to receive an economic return for its efforts and eventually be held responsible for improper decisions, one can conceive the existence of a genuine link yielding the control of the enterprise to that person.[36]

The tribunal ultimately concluded that, based on this criteria, the claimant exercised "control" over the entities in which it held only a minority interest.[37]

At least one tribunal has declined jurisdiction based on a finding of no control. In a relatively early decision at ICSID, *Vacuum Salt Products Limited v. Ghana*, the tribunal concluded that there was no "foreign control" of the entity at issue by a natural person who owned 20% of the entity's shares, but who had not

36 *Id*. ¶ 108 (emphasis added).

37 *Id*. ¶ 110.

been proven to be "capable of strongly influencing critical decisions on important matters." [38]

c. Non-controlling and Indirect Shareholders

As demonstrated in *Aguas del Tunari*, an investment treaty claim can be brought directly on behalf of a company, based on the nationality of the company's controlling shareholders. As demonstrated by *Saluka* and *Tokios*, claims can be brought indirectly by the majority or controlling shareholders. And as demonstrated in *Thunderbird*, tribunals may also have jurisdiction to hear claims by minority shareholders, if the minority shareholders have a "controlling" interest in the company.

Depending on the treaty and operative facts at issue, tribunals may also have jurisdiction to hear the claims of non-controlling and indirect shareholders. Certainly, the trend has been to allow such claims. In *CMS Gas Transmission Company v. Argentina*,[39] the claimant, a U.S. company, was a minority shareholder in a local Argentine company that held a gas transportation license. The investment was alleged to have been adversely affected when the Argentine government suspended a tariff adjustment formula. The claimant asserted claims under the Argentina-U.S. BIT. The tribunal concluded that nothing in the ICSID Convention precluded an indirect claim by a minority shareholder. The claimant,

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[38] Award dated 16 February 1994, ICSID Case No. ARB/92/1, ¶ 29, reprinted at 9 ICSID Rev. – FILJ 72, 99 (1994). The claims in *Vacuum Salt* were based on an ICSID clause in an investment agreement, rather than on a BIT.

[39] Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, ICSID Case No. ARB/01/8.

as a U.S. company, met the definition of investor under the BIT. The BIT broadly defined "investment" as including "every kind of investment in the territory of one Party owned or controlled, directly or indirectly by nationals or companies of the other Party." The definition explicitly included "a company or shares of stock or other interests in a company or interests in the assets thereof." Accordingly, the tribunal found it had jurisdiction to hear the claimant's claims.

Other relatively recent cases have similarly found jurisdiction over the claims of minority and/or indirect shareholders, based on similar analysis and reasoning as in *CMS*.[40]

B. Jurisdiction *Ratione Materiae*: What Qualifies as an Investment?

As indicated by the discussion of *CMS* above, most investment treaties define "investment" broadly. The definition in the Bolivia-Netherlands BIT is fairly typical. It provides:

> [T]he term "investment" shall comprise every kind of asset and more particularly, though not exclusively:
>
> > (i) movable and immovable property as well as any other rights *in rem* in respect of every kind of share;
> >
> > (ii) rights derived from shares, bonds and other kinds of interests in companies and joint ventures;
> >
> > (iii) title to money, goodwill and other assets and to any performance having economic value;

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[40] *Azurix Corp. v. Argentina*, Decision on Jurisdiction, 8 December 2003, ICSID Case No. ARB/01/12; *LG&E v. Argentina*, Decision on Jurisdiction, 30 April 2004, ICSID Case No. ARB/02/1; and *Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004, ICSID Case No. ARB/02/8.

> (iv) rights in the field of intellectual property, technical processes and know-how;
>
> (v) rights granted under public law, including rights to prospect, explore, extract and exploit natural resources.[41]

Given the broad definitions of "investment" in most investment treaties, there are relatively few cases in which respondents have even challenged jurisdiction on *ratione materiae* grounds. In *FEDAX v. Venezuela*,[42] the claimant, a company established under the laws of Curaçao, Netherlands Antilles, acquired promissory notes issued by the Venezuelan government in connection with a contract made between the government and a Venezuelan corporation. The claimant later asserted claims based on the Netherlands-Venezuela BIT. Venezuela argued that the acquisition of the promissory notes did not constitute an "investment" under the treaty. But the tribunal disagreed, observing that the ICSID Convention did not define the term "investment" and therefore left considerable discretion to the parties in defining the term. The tribunal further observed that the definition of "investment" in the BIT at issue included "every kind of asset," including "titles to money, to other assets or to any performance having an economic value," and concluded that such definition was sufficiently broad to encompass the promissory notes at issue.[43]

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41 Bolivia-Netherlands BIT, Art. 1(a).

42 Decision on Jurisdiction, 11 July 1997, ICSID Case No. ARB/96/3(1).

43 *Id.* ¶¶ 31-32, 38-43.

Salini Costruttori S.p.A. and Ilustrade S.p.A. v. Morocco[44] involved a contract entered by two Italian companies and a Moroccan company controlled by the Moroccan government. The contract involved the construction of a highway in Morocco. In concluding that the contract constituted an "investment" under both the Italy-Morocco BIT and the ICSID Convention, the tribunal developed what has been referred to as the "*Salini* test." As one tribunal recently articulated it, the *Salini* test "implies the presence of the following elements: (a) a contribution of money or other assets of economic value, (b) a certain duration, (c) an element of risk, and (d) a contribution to the host State's development."[45] The tribunal in *Salini* concluded that the contract at issue met the required elements.

We are aware of only one ITA case in which a tribunal concluded it did not have jurisdiction because the definition of "investment" was not satisfied. In *Joy Mining Machinery Limited v. Egypt*,[46] a U.K. company alleged that it supplied mining equipment to IMC, an enterprise run by the Egyptian government, for a project in Egypt. The claimant acknowledged that it had been paid for the equipment, but complained that IMC had failed to release bank guarantees that the claimant had been required to put in place under the parties' contract. Although certain commissioning and testing of the equipment was required for the release of

44 Decision on Jurisdiction, 23 July 2001, ICSID Case No. ARB/00/1.

45 *Saipem S.p.A.v. Bangladesh,* Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, ICSID Case No. ARB/05/07, ¶ 99 (citing *Salini*). As the tribunal in *Saipem* noted, the need for the last element has been put in doubt. *Id.* ¶ 99, n.22 (citing *L.E.S.I. – DIPENTA v. Algeria*, Award, 12 July 2006, ICSID No. ARB/05/3 ¶ 72).

46 Decision on Jurisdiction, 6 August 2004, ICSID Case No. ARB/03/11.

the guarantees, the claimant argued that it had been prevented by the Egyptian government from the requisite commissions and testing. The U.K.-Egypt BIT, under which the claim was brought, had a typically broad definition of "investment." Nonetheless, the tribunal found that the bank guarantees did not fall within it, because they constituted merely a contingent liability:

> Even if a claim to return of performance and related guarantees has a financial value it cannot amount to recharacterizing as an investment dispute a dispute which in essence concerns a contingent liability. The claim here is very different from that invoked in *Fedax* where the promissory notes held by the investor were the proceeds of an earlier credit transaction pursuant to which the State received value in exchange for its promise of future payment.[47]

Accordingly, the tribunal concluded it did not have jurisdiction to hear the claim.[48]

C. Jurisdiction *Ratione Temporae*: When Does the Investment Have To Be Made/When Does the Claim Have To Arise?

A number of difficult issues can arise based on the timing of the investment and/or alleged treaty violations, based, for example, on when the treaty was signed and/or when it went into effect. Several NAFTA tribunals have squarely held that

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[47] *Id.* ¶ 47.

[48] It should be noted that several tribunals have found they did not have jurisdiction not because the claimant failed to meet the requirement of jurisdiction *ratione materiae*, but because the claimant failed to adduce a *prima facie* case of expropriation. *See, e.g., Telenor Mobile Communications A.S. v. Hungary*, Award, 13 September 2006, ICSID Case No. ARB/04/15. In addition, in *Inceysa Vallisoletana S.L. v. El Salvador*, the tribunal found that the investment had not been made "in accordance with the law" of El Salvador, as required by the BIT at issue, because the investor had used fraud in making the investment. Award, 2 August 2006, ICSID Case No. ARB/03/26. Similarly, in *World Duty Free Co. Ltd. v. Kenya*, the tribunal dismissed the case because of evidence that the claimant made its investment by paying a bribe to the former president of Kenya. Award, 4 October 2006, ICSID Case No. ARB/00/7.

actions undertaken by the host State prior to NAFTA's effective date cannot breach the treaty. Thus, for example, in *Feldman v. United Mexican States*, the Tribunal held:

> Given that NAFTA came into force on January 1, 1994, no obligations adopted under NAFTA existed, and the Tribunal's jurisdiction does not extend, before that date. NAFTA itself did not purport to have any retroactive effect. Accordingly, this Tribunal may not deal with acts or omissions that occurred before January 1, 1994.[49]

Similarly, the tribunal in *Mondev International Ltd v. United States of America* held: "The basic principle is that a State can only be internationally responsible for breach of a treaty obligation if the obligation is in force for that State at the time of the alleged breach. . . . There is nothing in NAFTA to the contrary."[50] However, as the tribunal in *Mondev* observed, Note 39 to NAFTA specifically states that "this Chapter covers investments existing on the date of entry into force of this Agreement as well as investments made or acquired thereafter."

By contrast, in *Tradex Hellas S.A. v. Republic of Albania*,[51] the tribunal specifically stated – albeit in *dictum* – that under the Greece-Albania BIT, an ICSID tribunal would have jurisdiction to hear a case if the treaty violation took place after the BIT was signed but before the BIT's entry into force, as long as the request for arbitration ("RFA") was filed after the BIT's entry into force. The

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49 Interim Decision on Preliminary Jurisdictional Issues, 6 December, 2000, ICSID Case No. ARB (AF)/99/1), ¶ 62, reprinted at 65 ILM 615, 625.

50 Award, 11 October 2002, ICSID Case No. ARB(AF)/99/2, ¶ 68

51 Decision on Jurisdiction, 24 December 1996, ICSID Case No. ARB/94/2, reprinted at 14 ICSID Review – FILJ 161 (1999).

tribunal reasoned that the language of the BIT – providing that investments "shall" not be expropriated and that disputes "shall" be submitted to ICSID arbitration – made "clear that the Contracting Parties had the intention to only submit to ICSID jurisdiction regarding alleged expropriation and request for arbitration occurring in the future, even if they concerned investments made earlier."[52] In addition, the Greece-Albania BIT provided that "[t]his Agreement shall also apply to investments made prior to its entry into force by investors of either Contracting Party in the territory of the other Contracting Party consistent with the latter's legislation."[53] In *Tradex*, however, the Claimant had filed its RFA before the BIT's entry into force. Accordingly, the tribunal concluded that there was no ICSID jurisdiction under the BIT.[54]

Interestingly, however, the tribunal in *Tradex* held that ICSID jurisdiction existed under an Albanian investment law. The so-called "1993 Law" had entered into force on January 1, 1994. The alleged expropriation had occurred in 1992-93, *i.e.*, before the 1993 Law had gone into effect. But the RFA was filed at ICSID on November 2, 1994, *after* the 1993 Law was in effect. The tribunal made clear that the analysis for whether the 1993 Law provided a basis for ICSID jurisdiction was different from that for whether the BIT provided for ICSID jurisdiction, because of the different language used in the 1993 Law and the BIT. Specifically, while the

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52 *Id*. at 180.

53 *Id*. at 177.

54 *Id*. at 180.

BIT provided that disputes arising under the BIT "shall be submitted" to ICSID arbitration, the 1993 Law provided that "[i]f a foreign investment dispute arises between a foreign investor and the Republic of Albania and it cannot be settled amicably, . . . then the investor may submit the dispute" to ICSID. The tribunal found significance in this difference in language:

> Regarding the "retroactivity" issue the first question is *when* the dispute "arose" in this case. If the time of the Request for Arbitration is decisive in this regard, as Tradex's Request was filed in November 1994 after the coming into force of the 1993 Law, jurisdiction would be established. As seen above, for application of the Bilateral Treaty, the Tribunal came to the conclusion that the date of filing the Request for Arbitration was considered to be the relevant date. And it might well be argued that a dispute is only identified sufficiently for an arbitration, once the Request for Arbitration is filed. But the wording and criteria used by the Treaty, i.e., "shall be submitted" to ICSID arbitration, differs considerably from Art. 8 [of the 1993 Law] where the criteria is when "the dispute arises." It might perhaps still be argued that the unilateral submission to ICSID arbitration by the 1993 Law only turns into the consent required by Art. 25 of the ICSID Convention by the filing of the Request for Arbitration by the investor who thereby notifies that he wants to use this option, but Art. 8 gives no indication that the time of this consent should be considered to be the date when "the dispute arises."[55]

After a lengthy analysis of the language of the 1993 Law, as well as its predecessor laws, the tribunal concluded that the 1993 Law provided ICSID jurisdiction over the dispute, even though the dispute arose before the 1993 Law went into effect.[56]

[55] *Id*. at 188.

[56] *Id*. at 195.

In *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*,[57] the tribunal took a somewhat different approach in finding ICSID jurisdiction, perhaps because of the different facts presented. In that case, the investor (Tecmed) had made its investment after the treaty at issue (the Mexico-Spain BIT) was signed, but before it entered into force. Before the treaty had entered into force, the government took actions that adversely affected Claimant's permits to operate a landfill. In December 1996, the BIT entered into force. In November 1998, Mexico denied outright the renewal of the landfill permit. The Claimant argued that the encroachments were precursors to the expropriation, but that the final denial was the actual expropriatory event. The Mexico-Spain BIT provided that the BIT "shall also apply to investments made prior to its entry into force by the investors of a Contracting Party."[58]

The tribunal concluded that the Claimant did "not include in its claims submitted to this tribunal acts or omissions of the Respondent prior to such date which, considered *in isolation*, could be deemed to be in violation of the Agreement prior to such date."[59] In light of that conclusion, the tribunal further concluded that it would "not consider any possible violations of the [BIT] prior to its entry into force on December 18, 1996, as a result of isolated acts or omissions that took place

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57 Award, 29 May 2003, ICSID Case No. ARB (AF)/00/2.

58 *Id*. ¶ 53 (citing Mexico-Spain BIT, Art. 2(2)).

59 *Id*. ¶ 60 (italics in original).

previously or of conduct by the Respondent considered in whole as an isolated unit and that went by before such date."[60] But the tribunal continued:

> On the other hand, conduct, acts, or omissions of the Respondent which, though they happened before the entry into force, may be considered a constituting part, concurrent factor or aggravating or mitigating element of conduct or acts or omissions of the Respondent which took place after such date do fall within the scope of this Arbitral Tribunal's jurisdiction.[61]

In *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. Republic of Peru*,[62] the tribunal concluded that the BIT at issue (between Chile and Peru) did not apply to disputes arising before the BIT's entry into force. However, Article 2 of the Chile-Peru BIT specifically provided that the BIT did "not, however, apply to differences or disputes that arose prior to its entry into force."[63] In *Lucchetti*, the claimants complained that the Peruvian government had wrongfully annulled permits previously granted to the claimants to operate a pasta plant. The permits were annulled prior to the BIT's entry into force. The claimants had pursued claims against Peru in the local courts of Peru, which were also resolved prior to the BIT's entry into force. However, the government entered additional decrees revoking the claimants' permits *after* the BIT came into effect. Claimants argued that the revocation after the BIT's coming into effect constituted a separate violation of the treaty. The tribunal disagreed, holding that "the critical element in determining

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60 *Id*. ¶ 67.

61 *Id*. ¶ 68.

62 Award, 7 February 2005, ICSID Case No. ARB/03/4.

63 *Id*. ¶ 25 (quoting Chile-Peru BIT, Art. 2).

the existence of one or two separate disputes is whether or not they concern the same subject matter."[64] The tribunal held that there was only one dispute at issue, and that since it arose prior to the BIT's entry into force, Article 2 barred it from protection under the treaty.

III. CLAIMS ON THE MERITS

The claims available in ITA cases will vary based on the particular treaty or treaties under which the arbitration is brought. Typical treaty protections include:

- No expropriation without just compensation;
- Fair and equitable treatment;
- Constant protection and security;
- No less favorable treatment than that accorded to other investors; and
- No less favorable treatment than required by international law.

Many treaties also contain so-called "umbrella clauses," which arguably bring investment contracts entered with the host State within the ambit of the treaty's protection and elevate breaches of the investment contract by the host State to a violation of the treaty.

This section will focus primarily on expropriation and fair and equitable treatment claims, which tend to predominate ITA cases, though other types of claims will be briefly discussed.

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64 *Id.* ¶ 50 (citing *CMS Gas Transmission Co. v. Argentina*, 17 July 2003, Case No. ARB/01/8, ¶ 109 42 ILM 788, (2003)).

A. Expropriation

It has long been a basic rule in international law that the property of aliens cannot be taken, whether for public purposes or not, without adequate compensation.[65] Freedom from expropriation without adequate compensation is a basic guarantee of most investment treaties. Expropriation claims are made in most ITA cases.

The model U.S. BIT includes a fairly typical provision prohibiting expropriation without adequate compensation. Article 6.1 of the model U.S. BIT states:

> Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except:
>
> (a) for a public purpose;
>
> (b) in a non-discriminatory manner;
>
> (c) on payment of prompt, adequate, and effective compensation; and
>
> (d) in accordance with due process of law . . . .

But again, while the language seems straightforward, the application of treaty prohibitions against expropriation can be complex. Tribunals have generally divided expropriations into two broad categories: direct expropriations and indirect expropriations. A direct expropriation takes place when property is seized outright

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[65] *See, e.g.,* OECD, '*Indirect Expropriation' and the 'Right To Regulate' in International Investment Law*, OECD WORKING PAPERS ON INTERNATIONAL INVESTMENT, No. 2004/4, at 2 (Sept. 2004).

by the State and/or when the title to property is formally transferred to the State. The term "indirect expropriation" is used to cover regulatory measures that diminish or destroy the value of the investment. Particularly within the context of indirect expropriation, tribunals have struggled with the need for legitimate regulatory action on the one hand, and the obligation to compensate investors for State action tantamount to expropriation on the other. As stated in an OECD paper, "the line between the concept of indirect expropriation and governmental regulatory measures not requiring compensation has not been clearly articulated and depends on the specific facts and circumstances of the case."[66] Indeed, the line has been difficult to draw even in cases involving allegations of direct expropriation.

1. Direct Expropriation

As discussed *supra* § II (B), the definition of investment contained in most investment treaties is broad. Accordingly, the scope of foreign property that tribunals have concluded to be the subject of expropriation (both direct and indirect) is also broad. In addition to tangible property, intangible property rights – such as shareholder and contractual rights – can also be expropriated.[67] Thus, in *SPP v. Egypt*, the tribunal rejected "the argument that the term 'expropriation' applies only to *jus in rem*. . . . [T]here is considerable authority for the proposition that contract rights are entitled to the protection of international law and that the taking of such

66 *Id*. at 3.
67 *See generally* August Reinisch, *Expropriation*, 2 TRANSNATIONAL DISPUTE MANAGEMENT, No. 5 (November 2005), at 5-11.

rights involves an obligation to make compensation therefor."[68] Similarly, in *Wena Hotels v. Egypt*, the tribunal stated that it is "well established that an expropriation is not limited to tangible property rights."[69] In *Pope & Talbot, Inc. v. Canada*, the tribunal held that investor's access to the U.S. softwood lumber market was a property right protected by NAFTA. And in *CME Czech Republic v. The Czech Republic*, the tribunal agreed with the investor that its contractual rights had been expropriated by the regulatory interference of the host state.[70]

More difficult than assessing what type of property can be the subject of an expropriation is the issue of whether an expropriation triggering a duty to compensate has occurred. Again, notwithstanding the seemingly straightforward language on expropriation that appears in most investment treaties, tribunals have struggled with the issue, as illustrated by the differing results reached in two recent cases on claims of direct expropriation.

In *ADC v. Hungary*,[71] two investment companies (collectively referred to as "ADC"), incorporated under the laws of Cyprus, entered into an agreement with Hungary to participate in the operation of the Budapest-Ferihegy International Airport. However, only several years into the twelve-year contract term, the Hungarian government transformed the regulatory administration with which ADC

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68 Award, 20 May 1992, ICSID Case No. ARB/84/3 reprinted in 3 ICSID – FILJ 189, 228 ¶ 164.

69 Award, 8 December 2000, ICSID Case No. ARB/98/4, 6 ICSID – FILJ 68, ¶ 98.

70 Partial Award, 13 September 2001,¶ 591 (UNCITRAL), reprinted in 14 WORLD TRADE AND ARBITRATION MATERIALS, No. 3 (2002). For numerous additional cases on this point, *see* Reinisch, *supra* n. 67, at 5-11.

71 Award , 2 October 2006, ICSID Case No. ARB/03/16.

had worked, amended relevant legislation, and ultimately issued a decree pursuant to which the government took over ADC's concession for the airport operations. Hungary argued that these changes were "necessary to modernize Hungary's aviation industry and to harmonize the aviation sector with EU law."[72]

In response to ADC's claim of expropriation under the Cyprus-Hungary BIT, Hungary argued that its cancellation of ADC's concession was "merely an exercise of its rights under international law to regulate its domestic economic and legal affairs." The tribunal disagreed:

> It is the Tribunal's understanding of international law principles that while a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have its boundaries. As rightly pointed out by the Claimants, the rule of law, which includes treaty obligations, provides such boundaries. Therefore, when a State enters into a bilateral investment treaty like the one in this case, it becomes bound by it and the investment-protection obligations it undertook therein must be honoured rather than be ignored by a later argument of the State's right to regulate.[73]

In concluding that Hungary had violated the BIT's prohibition against expropriation without just compensation, the tribunal found that the taking of ADT's concession was not in the public interest; was not done under due process; was discriminatory; and was without just compensation.[74] The tribunal awarded ADT damages of approximately $76 million – based on an analysis (on a discounted

[72] *Id*. ¶ 192.

[73] *Id*. ¶ 423.

[74] *Id*. ¶¶ 429-44.

cash flow basis) of what ADT would have earned had the concession not been cancelled. The tribunal awarded it an additional $7.6 million for its fees and costs associated with the arbitration.[75]

In *Saluka v. The Czech Republic*,[76] the claimant (Saluka), a holding company incorporated in The Netherlands, owned a substantial amount of the outstanding shares in IP banka a.s. ("IPB"), which had previously been one of four large State-owned commercial banks. After Saluka had acquired the shares, it was discovered that IPB had previously made a huge amount of bad loans. The other three State-owned banks, which remained majority-owned by the State, had similar problems, but received financial assistance from the State to address those problems. The State did not provide similar assistance to IPB, but instead called upon Saluka's parent company, Nomura, to provide additional capital to help stabilize IPB. Nomura stated it would not act to rescue IPB without State assistance. Ultimately, following a deepening crisis that resulted in two runs on IPB, the Czech Republic's banking regulator, the Czech National Bank ("CNB"), imposed a forced administration over IPB, and sold it to CSOB – one of the other four State-owned banks. As part of the forced administration, armed police entered IPB's headquarters and effected the physical removal from the premises of all bank managers. A subsequent Parliamentary Investigation Commission, set up at the instigation of opposition parties, concluded that the CNB had not been entitled to

[75] *Id.* ¶ 543.

[76] Partial Award, 17 March 2006 (UNICTRAL).

put IPB into forced administration and had exceeded its legal powers through the sale of IPB to CSOB. The Commission did not, however, conclude that the regulators had done anything illegal.[77]

In concluding that the Czech Republic had *not* expropriated Saluka's investment, the tribunal looked first at "whether the actions by the Czech Republic complained of by the Claimant are lawful or unlawful measures." In reviewing Article 5 of the Czech-Netherlands BIT, a fairly standard BIT provision barring expropriation without just compensation, the tribunal state as follows:

> The Tribunal acknowledges that Article 5 of the Treaty in the present case is drafted very broadly and does not contain any exception for the exercise of regulatory power. However, in using the concept of deprivation [of the investment], Article 5 imports into the Treaty the customary law notion that a deprivation can be justified if it results from the exercise of regulatory actions aimed at the maintenance of public order. . . .
>
> It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare.
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> * * *
>
> [T]he principle that a State does not commit an expropriation and is thus not liable to pay compensation as to a dispossessed alien investor when it adopts general regulations that are 'commonly accepted as within the police power of States' forms part of customary international law today.[78]

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77 *Id*. ¶¶ 32-146.

78 *Id*. ¶¶ 254-55, 262.

The tribunal acknowledged that international law "has yet to draw a bright and easily distinguishable line between non-compensable regulations on the one hand and, on the other, measures that have the effect of depriving investors of their investment and are thus unlawful and compensable in international law."[79] The tribunal did not undertake an elaborate analysis, but set forth in full the several-page decision by the regulators to undertake the forced administration. The tribunal then concluded that "[h]aving reviewed the totality of the evidence which the CNB invoked in support of its decision, the Tribunal is of the view that the CNB was justified, under Czech law, in imposing the forced administration of IPB . . . ."[80] Accordingly, the tribunal held, the Czech Republic had not violated the treaty's prohibition against expropriation without just compensation. The rejection of claimant's expropriation claim in *Saluka* was a short-lived victory for the Czech Republic, as the tribunal went on to conclude that the Czech Republic had breached its obligation to afford the claimant with fair and equitable treatment. That conclusion was based largely on the fact that the Czech Republic had offered financial assistance to the State-owned banks, but not to IPB.

The tribunals' discussions with respect to expropriation in *ADC* on the one hand and *Saluka*, on the other, are not easy to reconcile. According to the *ADC* tribunal, treaty obligations provide legal boundaries which proscribe the State's

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79 *Id*. at 263.

80 *Id*. at 271.

regulation of its domestic and legal affairs.[81] According to the *Saluka* tribunal, the State is free to regulate – without regard to treaty prohibitions against expropriation – so long as they are "commonly accepted as within the policy power or States."[82] Ultimately, the different factual scenarios presented by the two cases best explain the different results. In *Saluka*, the Czech Republic intervened in a banking crisis involving a failing bank which had already seen two runs on the bank. In *ADC*, by contrast, Hungary was seeking to restructure a regulatory regime that was without apparent problems. The Czech Republic's regulatory actions in *Saluka* were arguably necessary to promote the general welfare, while Hungary's regulatory actions in *ADC* were not. Nonetheless, the different legal analyses undertaken by the respective tribunals – while perhaps leading to compatible results – appear starkly different in their approach to assessing an expropriation for which compensation is due.

2. Indirect Expropriation

As opposed to direct expropriation, which involves the State's taking of tangible or intangible property, "indirect expropriation may occur when measures short of an actual taking 'result in the effective loss of management, use or control, or a significant depreciation of the value, of the assets of a foreign investor.'"[83] According to one prominent commentator, "though there have been various

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[81] *ADC*, Award ¶ 423.

[82] *Saluka*, Partial Award ¶ 262 (quoting *Methanex Corp. v. United States of America*, Final Award, 2 August 2005, 44 ILM 1343 P410 (2005)).

[83] Reinisch, *supra* note 67, at 15 (quoting UNCTAD, TAKING OF PROPERTY 2 (2000)).

attempts at clarifying and differentiating different types of indirect expropriations, it appears that the term is frequently used interchangeably with expressions such as *de facto,* disguised, constructive, regulatory, consequential or creeping expropriation."[84] Given that indirect expropriation claims by definition arise as a result of regulation by the State, the tension between the State's legitimate need to regulate for the public welfare and the requirement of just compensation for the expropriation of an alien's property is especially high when such claims are made.

One of best known and most controversial cases is *Metalclad Corp. v. United Mexican States.*[85] In *Metalclad*, the Claimant had been assured by Mexico's federal government that its project for a landfill facility had complied with all relevant environmental and planning regulations. Later, however, the municipal government denied a construction permit and the regional government declared the land at issue a national area for the protection of rare cactus. The tribunal held for the claimant, concluding that Mexico had violated NAFTA's prohibition against expropriation:

> [E]xpropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favor of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be expected economic benefit of

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84 *Id*. at 15-16 (citing Rudolf Dolzer and Margrete Stevens, BILATERAL INVESTMENT TREATIES 99 (1995)).

85 Award, 30 August 2000, ICSID Case no. ARB(AF)/97/1, reprinted at 5 ICSID – FILJ 168 (2001).

> property even if not necessarily to the obvious benefit of the host State.[86]

Similarly, in *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States* (better known as "*Tecmed*"), the tribunal concluded that the revocation of a license for the operation of a landfill violated the prohibition against expropriation or equivalent measures found in the Mexico-Spain BIT. As stated by the tribunal:

> Generally, it is understood that the term ". . . equivalent to expropriation . . ." or "tantamount to expropriation" included in the Agreement and in other international treaties related to the protection of foreign investors refers to the so-called "indirect expropriation" or "creeping expropriation," as well as to the above-mentioned *de facto* expropriation. Although these forms of expropriation do not have a clear or unequivocal definition, it is generally understood that they materialize through actions or conduct, which do not explicitly express the purpose of depriving one of rights or assets, but actually have that effect.[87]

In *Middle East Cement v. Egypt*, the tribunal concluded that the revocation of a free zone license, which prohibited the import of cement, violated the expropriation- without-just-compensation provisions of the Egypt-Greece BIT, even though the investor retained the nominal ownership of its rights. According to the tribunal:

> When measures are taken by a State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights being the investment, the measures are often referred to as a "creeping" or "indirect" expropriation or, as in the BIT, "the effect of

86 *Id.* ¶ 103.

87 Award, 29 May 2003, ICSID Case No. ARB(AF)/00/2, ¶ 114.

> which is tantamount to expropriation." As a matter of fact, the investor is deprived by such measures of parts of the value of his investment. This is the case here, and, therefore, it is the Tribunal's view that such a taking amounted to an expropriation within the meaning of Art. 4 of the BIT and that, accordingly, Respondent is liable to pay compensation therefor.[88]

And in *CME v. The Czech Republic*, the tribunal held that the Czech Media Council, a regulatory authority, indirectly expropriated the claimant's investment by creating a legal situation that allowed the investor's local partner to terminate the contract on which the investment depended. Indeed, the tribunal concluded that the Media Council had "coerced" the investor into changing its contract with its business partner, leading to a loss of legal security that had previously protected the investment. As one commentator puts it, the *CME* decision "embodies a very indirect finding of an indirect expropriation."[89]

Cases such as *Metalclad* have been criticized in some quarters for not allowing local or regional governments sufficient room to enact regulations to protect the public welfare. Certainly, a critical factor in the *Metalclad* tribunal's decision was that the federal government had assured Metalclad that its project satisfied all applicable laws and regulations, thus creating a legitimate expectation on the part of the investor that its investment could go forward, without violating any laws or regulations or being subject to further legal or regulatory action.

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88 Award, 12 April 2002, ICSID Case No. ARB/99/6, ¶ 107. *See also Goetz v. Republic of Burundi*, 2 September 1998, ICSID Case No. ARB/95/3, reprinted at 6 ICSID Reports 5 (revocation of investor's free zone license constituted indirect expropriation without just compensation).

89 Reinisch, *supra* n. 67, at 46.

However, whether as a reaction to the criticism levelled at *Metalclad* and other decisions, or as a result of different factual scenarios presented by recent cases, the recent trend has been *against* findings of indirect expropriation. According to UNCTAD, there were seven decisions rendered in 2006 that examined claims based on expropriation. Only one decided in favor of the investor – *ADC v. Hungary* (discussed *supra* § III(A)(1)). The other six rejected such claims. Of those six, however, three cases (*Saluka v. Czech Republic, LG&E v. Argentina*, and *Azurix v. Argentina*) found that the host States had violated other treaty provisions, in particular, the treaty's provisions requiring fair and equitable treatment. These three cases are discussed further in this paper's discussion of claims for fair and equitable treatment (*infra* at § III(B)). The three cases in which the claimant's claims were rejected entirely were *EnCana Corp. v. Ecuador*; *Thunderbird v Mexico*; and *Telenor Mobile Communications v. Hungary*.[90]

At issue in *EnCana*[91] were resolutions by the Ecuadorian tax authority to deny claimant's subsidiaries refunds of value added tax (VAT). In essence, through a combination of executive acts and judicial decisions interpreting the Ecuadorian tax code, Ecuador took the position that VAT payable by oil companies was no longer to be refunded, because the companies were not engaged in "manufacture" (a requirement for VAT to be refunded under the tax laws). EnCana, a Canadian company, alleged that Ecuador had violated the Canada-Ecuador BIT's provisions

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90 UNCTAD, LATEST DEVELOPMENTS, *supra* note 7, at 5.

91 Award, 3 February 2006 (UNCITRAL).

on expropriation, fair and equitable treatment, national treatment, and "encourag[ing] the creation of favourable conditions for investors of the other Contracting Party to make investments in its territory."[92] However, the tribunal concluded that the BIT prohibited all claims other than expropriation for taxation measures.[93] The tribunal then rejected Encana's claims for both direct and indirect expropriation. With respect to direct expropriation, the tribunal took the position that the tax law would have to have violated Ecuadorian law to constitute a direct expropriation. But according to the tribunal, the "policy on oil refunds [for VAT] never rose to the level of the repudiation of an Ecuadorian legal right . . . ."[94] With respect to the claim for indirect expropriation, the tribunal stated that "[i]n the absence of a specific commitment from the host State, the foreign investor has neither the right nor any legitimate expectation that the tax regime will not change, perhaps to its disadvantage, during the period of the investment."[95] The tribunal further stated that "[f]rom the perspective of expropriation, taxation is in a special category." It continued:

> In principle a tax law creates a new legal liability on a class of persons to pay money to the State in respect of some defined class of transactions, the money to be used for public purposes. In itself such a law is not a taking of property; it if were, a universal State prerogative would be denied by a guarantee against expropriation, which cannot be the case. Only if a tax law is extraordinary,

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92 *Id.* ¶ 107 (quoting Canada-Ecuador BIT, Art II(1)).

93 *Id.* ¶¶ 149, 168.

94 *Id.* ¶197.

95 *Id.* ¶ 173.

> punitive in amount or arbitrary in its incidence would issues of indirect expropriation be raised. In the present case, in any event, the denial of VAT refunds in the amount of 10% of transactions associated with oil production and export did not deny EnCana "in whole or significant part" the benefits of its investment.[96]

Accordingly, the tribunal denied EnCana's claims.[97]

In *Thunderbird*, the claimant asserted a variety of claims against Mexico under NAFTA, after regulators closed gaming facilities that the claimants operated in Mexico. Although the decision rejecting all of the claims turned in large part on the complex facts presented by the case, the tribunal observed that Mexico should have "wide" latitude in regulating gambling within its borders:

> Mexico has in this context a wide regulatory "space" for regulation; in the regulation of the gambling industry, governments have a particularly wide scope of regulation reflecting national views on public morals. Mexico can permit or prohibit any forms of gambling as far as the NAFTA is concerned. It can change its regulatory policy and it has a wide discretion with respect to how it carries out such policies by regulation and administrative conduct. The international law disciplines of [NAFTA Article 11] in particular only assess whether Mexican regulatory and administrative conduct breach these

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96 *Id.* ¶ 177.

97 Interesting, and as acknowledged by the *EnCana* tribunal, another tribunal had earlier concluded that the same refusal to refund VAT violated the provisions of the U.S.-Ecuador BIT that guaranteed fair and equitable treatment and treatment no less favorable than that accorded to nationals and other companies. *Occidental Exploration and Production Co. v. Ecuador*, Final Award, 1 July 2004 (UNCITRAL). Unlike the Canada-Ecuador BIT, the U.S.-Ecuador BIT did not limit claims involving tax measures to only the expropriation provisions of the treaty. In *EnCana*, the tribunal took the apparently unprecedented step of charging Ecuador – the prevailing party – with reimbursing approximately $330,000 in costs to EnCana. Although the tribunal concluded that Ecuador's actions did not violate the Canada-Ecuador BIT, it nonetheless believed that Ecuador's conduct in denying the VAT refunds was neither just nor equitable. *See EnCana*, Award ¶ 202.

> specific disciplines. The perspective is of an international law obligation examining national conduct as a "fact."[98]

In a 2-1 decision, the tribunal rejected claimant's contention that the Mexican government had created a legitimate expectation on the claimant's part, when claimant submitted a "*Solicitud*" (application or request) concerning its proposed gaming operations to the relevant government ministry (the *Secretaria de Gobernación*, or "SEGOB), and the SEGOB responded with an "*Oficio*" (an official letter) to claimant. The tribunal concluded that the *Oficio* could not have created a legitimate expectation that the government would not block the gaming operations, in part because the information presented in the *Solicitud* was incomplete and inaccurate.[99] Accordingly, the tribunal rejected claimant's expropriation claim, along with its other claims.

In *Telenor,* a Norwegian company (Telenor) owned Pannon GSM Telecommunications RT (Pannon) as a wholly owned subsidiary. Pannon entered into a concession agreement for the provision of public mobile radiotelephone services with the Hungarian Ministry of Transport, Communications and Water Management. In arbitration brought at ICSID, Telenor claimed that various regulatory action taken against Pannon violated both the concession agreement and the BIT between Norway and Hungary. *Telenor* is an unusual decision, in that the

[98] Award, 26 January 2006 (UNCITRAL), ¶ 127.

[99] *Id*. ¶ 155.

tribunal repeatedly expresses its frustration with the lack of clarity in Telenor's claims:

> The Tribunal has not found it easy to identify with precision the claims that Telenor is making and their relationship with the BIT. This is partly because they have been put differently at different stages of the arbitral proceedings and partly because they have remained very diffuse despite the Tribunal's direction at the first session that they should be pleaded with particularity.
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> In the present case Telenor complains of a series of governmental and administrative acts by Hungary which it says have reduced the value of its investment. However, the inconsistencies and lack of particularity in Telenor's various pleadings have made it difficult for the Tribunal, even at the conclusion of the hearing on jurisdiction, to have a clear idea either of the claims it is making or of the magnitude of the erosion of its investment it is seeking to assert.[100]

Ultimately, the tribunal dismissed the case for lack of jurisdiction, concluding that the claimant failed to establish a *prima facie* case of jurisdiction. The tribunal observed that none of the regulatory steps taken by Hungary seemed to be out of the ordinary, and that Pannon, according to its own annual reports, continued to be "a highly profitable company whose net income and asset value has increased steadily year by year."[101]

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[100] Award, 13 September 2006, ICSID Case No. ARB/04/15, ¶¶ 33, 71.

[101] *Id*. ¶ 79.

B. Fair and Equitable Treatment and Related Claims

There will be a separate panel entirely devoted to the fair and equitable treatment standard at the Spring Meeting, so we will only briefly review several of the most recent cases here. It has become an increasingly important claim, in part because of the apparent reluctance of tribunals to conclude that regulatory actions by the State amount to expropriation without just compensation, as reflected by some of the recent cases discussed above. As stated above, in the ITA decisions issued in 2006, only one of seven expropriation claims was found to have merit. But of the six remaining decisions that rejected the expropriation claim, three of them found violations of other treaty provisions – in particular, the fair and equitable treatment standard. Those three decisions are discussed below.

The origin of the fair and equitable treatment clause appears to date back many decades. For example, the 1954 Treaty of Friendship, Commerce and Navigation between Germany and the United States reads: "Each Party shall at all times accord fair and equitable treatment to the nationals and companies of the other Party and to their property, enterprises and other interests."[102] Virtually all modern investment treaties contain fair and equitable language. The formulation contained in the Czech Republic-Netherlands BIT is fairly typical. Article 3(1) of that BIT provides:

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[102] Rudolf Dolzer, *Fair and Equitable Treatment: A Key Standard in Investment Treaties*, 39 INT'L LAW 87, 89 (2005) (quoting Treaty of Friendship, Commerce and Navigation, Art. I, sec. 1, U.S.-F.R.G., 273 U.N.T.S. 4).

> Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, use, enjoyment or disposal thereof by those investors.

Article 3(1) of the China-Netherlands BIT provides:

> Investments of investors of each Contracting Party shall all the time be accorded fair and equitable treatment in the territory of the other Contracting Party. Investments of the investors of either Contracting Party shall enjoy the constant protection and security in the territory of the other Contracting Party.

As can be seen in these and other BITs, many treaties combine the fair and equitable treatment standard with other guarantees, such as the guarantee of non-discrimination (as in the Czech Republic-Netherlands BIT) and the guarantee of constant protection and security (as in the China-Netherlands BIT). A tribunal's analyses of these various claims – while typically done separately in the decisions – often have a certain amount of overlap.

As discussed above, the tribunal in *Saluka* rejected the investor's claims of expropriation, but agreed with the investor that the host State had breached its obligation of fair and equitable treatment. The facts of *Saluka* are set forth *supra*. Although finding that the Czech Republic's regulatory response to the banking crisis at IPB was a reasonable exercise of regulatory powers under the circumstances, the tribunal nonetheless found that the Czech Republic's conduct toward IPB was discriminatory. Specifically, the government's provision of financial assistance to the banks that remained majority-owned by the State – while refusing to provide such assistance to IPB – breached its obligation to treat foreign investments "in an even-handed and consistent manner." The tribunal further found that the Czech Republic had not provided a reasonable justification for IPB's differential treatment.[103] Accordingly, the tribunal concluded that the Czech Republic had "violated the 'fair and equitable' obligation as well as the 'non-impairment' obligation under Article 3.1 of the Treaty."[104]

The claims in *LG&E Energy Corp. v. Argentine Republic*[105] arose from Argentina's economic crisis, which began in the late 1990s. In response to the crisis, the Argentine government abrogated various guarantees in its Gas Law and implementing regulations, which adversely affected the gas-distribution sector of the economy. Claimants asserted various claims under the U.S.-Argentina BIT, including expropriation. The tribunal rejected the claim for expropriation. According to the tribunal:

> [A]though the State adopted severe measures that had a certain impact on Claimants' investment, such measures did not deprive the investors of the right to enjoy their investment.
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> Thus, the effect of the Argentine State's actions has not been permanent on the value of the Claimants' shares, and Claimants' investment has not ceased to exist. Without 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, the

103 *Saluka*, Partial Award ¶¶ 323, 347.

104 *Id.* ¶ 497.

105 Decision on Liability, 3 October 2006, ICSID Case No. ARB/02/1.

> Tribunal concludes that these circumstances do not constitute expropriation.[106]

However, the tribunal concluded that Argentina had violated the BIT's guarantee of fair and equitable treatment when it changed the legal and regulatory framework that had induced the claimants to invest in Argentina. According to the tribunal, the claimants had invested in Argentina based on

> an attractive framework of laws and regulations that addressed the specific concerns of foreign investors with respect to the country risks involved in Argentina. . . . Having created specific expectations among investors, Argentina was bound by its obligations concerning the investment guarantees vis-à-vis public utility licensees, and in particular, the gas distribution licensees. The abrogation of these specific guarantees violates the stability and predictability underlying the standard of fair and equitable treatment.[107]

In *Azurix Corp. v. The Argentine Republic*, the tribunal reached a similar conclusion, based on similar analysis. In *Azurix*, the tribunal concluded that the impact of various adverse regulatory actions against a water concession "was not to the extent required to find that, in the aggregate, these actions amount to an expropriation . . . ."[108] However, the actions of the government, when considered together, "reflect[ed] a pervasive conduct of the [government] in breach of the standard of fair and equitable treatment."[109]

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106 *Id.* ¶¶ 198, 200.

107 *Id.* ¶ 133.

108 Award, 14 July 2006, ICSID Case No. ARB/01/12, ¶ 322.

109 *Id.* ¶ 377. Two cases decided in early 2007 also found breaches of the guarantee of fair and equitable treatment: *PSEG Global Inc. v. Republic of Turkey*, Award, 19 January 2007, ICSID Case

(continued…)

C. The "Umbrella" Clause

Many treaties contain so-called "umbrella" clauses, in which the host States agree in the treaty to comply with any obligation they have undertaken with respect to investments of the other State. For example, Article II.2(c) of the U.S.-Argentina BIT provides that "[e]ach party shall observe any obligation it may have entered into with regard to investments." Based on the language of the umbrella clause, it would appear that a breach of an investment contract can become a treaty violation. But the cases have not been consistently decided.

The first ITA decision to analyze the umbrella clause was apparently *SGS v. Pakistan*, decided in 2003.[110] In that case, the tribunal *rejected* the notion that a contract claim could be transformed into a treaty claim by virtue of an umbrella clause. The tribunal's concern was that a conclusion to the contrary could have sweeping consequences. Accordingly, interpreting the clause to transform contract claims into treaty claims had to be based on "clear and convincing evidence" that the contracting parties so intended. The tribunal stated:

> Considering the widely accept principle . . . that . . . a violation of a contract entered into by a State with an investor of another State is not, by itself, a violation of international, and considering further the legal consequences that the Claimant would have us attribute to Article 11 of the BIT are so far-reaching in scope, and so automatic and unqualified and sweeping in their potential impact upon a Contracting Party, we believe

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No. ARB/02/5, and *Siemens A.G. v. The Argentine Republic*, Award, 6 February 2007, ICSID Case No. ARB/02/8.

110 Decision on Jurisdiction, 6 August 2003, ICSID Case No. ARB/01/13.

> that clear and convincing evidence must be adduced by the Claimant. Clear and convincing evidence of what? Clear and convincing evidence that such was indeed the shared intent of the parties . . . .[111]

Other tribunals have reached the same conclusion.[112]

But in *L.E.S.I.-DIPENTA v. Algeria*, the tribunal explicitly stated that the effect of an umbrella clause "is to transform breaches of the State's contractual commitments into violations of that provision of the treaty, and accordingly, to endow the arbitral tribunal constituted in accordance with the treaty with jurisdiction [over such breaches] . . . ."[113] The tribunals reached similar conclusions in *SGS v. Philipines*[114] and *Eureko B.V. v. Poland*[115]. In *Azurix v. Argentine Republic*[116] and *Siemens v. Argentina*[117], the tribunals appeared to take the same view of the umbrella clause, but denied the claim when the claimant in the arbitration was not the party to the contracts at issue.

Similarly, in *LG&E v. Argentina*, the tribunal stated that the umbrella clause "creates a requirement for the host State to meet its obligations toward foreign investors, including those that derive from a contract. Hence, such obligations

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111 *Id.* ¶ 167.

112 *See Joy Mining Machinery Ltd. v. Egypt*, Decision on Jurisdiction, 6 August 2004, ICSID Case No. ARB/03/11; *El Paso v. The Argentine Republic*, Decision on Jurisdiction, 27 April 2006, ICSID Case No. ARB/03/15; *BP America Production v. Argentine Republic*, Decision on Preliminary Objections, 27 July 2006, ICSID Case No. ARB/04/8.

113 Award, 10 January 2005, ICSID Case No. ARB/03/08, ¶ 25 at 464, *quoted in* UNCTAD, INVESTOR-STATE DISPUTE SETTLEMENT, *supra* n. 7, at 43.

114 Decision on Jurisdiction, 29 January 2004, ICSID Case No. ARB/02/06.

115 Partial Award, 19 August 2005.

116 Award, 14 July 2006, ICSID Case No. ARB/01/12, ¶ 52.

117 Award, 6 February 2007, ICSID Case No. ARB/02/8, ¶ 204.

receive extra protection by virtue of their consideration under the bilateral treaty."[118] But the tribunal in *LG&E* appeared to go even further by holding that Argentina's abrogation of guarantees to foreign investors contained within a statutory framework could breach the umbrella clause.[119]

These cases do not appear capable of reconciliation based on the facts or treaty language at issue. The interpretation of umbrella clauses in ITA cases is one of many issues on which tribunals have not reached consensus.

D. **<u>Most Favored Nation Clause</u>**

The most favored nation ("MFN") clause arguably allows claimants to "borrow" from the provisions of other treaties entered by the host State, if those provisions are more favorable than those contained in the treaty between the host State and the investor's State. Article 4 of the U.S. model BIT provides:

> Each Party shall accord to investors [and investments] of the other Party treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

The MFN clause has been invoked to take advantage of substantive protections in other BITs. For example, in *MTD v. Chile*,[120] the tribunal allowed the "importation" of the fair and equitable standard from the Chile-Denmark and Chile-

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118 Decision on Liability ¶ 170.

119 *Id.* ¶ 175.

120 Award, 25 May 2004, ICSID Case No. ARB/01/7.

Croatia BITs to the dispute submitted under the Chile-Malaysia BIT containing an MFN clause.

MFN clauses have also been invoked to take advantage of the procedural provisions of a BIT, and here, in particular, tribunals have reached inconsistent results in interpreting the clause. In *Maffezini v. Spain*,[121] the MFN clause in the relevant BIT extended to "all matters subject to this agreement." The tribunal concluded that this broad language permitted the use of other BITs' provisions to override a requirement to submit the dispute first to domestic courts. Similarly, two recent decisions allowed investors to avail themselves of a shorter waiting period before commencing international arbitration.[122]

Other tribunals, however, have declined to follow the *Maffezini* line of cases. In *Plama v. Bulgaria*,[123] the BIT at issue provided for ITA only for disputes relating to expropriation. Claimants attempted to import settlement provisions from another BIT but that approach was rejected by the tribunal. The tribunal concluded it was impossible to infer the State's consent to a particular means of

121 *Emilio Agustin Maffezzini v. Spain,* Decision on Jurisdiction, 25 January 2000, ICSID Case No. ARB/97/7.

122 *Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic*, Decision on Jurisdiction, 3 August 2006, ICSID Case No. ARB/03/19; *National Grid plc v. The Argentine Republic*, Decision on Jurisdiction, 20 June 2006 (UNCITRAL).

123 *Plama Consortium Limited v. Bulgaria*, Decision on Jurisdiction, 8 February 2005, ICSID Case No. ARB/03/24.

dispute settlement from the MFN clause covering "all aspects of treatment."[124] Two other recent cases followed the reasoning of *Plama*.[125]

As with umbrella clauses, the treatment of MFN clauses remain one of the issues in ITA jurisprudence on which consensus has not yet been reached.

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124 *Id.* ¶183-184

125 *Vladimir Berschader and Michael Berschader v. Russian Federation*, Decision on Jurisdiction, April 2006, (SCC Arbitration Institute); *Telenor Mobile Communications A.S. v. Republic of Hungary*, 13 September 2006, ICSID Case No. ARB/04/15.