



# International Investment Law and Sustainable Development

**Key cases from 2000–2010**

Edited by Nathalie Bernasconi-Osterwalder  
and Lise Johnson

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# INTERNATIONAL INVESTMENT LAW AND SUSTAINABLE DEVELOPMENT

## KEY CASES FROM 2000–2010

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The International Institute for Sustainable Development (IISD) contributes to sustainable development by advancing policy recommendations on international trade and investment, economic policy, climate change and energy, and management of natural and social capital, as well as the enabling role of communication technologies in these areas. We report on international negotiations and disseminate knowledge gained through collaborative projects, resulting in more rigorous research, capacity building in developing countries, better networks spanning the North and the South, and better global connections among researchers, practitioners, citizens and policy-makers.

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## ABBREVIATIONS

BIT	Bilateral Investment Treaty
FET	Fair and Equitable Treatment
GATT	General Agreement on Tariffs and Trade
ICSID	International Centre for Settlement of Investment Disputes
ICSID Arbitration Rules	International Centre for Settlement of Investment Disputes Rules of Procedure for Arbitration Proceedings
ICSID Convention	International Centre for Settlement of Investment Disputes Convention on the Settlement of Investment Disputes between States and Nationals of Other States
IIA	International Investment Agreement
MFN	Most Favoured Nation
NAFTA	North American Free Trade Agreement
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
WTO	World Trade Organization

# TABLE OF CONTENTS

Acknowledgements .....	iii
Abbreviations.....	iv
Introduction .....	12
<i>Biwater v. Tanzania</i> .....	22
1. Case summary .....	23
1.1 Factual background .....	23
1.2 Summary of legal issues and award .....	24
2. Select legal issues.....	26
2.1 Definition of an “investment” under the ICSID Convention.....	26
2.2 Confidentiality requirements.....	27
2.3 Amicus curiae participation .....	28
2.4 Expropriation: Lowering the threshold for liability .....	30
2.5 Protection of public interests and the margin of appreciation....	31
2.6 Causation and damages: Finding liability even without losses ..	32
<i>CME v. Czech Republic and Lauder v. Czech Republic</i> .....	33
1. Case summary .....	34
1.1 Factual background .....	34
1.2 Summary of legal issues and awards.....	35
2. Select legal issues.....	36
2.1 Allowing investors to pursue actions based on the same conduct in multiple forums.....	37
2.2 The scope of expropriation provisions: <i>CME</i> finds the Czech Republic liable, while <i>Lauder</i> rejects liability.....	37
2.3 The causation requirement: A barrier to liability in <i>Lauder</i> but not in <i>CME</i> .....	39
2.4 The tribunals’ different awards and approaches: Exacerbating uncertainty for host states and investors.....	40



<i>CMS v. Argentina</i> .....	42
1. Case summary .....	43
1.1 Factual background .....	43
1.2 Summary of legal issues and decisions .....	44
2. Select legal issues.....	45
2.1 Allowing minority shareholders to bring claims .....	45
2.2 Fair and equitable treatment: A stable legal and business environment as an essential element .....	46
2.3 The umbrella clause: The Annulment Committee rejects the Tribunal’s broad interpretation .....	47
2.4 Defence of necessity: The Annulment Committee upholds the Tribunal’s rejection of the defence .....	48
<i>Continental Casualty v. Argentina</i> .....	51
1. Case summary .....	52
1.1 Factual background .....	52
1.2 Summary of legal issues and decisions .....	52
2. Select legal issues.....	53
2.1 Accepting Argentina’s defence of necessity .....	54
2.2 Fair and equitable treatment and the issue of non-discriminatory laws of general application.....	56
2.3 Adopting a broad interpretation of the umbrella clause as encompassing a wide array of contractual commitments .....	57
<i>Glamis v. United States</i> .....	59
1. Case summary .....	60
1.1 Factual background .....	60
1.2 Summary of legal issues and award .....	61
2. Select legal issues.....	61
2.1 Amicus curiae participation and transparency .....	61
2.2 Expropriation: Finding that the investor’s losses were not significant enough to support its claim .....	62
2.3 Minimum international standards of treatment: Reining in the standard under NAFTA and customary international law .....	63



<i>Maffezini v. Spain</i> .....	67
1. Summary of the Decision on Jurisdiction.....	68
2. Select legal issue: Using the most favoured nation clause to broaden dispute settlement rights .....	69
<i>Metalclad v. Mexico</i> .....	72
1. Case summary .....	73
1.1 Factual background .....	73
1.2 Summary of legal issues and decisions .....	75
2. Select legal issues.....	75
2.1 Minimum standard of treatment: Applying wide-ranging requirements on host states .....	75
2.2 Expropriation: Applying a test that focuses on the economic impacts of the measures and the protection of the investors' expectations .....	77
2.2.1 Denial of the construction permit .....	77
2.2.2 The Ecological Decree .....	79
2.3 Judicial review: National courts' limited authority to address problems with arbitral awards .....	80
<i>Methanex v. United States</i> .....	81
1. Case summary .....	82
1.1 Factual background .....	82
1.2 Summary of legal issues and decisions .....	82
2. Select legal issues.....	83
2.1 Transparency and amicus curiae.....	83
2.2 National treatment and state discretion to distinguish between investors for environmental or other public purposes .....	84
2.3 Minimum international standards of treatment: Narrowing the scope of the obligation .....	85
2.4 Expropriation: Applying the customary international law police powers rule to protect laws and regulations, with a caveat .....	87



<i>Occidental v. Ecuador</i> .....	90
1. Case summary .....	91
1.1 Factual background .....	91
1.2 Summary of legal issues and Decision on Jurisdiction .....	92
2. Select legal issues .....	93
2.1 Contractual waiver of investment treaty arbitration .....	93
2.2 Disregarding the required treaty waiting period before commencing arbitration .....	96
<i>Parkerings v. Lithuania</i> .....	97
1. Case summary .....	98
1.1 Factual background .....	98
1.2 Summary of legal issues and award .....	99
2. Select legal issues .....	99
2.1 Equitable and reasonable treatment/fair and equitable treatment: Protecting investors' legitimate expectations .....	100
2.2 Most favoured nation obligation: Permissible differentiation between investors .....	102
2.3 Contract claims as breaches of international law .....	103
<i>Phoenix v. Czech Republic</i> .....	105
1. Case summary .....	106
1.1 Factual background .....	106
1.2 Summary of legal issues and award .....	106
2. Select legal issues .....	107
2.1 Definition of "investment" under the investment treaty and the ICSID Convention .....	108
2.2 The requirement of good faith in making the investment .....	110
<i>SGS v. Pakistan</i> .....	112
1. Case summary .....	113
1.1 Factual and procedural background .....	113
1.2 Summary of legal issues and Decision on Jurisdiction .....	114
2. Select legal issues .....	116
2.1 Accepting jurisdiction due to a broad interpretation of "investment" .....	117





2.2	Interpreting broad investor–state arbitration clauses in BITs...	117
2.3	Adopting a narrow reading of umbrella clauses as not automatically transforming purely contractual claims into treaty claims.....	119
	<i>SGS v. Philippines</i> .....	120
1.	Case summary.....	121
1.1	Factual background .....	121
1.2	Summary of legal issues and Decision on Jurisdiction.....	121
2.	Select legal issues.....	122
2.1	Broad interpretation of “investment” as including a contract for the provision of services performed mostly outside the territory of the host state.....	123
2.2	The power of umbrella clauses to transform purely contractual claims into treaty claims .....	124
2.3	Does the general description of a “dispute concerning an investment” in the BIT’s investor–state arbitration clause encompass claims of an essentially contractual character? .....	126
	<i>Siemens v. Argentina</i> .....	128
1.	Case summary.....	129
1.1	Factual background .....	129
1.2	Summary of legal issues, award and subsequent developments .....	130
2.	Select legal issues.....	131
2.1	Most favoured nation (MFN) treatment: Allowing a BIT’s MFN clause to import rights related to dispute settlement.....	133
2.2	Expropriation: Clarifying that a state can only be found to have expropriated property if it acted in its sovereign capacity .....	134
2.3	The umbrella clause: Elevating contract breaches to treaty breaches only if both the state and investor are party to the contract.....	135
2.4	Compensation: Addressing whether the amount of compensation owed is affected by the public interest nature of the state’s unlawful actions .....	135



<i>Tecmed v. Mexico</i> .....	137
1. Case summary .....	138
1.1 Factual background .....	138
1.1.1 Terms of the transaction .....	138
1.1.2 Regulatory violations and community opposition.....	138
1.1.3 Revocation of the Permit .....	139
1.2 Summary of legal issues and award .....	139
2. Select legal issues.....	140
2.1 Expropriation: Looking beyond the “sole effects” of the measure to examine the proportionality between public interests involved and the impacts on the investment .....	141
2.2 Fair and equitable treatment: Broadly reading the standard to require states to act consistently, transparently and without ambiguity.....	143
2.3 Tools of interpretation: Referring to principles set forth by the European Court of Human Rights .....	144
<i>Vivendi v. Argentina</i> .....	145
1. Case summary .....	147
2. Select legal issues.....	151
2.1 Original arbitration proceeding .....	152
2.1.1 Argentina’s responsibility for the acts of its provincial government .....	152
2.1.2 Jurisdiction over the investment dispute, notwithstanding the contractual forum selection clause.....	152
2.2 First annulment proceeding .....	153
2.2.1 Contractual forum selection clause .....	153
2.2.2 Conflicts of interests in arbitral proceedings.....	154
2.3 Resubmitted arbitration proceeding.....	155
2.3.1 Expropriation and the “effects” test .....	155
2.3.2 Fair and equitable treatment purportedly includes a “do no harm” standard .....	157
2.3.3 Damages for lost profits .....	158
2.3.4 More on arbitrator conflicts of interests.....	159



2.4 Second annulment proceeding.....	159
2.4.1 Annulment under Article 52(1)(b), (d), and (e) of the ICSID Convention .....	159
2.4.2 Annulment under Article 52(1)(a) and (d)— and even more on conflicts of interests in arbitration proceedings .....	160
<i>World Duty Free v. Kenya</i> .....	162
1. Case summary .....	163
2. Select legal issues.....	164
2.1 Applying general principles of international law and public policy on corruption.....	165
2.2 Investors' legal obligations .....	166
2.3 Confidentiality .....	167
Appendix 1: List of Cases and Their Select Issues .....	168
Appendix 2: List of Select Issues.....	174



## INTRODUCTION

It is difficult to imagine economic, social and environmental development without investment. Foreign direct investment is a major source of international development capital for developing countries, providing for much-needed infrastructure development, technology transfers, capacity building and more. Indeed, due to the benefits that can flow from foreign investment, all countries—developing and developed—wish to attract investment into their countries.

International investment agreements (IIAs)—treaties between countries on cross-border investment—are one tool with which countries hope to attract investment from abroad. By providing safeguards on the treatment given to investments, it is argued that IIAs encourage foreign investors to venture abroad. Yet there is no convincing evidence showing that these instruments lead to an increase in foreign investment, much less investment that promotes sustainable development. Nevertheless, many countries have concluded IIAs in their attempts to lure foreign capital. Today, there are roughly 3,000 IIAs binding countries throughout the world.<sup>1</sup>

Although the first IIA was signed in 1959, it is only over the last 10 to 15 years that the important legal implications of the IIAs' standards have begun to emerge. The first arbitration award under an IIA was issued in 1990; a decade later, the number of investor–state disputes exploded. By the end of 2009, at least 357 investor–state cases had been filed. The steep increase in treaty-based disputes took many by surprise, both due to the number of disputes and the breadth of matters they involved. The cases challenged a wide array of governmental measures, demonstrating the extent to which IIAs can affect important public interest issues.

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<sup>1</sup> United Nations Conference on Trade and Development (UNCTAD) (2007), *Bilateral investment treaties 1995–2006: Trends in investment rulemaking*, at 1; UNCTAD (2009), *IIA Monitor No. 3: Recent developments in international investment agreements (2008–June 2009)*; UNCTAD (2002), *Quantitative data on bilateral investment treaties and double taxation treaties*, available at <http://www.unctad.org/Templates/WebFlyer.asp?intItemID=3150&lang=1>.



The main (and typically only) function of IIAs is to prescribe how host states are to treat foreign investors. IIAs commonly provide that if an investor is of the view that it has not been treated as required under the IIA, the investor may bypass local courts or administrative review and request the formation of an international arbitral tribunal (typically composed of three arbitrators), which will decide whether the state has breached its obligations under the IIA and must pay compensation or other damages to the investor. International investment tribunals therefore decide specifically on the legitimacy of host state actions or inactions, including legislative and administrative measures of general applicability.

Because the language in most IIAs is often broad and vague, the tribunals in investor–state arbitrations possess enormous powers to interpret the scope and meaning of states’ obligations under these agreements. These broad powers are expanded even further by the fact that the system of investor–state arbitration currently lacks an appellate mechanism to promote correct and consistent application of the law and provides only limited avenues for judicial oversight and review. Consequently, arbitrators decide to what extent IIAs limit a state’s regulatory powers and impact a government’s willingness and ability to adopt and maintain sustainable development policies.

To understand the implications of the international investment law regime for sovereign states, one must therefore look beyond the language of the treaties and examine the increasing number of investment arbitration decisions.

Although many investor–state decisions are not publicly disclosed, a growing number have been released by one or both of the disputing parties. Applicable arbitration rules also appear to be moving in a direction that will encourage, if not require, greater disclosure of these awards in the future.

In addition to alerting governments and investors about what the IIAs *actually mean in practice*, an effect of publication of the arbitration decisions is that, once in the public domain, attorneys can cite relevant decisions in support of their clients’ claims or defences, and tribunals can rely on those decisions to support their findings in separate cases raising



similar legal issues. Thus, despite the fact that there is no formal binding system of precedent in this area, dissemination of the decisions has created a growing body of *de facto* international investment jurisprudence interpreting, and elaborating upon, the meaning of countries' obligations under IIAs. Consequently, a tribunal's decision may not only affect the scope of a state's obligations under the specific IIA at issue in the dispute; it may also affect the scope of that state's and other states' obligations under other IIAs with similar provisions.

In this e-book, we provide summaries of selected investment treaty cases between foreign investors and their host governments. These cases leave no doubt that investment treaties have significant public policy implications, including in the areas of health, environmental protection, economic development and taxation. We aim to examine the relationship between international investment law cases and sustainable development goals and policies. That relationship is complex and is affected by myriad issues that may arise in the context of an investor–state dispute, from jurisdiction through enforcement of an award. This book illustrates those issues by examining select aspects of some twenty cases decided over the last decade.

## **Jurisdiction**

An investor–state tribunal is the judge of its own authority to hear the dispute brought before it. Its competence to hear the matter will often depend on a number of factors, including the applicable treaty's or treaties' definition of covered “investors” and “investments,” the nature of disputes the states have agreed to arbitrate, and whether there are any prerequisites with which investors must comply before initiating actions.

Tribunals' assessments of these matters and their jurisdiction have significant impacts on the scope of an IIA and host states' obligations and possible liabilities under it. These issues, in turn, impact the evaluation of whether and to what extent IIAs serve the goal of promoting investment and development. Questions worth considering here include the following: To what types of “investments” did state parties intend to extend their



treaty protections? Are those protections only afforded to investments representing some type of long-term commitment to the host state or do they, more broadly, also represent any *de minimis* or temporary contributions or rights? Likewise, in an era when corporations can relatively easily change their nationalities or establish foreign enterprises, are there limits on when an investor may take such actions for the specific purpose of becoming a covered foreign “investor” under the applicable IIA? How do definitions of covered “investors” and “investments” affect cost-benefit analyses of IIAs for host states?

Reflecting these questions, when faced with an arbitration claim, respondent states’ defences often include objections that the tribunals lack authority to hear the claims on the grounds that the claimants are not “investors” protected by the IIA or that the “investments” do not fall within the governing IIA’s coverage. In *CMS v. Argentina*,<sup>2</sup> for instance, Argentina argued that the applicable IIA was not intended to cover indirect minority shareholders and would be unreasonably and impractically broad if it did. The tribunal, however, rejected that argument and accepted jurisdiction over the claim.

In two other cases, *SGS v. Pakistan*<sup>3</sup> and *SGS v. Philippines*,<sup>4</sup> the tribunals similarly rejected the respondent states’ jurisdictional objections and adopted broad interpretations of the governing IIAs’ scope. The states had argued, in part, that the treaties only intended to provide coverage for those investments that actually contributed to the host states’ economic development. They reasoned that the “investments” at issue, which were contracts with the host states for services that primarily would be performed in third countries, were therefore not covered by the IIA. Applying a textualist interpretation of the relevant treaties, the two tribunals determined that the contracts were protected “investments” and that they had jurisdiction to hear the cases.

<sup>2</sup> *CMS Gas Transmission Co. v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decision on Jurisdiction, 17 July 2003, and Decision on Annulment, 25 September 2007.

<sup>3</sup> *SGS Société Générale de Surveillance v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction, 6 August 2003.

<sup>4</sup> *SGS Société Générale de Surveillance v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction, 24 January 2004.



In some disputes, however, the tribunals applied more contextual interpretations to determine when “investors” may bring claims relating to harm to their “investments.” In *Phoenix v. Czech Republic*,<sup>5</sup> for instance, the tribunal determined that the definition of an “investment” incorporated requirements that the investment be made in compliance with the host state’s law and general principles of international law. The tribunal then rejected the claimant’s action on the ground that the investment had not been made in accordance with the principle of good faith, which was considered of “utmost importance” among the general principles of international law.<sup>6</sup>

Other questions raised by IIAs’ jurisdictional provisions, and the decisions interpreting them, relate to how the treaties impact investors’ decisions to bring legal actions against the host states. A number of treaties, for example, specify that investors must abide by “cooling off” periods before seeking to resolve disputes through investor–state arbitrations. Such waiting periods can provide the parties time to negotiate and informally resolve issues, avoiding often time-consuming and extremely costly litigation. Respondent states, in certain cases, have accordingly objected that tribunals do not have jurisdiction to hear investor–state claims until the investor has complied with the applicable waiting periods specified in the bilateral investment treaty. As shown in *SGS v. Pakistan* and *Occidental v. Ecuador*,<sup>7</sup> however, tribunals have generally rejected those arguments and allowed the claims to proceed.

Tribunals have also circumvented provisions that provide for host state jurisdiction in the law or in a contract. Often, disputes between investors and host states relate to performance of a contract between the investor and state. As cases such as *Vivendi v. Argentina*<sup>8</sup> and *Occidental v. Ecuador* show, even when the relevant contract mandates that disputes be settled in domestic courts of the host state, tribunals have allowed investors to pursue

<sup>5</sup> *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 9 April 2009.

<sup>6</sup> *Phoenix v. Czech Republic*, para. 106.

<sup>7</sup> *Occidental Petroleum Corp. and Occidental Exploration and Production Co. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Jurisdiction, 9 September 2008.

<sup>8</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/97/3, Award, 21 November 2000, and Decision on Annulment, 3 July 2002.





treaty-based arbitration instead of, or parallel to, claims before that contractually agreed-upon forum. Similarly, in cases that do not arise from contract disputes between the investor and host state but that arise, for example, as a result of general legislative or administrative actions taken by the host state, tribunals have allowed investors to rely upon IIAs to bring their claims directly to arbitration, irrespective of whether the investors have pursued or exhausted their domestic remedies.

Investors' abilities to bypass administrative and judicial relief and proceed directly to investment arbitration for resolution of disputes may have myriad impacts on the host states and development of the rule of law. For one, it can result in a three-person tribunal examining and interfering in sensitive and complex domestic regulatory and policy matters without according government actors appropriate levels of deference. Further, it can strain host states' resources by forcing them to litigate overlapping (if not identical) issues in multiple fora. Different decisions produced by the different fora can also result in greater uncertainty for both investors and host states regarding their respective rights and responsibilities. Additionally, the ability of foreign investors to bypass domestic administrative and judicial channels can slow the development of law and institutional capacity in those domestic systems and entrench concerns that the host states' domestic legal systems are unable to fairly and efficiently adjudicate cases involving foreign investors.

### **States' substantive obligations**

Once jurisdiction is established, tribunals turn to the merits of the claims. These aspects of the disputes involve diverse allegations of government wrongdoing arising from a variety of government actions and inactions. A number of cases included within the book specifically involve situations in which the purportedly wrongful government conduct was in matters of particular public interest, such as environmental protection, water infrastructure and services, health and safety, and cultural and religious heritage.

Common alleged breaches of IIAs include unlawful expropriation, the failure to treat foreign investors "fairly and equitably," or the failure to treat



foreign investors no less favourably than domestic or other foreign investors. Often, investors also allege breaches of contractual and other obligations under the so-called umbrella clause, a treaty provision that requires the host state to comply with any commitment it may have assumed toward foreign investors.

Although consistent principles and approaches are not easily discernable within the multitude of publicly available investment treaty decisions, there are some apparent trends. For one, the standard for establishing a claim of unlawful expropriation may have become more rigorous and difficult to satisfy over the past decade. In contrast, the rather vague fair and equitable treatment (FET) obligation, which may have been intended by states as a relatively innocuous and benign standard, has become one that has allowed a number of investors to prevail in cases where their expropriations or other claims have failed. Consequently, allegations of breach of the FET obligation now appear to be standard in investors' treaty claims.

There are several iterations of the FET standard, with the different versions having very different implications for host states' potential liabilities. A common theme in those various formulations, however, has been that the obligation protects investors' legitimate expectations. The cases also illustrate that, depending on the tribunal's interpretation of the relevant treaty, this focus on the investors' expectations may threaten to chill states' development of their regulatory frameworks and willingness and ability to shape their domestic policies (see, e.g., *Tecmed v. Mexico*,<sup>9</sup> *CMS v. Argentina* and *Vivendi v. Argentina*), or it may offer some protection to states' policy space and regulatory authority by charging investors with constructive knowledge that host states' legal, economic and/or political frameworks were going to change (see, e.g., *Glamis v. United States*<sup>10</sup>).

The decisions raise questions regarding the FET and other substantive standards. These include the following: How do the IIAs and the tribunals

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<sup>9</sup> *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID No. ARB(AF)/00/2, Award, 29 May 2003.

<sup>10</sup> *Glamis Gold Ltd. v. United States of America*, UNCITRAL, Award, 14 May 2009.

interpreting them balance foreign investors' rights against host states' rights and obligations to regulate? How willing and able are tribunals to look at and draw from other sources of law, including international human rights or environmental law? What level of due diligence do tribunals expect of investors, and how can that impact investors' claims? And what degree of deference do tribunals accord respondent states defending their conduct?

A unique and important aspect to keep in mind is that investor–state arbitration decisions—which may result in extremely large damage awards against the respondent states—are strongly shielded from challenge or appeal. The New York Convention<sup>11</sup> and ICSID Convention<sup>12</sup> both strengthen the force of awards rendered under IIAs. They require signatory states to enforce such awards with only very few exceptions, including issues of due process, corruption of a member of a tribunal, an excess of power, or absence of reasons given to explain the award. While the New York Convention also includes an *ordre public* exception, the ICSID Convention does not. Moreover, the New York Convention specifically permits losing parties to challenge awards before national courts (albeit only on certain, limited grounds). By contrast, the ICSID Convention states that when an award is rendered under the Convention, the only avenue the losing party has to challenge the award is to ask a new panel of arbitrators to annul the award on one or more of the narrow grounds for annulment set forth in that Convention. Cases illustrating these issues include *Vivendi v. Argentina*, *CMS v. Argentina* and *Metalclad v. Mexico*.<sup>13</sup>

### **Other issues relating to investor–state arbitration**

In addition to the implications of arbitration decisions for jurisdiction and substance, the institutional or *ad hoc* frameworks governing the appointment of arbitrators and other procedural matters are of paramount importance. As in any system of adjudication, rules regarding decision-makers' qualifications and their methods of appointment, as well as rules

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<sup>11</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 UNTS 38, entry into force 7 June 1959.

<sup>12</sup> International Centre for Settlement of Investment Disputes Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 575 UNTS 159, entry into force 10 October 1966.

<sup>13</sup> *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000.



regarding the conduct of the proceedings, are crucial for ensuring fair, competent, legitimate and efficient resolution of disputes. Although it is outside the scope of this book to thoroughly analyze whether current procedural features of investor–state arbitrations satisfy crucial thresholds of fairness, competence, legitimacy and efficiency, the book does address certain procedural or institutional aspects of investor–state arbitrations that are relevant to that analysis.

In particular, the book contains decisions involving rulings on confidentiality of the arbitrations, the ability of an *amicus curiae* (friend of the court) to participate in the proceedings, and independence and impartiality of arbitrators. *Biwater v. Tanzania*,<sup>14</sup> for example, illustrates a situation in which the tribunal imposed a “gag order” during the proceedings in a purported attempt to protect the arbitral process. The dispute concerned a failed water services concession, with important impacts on the citizens of Dar-es-Salaam. The public interest of the case was undeniable and acknowledged by the tribunal. Nevertheless, the tribunal ordered the disputing parties to make all documents confidential during the proceedings upon request of the investor, thereby undermining the legitimacy of the arbitral proceedings by interfering with the public’s right and ability to know about the dispute and with the government’s wishes and obligations to disclose such information.

*Biwater*, as well as other decisions such as *Methanex v. United States*,<sup>15</sup> also addresses the issue of public participation by means of *amicus curiae* in arbitration proceedings. Through practice, reforms to arbitrations rules, and provisions on transparency incorporated directly into some IIAs, investor–state arbitrations have become increasingly open to *amicus curiae* participation, allowing the public to provide specialized knowledge or expertise to the tribunal. By permitting such involvement by interested non-parties, tribunals can enhance the quality of awards and can also help

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<sup>14</sup> *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008.

<sup>15</sup> *Methanex Corp. v. United States of America*, Decision on Acceptance of *Amicus Curiae*, 15 January 2001.



ensure their fairness by providing a means for those who may be affected by, but not party to, a dispute to present pertinent information.

A third procedural issue addressed in the cases included in this book relates to arbitrator independence and impartiality. Arbitrator independence and impartiality are fundamental to producing fair and legitimate decisions and to ensuring respect of those decisions by parties and reviewing courts. And, as alluded to in *Vivendi v. Argentina*, although the rules governing arbitral proceedings generally require arbitrators to be independent and impartial, and although those rules provide mechanisms for challenging arbitrators who lack or appear to lack those qualities, parties nonetheless appear to face great difficulties succeeding in their applications to remove arbitrators.

### **Structure of the book**

This book catalogues each case in a separate chapter. For each, it identifies the parties to the dispute; the relevant treaty; the arbitrators deciding the case and the members of the annulment committee, if any; the claims advanced and other key legal issues raised; dates of relevant decisions on jurisdiction and awards; and keywords. Each chapter then provides a factual and legal summary of the dispute and discusses select aspects of the case in more detail, drawing links between the issues raised and sustainable development.

The book also includes an Issue List and Case List to help the reader identify the topics discussed and the various cases that may be relevant to one particular issue. Similar to the case summaries, these lists do not aim to be comprehensive compilations of all the issues addressed by the tribunal in a particular case nor of all cases in the universe of investor–state disputes relevant to a particular issue; rather, they highlight the issues addressed in the case summaries included in this book.

Finally, this book is designed as an e-book so that more decisions can be added, providing a fuller understanding of what IIAs actually mean for states and investors.



# **Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22 (*Biwater v. Tanzania*)**

Lise Johnson

Award available at [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC770\\_En&caseId=C67](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC770_En&caseId=C67)

**Keywords:** Amicus curiae, causation, damages, definition of “investment,” expropriation, fair and equitable treatment, jurisdiction, margin of appreciation, multiple/parallel proceedings, necessity, reference to other bodies/principles of law, “*Salini*” test, transparency

### **Key dates:**

Request for Arbitration: 5 August 2005

Constitution of Tribunal: 9 February 2006

Award: 24 July 2008

### **Arbitrators:**

Mr. Bernard Honotiau (president)

Mr. Gary Born (claimant appointee)

Mr. Toby Landau (respondent appointee)

### **Forum and applicable procedural rules:**

International Centre for Settlement of Investment Disputes (ICSID)

ICSID Rules of Procedure for Arbitration Proceedings

### **Applicable treaty:**

United Kingdom–Tanzania Bilateral Investment Treaty (BIT)

### **Alleged treaty violations:**

- Expropriation
- Fair and equitable treatment
- Full protection and security
- Unreasonable or discriminatory measures
- Unrestricted transfer of capital and returns

### **Other legal issues raised:**

- Causation
- Damages
- Interpretation—reference to other bodies/principles of law
- Jurisdiction—definition of “investment”—definition under the ICSID Convention
- Margin of appreciation
- Necessity defence
- Procedure—amicus curiae participation
- Procedure—transparency



## 1. CASE SUMMARY

### 1.1 | Factual background

In 2003, the World Bank and other international financial institutions awarded Tanzania US\$140,000,000 in order to enable the country to repair and upgrade its water and sewer infrastructure and services. As a condition of that funding Tanzania had to appoint a private party to manage and operate the water and sewerage systems and related works. The claimant, Biwater Gauff (Tanzania) Limited (“Biwater” or “the Claimant”<sup>1</sup>), successfully bid for the right to develop Tanzania’s water and sewer infrastructure and services project (“the Project”) and formed another company, City Water, to operate the Project. City Water and the relevant government agency, the Dar es Salaam Water and Sewerage Authority (“Water Authority”), entered into the contracts governing implementation and operation of the Project in February 2003.

As a result of the Claimant’s “poor” bid and the Claimant/City Water’s subsequent mismanagement of the Project, City Water failed to generate expected income and consequently encountered extreme financial and practical difficulties that prevented it from meeting its contractual obligations (para. 789). These difficulties became so severe that, just eighteen months into what was supposed to be at least a ten-year arrangement, City Water made clear that it needed to renegotiate the terms of the underlying deal in order to avoid complete collapse of its business and activities. Although the government had no legal obligation under the contract to renegotiate, it agreed in February 2005 to do so. The parties appointed an expert mediator to facilitate the process and set 6 May 2005 as the deadline for reaching an agreement.

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<sup>1</sup> The term “Claimant” is used to refer to Biwater Gauff (Tanzania), or BGT, as well as Biwater International Limited and HP Gauff Ingenieure GmbH and Company, BGT’s English and German parent companies, whose joint venture had prepared and submitted the bid (para. 112).



On 12 May 2005, the renegotiation process ended in failure when City Water rejected the final compromise agreement proposed by the mediator. Given the failure of the renegotiations and City Water's inability to fulfill its obligations under the contract, the Water Authority concluded that same day that, among other actions, it should begin the process to terminate the Project contract with City Water. On 13 May 2005, the Minister of Water and Livestock Development ("the Minister") issued a press release to the same effect. On 17 May 2005, the Minister informed City Water staff that the Project contract with City Water had been terminated and that City Water operations and staff would be transferred to a new government entity. The Water Authority issued a notice to terminate the contract on 25 May 1999; pursuant to that notice, the contract would terminate on 24 June 1999 if City Water had not yet cured its breach.

City Water, in turn, stated in a 30 May 1999 communication with the Water Authority that (1) the 25 May 1999 notice of contract termination was invalid and that (2) City Water was "determined to continue to perform the contract and would continue to do so unless and/or until" an arbitral tribunal constituted in accordance with the Project contract "decided otherwise" (para. 221). On 1 June 2005, government officials deported City Water's senior management, appointed new management, entered City Water's offices, took control of the company's assets and informed City Water staff of the changes.

## **1.2 | Summary of legal issues and award**

The Claimant initiated these ICSID proceedings roughly two months later. It argued that the government's actions (including the actions of the Water Authority and the Minister, all collectively referred to as "Tanzania" or "the Government"), including its termination of the contract, announcements about that termination in a press conference and staff meeting, deportation of City Water's management, and seizure of City Water's assets violated Tanzania's obligations under the United Kingdom-Tanzania Bilateral Investment Treaty (BIT) to (1) not unlawfully expropriate property, (2) provide fair and equitable treatment, (3) not impair the investment





through unreasonable or discriminatory measures, (4) grant full protection and security and (5) guarantee the unrestricted transfer of funds.

Over the respondent's objections, the Tribunal found that it had jurisdiction over the dispute and then agreed with the Claimant that Tanzania had violated the first four of the five treaty obligations noted above. The Tribunal held, however, that the breaches of the BIT did not cause City Water any losses. Accordingly, the Tribunal held that Tanzania was not liable to pay any damages to the Claimant. In reaching its conclusions, the Tribunal relied not only on the submissions by parties, but also on information provided in an amicus brief by several non-governmental organizations (NGOs) ("the Amici")<sup>2</sup> with expertise in environmental, human rights and sustainable development issues relevant to the case (paras. 57–68, 356–392).

City Water had also initiated parallel proceedings before a separate tribunal, in which City Water alleged Tanzania breached its obligations under the Project contract. In a December 2007 decision, that tribunal, which operated in accordance with the UNCITRAL [United Nations Commission on International Trade Law] Arbitration Rules, rejected City Water's claims and instead awarded roughly £3 million in damages to the Water Authority.<sup>3</sup> Shortly after the UNCITRAL tribunal issued that decision, Tanzania submitted the decision to the ICSID Tribunal on the ground that it was relevant to, and should be considered in connection with, assessment of the Claimant's treaty-based claims (para. 477). The ICSID Tribunal, however, disagreed. It stated that it was both obligated and able to "make its own determinations on all matters of fact and law" and that it would therefore not rely on the UNCITRAL award when assessing the merits of the treaty dispute (para. 478).

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<sup>2</sup> The Amici included the Lawyers' Environmental Action Team, the Legal and Human Rights Centre, the Tanzania Gender Networking Programme, the Center for International Environmental Law, and the International Institute for Sustainable Development (para. 57).

<sup>3</sup> See A. Seager (2008), "Tanzania wins £3m damages from Bewater subsidiary," *The Guardian*, 11 January, <http://www.guardian.co.uk/business/2008/jan/11/worldbank.tanzania>.



## 2. SELECT LEGAL ISSUES

This investor–state dispute touches on a host of issues relating to sustainable development: it speaks to, among other topics, the balance struck by BITs between investors’ rights and investors’ obligations and states’ corresponding rights and obligations; transparency in and legitimacy of investor–state dispute settlement; and needs for and risks of private investment in what are traditionally public services. This summary focuses on six particular issues: (1) jurisdiction and the definition of an “investment” under the ICSID Convention; (2) transparency of the proceedings; (3) amicus curiae participation in investment disputes; (4) the award’s apparently low threshold for successful expropriation claims; (5) the Tribunal’s apparent failure to accord Tanzania a “margin of appreciation” and subsequent rejection of the government’s “necessity” justifications; and (6) the practical significance of the Tribunal’s approach to causation.

### 2.1 | Definition of an “investment” under the ICSID Convention

Article 25 of the ICSID Convention specifies that ICSID tribunals can only assume jurisdiction over certain legal disputes. One of its jurisdictional requirements is that the dispute must arise directly out of an “investment,” a term that, in contrast to many BITs (including the BIT between the United Kingdom and Tanzania governing the *Biwater* dispute), is not defined in the Convention. Tanzania argued that the meaning of an “investment” under the ICSID Convention had been developed through case law and required establishment of five criteria that are often cited as the “*Salini*” test: (1) adequate duration; (2) regularity of profit and return; (3) risk; (4) substantial commitment of resources, financial or otherwise; and (5) contribution to the host state’s development.<sup>4</sup> Tanzania objected that even if the Claimant’s activities qualified as an investment under the governing BIT, which defined investments broadly, the Claimant’s activities

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<sup>4</sup> As shown in *Phoenix v. Czech Republic*, the *Salini* test is often cited as having four, not five, criteria: a contribution (1) of money or other assets of economic value, (2) for a certain duration, (3) with an element of risk, and (4) that makes a contribution to the host state’s development.



did not satisfy the *Salini* test and, therefore, the Tribunal did not have jurisdiction under the ICSID Convention to hear the dispute.

The Tribunal rejected Tanzania's arguments. It stated that the five *Salini* criteria were neither fixed nor mandatory requirements for an "investment" under the ICSID Convention, but were merely factors that should be taken into account. Notably, the Tribunal also stated that the definition of "investment" in the relevant BIT should inform interpretation of "investment" under the ICSID Convention. The Tribunal noted that, in the case before it, the governing BIT broadly defined an "investment" as "every kind of asset." It then concluded that such broad language counselled against using the narrow definition of "investment" that would result through strict application of the *Salini* test.

The approach used by the Tribunal here—of using the BIT to guide interpretation of the ICSID Convention and to inform (and broaden) the scope of ICSID jurisdiction—arguably contrasts with the approach used by other tribunals. In *Phoenix v. Czech Republic*, for example, the tribunal emphasized that the jurisdictional requirements of the ICSID Convention were separate from and additional to the jurisdictional requirements under the governing BIT or other agreement. According to the *Phoenix* tribunal, parties to a BIT can confirm or restrict the ICSID notion of an investment in their BITs, but cannot expand it in order to have access to arbitration under the ICSID Convention.

## 2.2 | Confidentiality requirements

In September 2006, in response to a request by the Claimant, the Tribunal issued an order directing parties to refrain from disclosing to any third parties documents and other information produced by the parties during the proceedings. The confidentiality order also instructed parties to limit public discussion of the case to what was "necessary" and would not cause the dispute's resolution to become "potentially more difficult" (para. 51). When issuing that order, the Tribunal noted that there was no general principle of confidentiality in ICSID proceedings that would prevent a



party from disclosing information from or about the proceedings,<sup>5</sup> and also acknowledged that there was an “accepted need for greater transparency in this field [that] generally militate[d] against” the gag order sought by the Claimant.<sup>6</sup> It nevertheless held that its restrictions on disclosure were warranted in the *Biwater* dispute because the public interest in and media attention on the case *threatened* to aggravate the matter and prejudice the parties.<sup>7</sup>

The Tribunal’s order—which limits public access to information precisely because of the public’s interest in it and which was triggered by the *threat* of (as opposed to *actual*) prejudice—raises concerns, including that it could conflict with obligations of governments and businesses to act openly and transparently.

### 2.3 | Amicus curiae participation

During the course of these proceedings, the ICSID Arbitration Rules were amended to include more specific provisions regarding non-party participation. In particular, Arbitration Rule 37 was revised to both make clear that tribunals have the general authority to allow submissions by amicus curiae and to provide guidelines regarding when consideration of such submissions would be appropriate. Pursuant to those amended rules, the Amici filed their petition for amicus curiae status in November 2006.

The Claimant opposed the Amici’s request on the grounds that the Amici’s contributions would be factually and legally irrelevant to the dispute and/or would not contribute anything that could not be added by the parties (para. 358). The Tribunal, however, rejected the Claimant’s arguments. In support of its decision to admit the brief, the Tribunal first noted the broad implications of and the public interest in the dispute (para. 358). Then, turning to the particular application of the Amici, the Tribunal held that their participation was appropriate in light of the considerations set forth in the new Arbitration Rule 37. The Tribunal explained that the petitioners were NGOs “with specialized interests and expertise in human rights,

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<sup>5</sup> *Biwater*, Procedural Order No. 3, 29 September 2006, paras. 124–25.

<sup>6</sup> *Biwater*, 2006, para. 133.

<sup>7</sup> *Biwater*, 2006, paras. 143–48.

environmental and good governance issues” who “approach[ed] the issues in this case with interests, expertise and perspectives that have been demonstrated to materially differ from those of the two contending parties, and as such have provided a useful contribution to these proceedings” (para. 359). The Tribunal further emphasized the importance of the Amici’s input, making clear that the Amici’s “submissions [had] informed the [Tribunal’s] analysis of [the] claims” (para. 392).

The Tribunal, however, constrained the nature of the Amici’s participation. The gag order discussed above hindered the Amici’s ability to meaningfully participate in the dispute by limiting the Amici’s knowledge about relevant issues and facts. The Tribunal also rejected the Amici’s attempts to overcome those limits when it denied the Amici’s requests to access documents produced by the parties during the proceedings and to attend oral hearings (paras. 365–369).<sup>8</sup> Although the Tribunal indicated that it might have revisited and/or altered its decision regarding access to documents if there were sufficient need, it suggested its discretion on the issue of oral hearings was more limited: the Tribunal explained that because the Claimant opposed opening the hearings to the Amici, it was powerless under the ICSID Arbitration Rules to allow the non-parties’ attendance (paras. 367–369).

The Tribunal’s acceptance of and reference to the Amici’s contributions is significant for a number of reasons: it recognizes and affirms the public interest in investor–state disputes, helps normalize the idea of non-party participation, helps ensure that investor–state disputes take into account broader issues such as sustainable development and human rights where relevant, promotes investor and government accountability and enhances the perceived legitimacy of the system. Moreover, although the decision seems to allow either party to veto opening hearings to non-parties, it also appears to suggest a willingness to override a party’s objection to disclosing

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<sup>8</sup> See N. Bernasconi-Osterwalder (forthcoming), “Transparency and *amicus curiae* in ICSID arbitration: Lessons learned from *Biwater Gauff v. Tanzania*,” in M. Gehring, M.-C. Cordonier Segger & A. Newcombe (Eds.), *Sustainable development in world investment law*, Kluwer Law International.



documents in some circumstances (paras. 365–368). Building on these trends, in October 2009, a tribunal in another investor–state dispute, *Foresti v. South Africa*,<sup>9</sup> issued a decision clarifying when such document disclosure would be necessary. It concluded that in order to enable the non-parties participating in the dispute to be effective and useful, those non-parties must be granted access to documents submitted by the disputing parties.<sup>10</sup>

## 2.4 | Expropriation: Lowering the threshold for liability

According to the Tribunal, key elements establishing an expropriation claim are that the state, (1) acting through exercise of its sovereign authority (as opposed to acting merely as a contractual party) (paras. 457–458), (2) unreasonably deprived an investor of its rights (para. 463). Based on these principles, the Tribunal found that Tanzania had cumulatively expropriated the Claimant’s rights in violation of the BIT. More specifically, the “rights” that the Tribunal found had been expropriated were the Claimant’s *rights to termination of the contract in accordance with the contractually specified procedures* (para. 487). With respect to the allegedly wrongful acts, the Tribunal held that Tanzania had effected the expropriation through a series of steps including (1) the Minister’s 13 May 2005 press conference and 17 May 2005 speech to City Water staff announcing termination of the contract, (2) the government’s takeover of City Water’s premises, assets and operations on 1 June 2005 and (3) the government’s deportation of City Water officials, also on 1 June 2005 (para. 519).

One reason these findings warrant attention is that they appear to deviate from other investment law decisions by applying a low threshold for government exposure to expropriation claims. More specifically, the Tribunal’s holding that the government effected an expropriation by depriving the Claimant of its contract termination rights—a small subset of the Claimant’s original bundle of rights under the Project contract—seems inconsistent with the body of case law that only allows expropriation

<sup>9</sup> *Piero Foresti, Laura de Carli and others v. Republic of South Africa*, ICSID Case No. ARB(AF)/07/1.

<sup>10</sup> *Foresti v. South Africa*, Letter to Non-Parties in Response to Petition for Limited Participation as Non-Disputing Parties, 5 October 2009. The *Foresti* tribunal left open to a later date the issue of whether it would allow the non-parties to attend or make oral submissions at hearings in the case.



claims for substantial deprivations of rights that essentially destroy the investor's investment (paras. 438, 463). The Tribunal noted that those rights to normal contract termination were, as a result of the Claimant's own misconduct, the *only* rights the Claimant had left at the time of the expropriation; the Tribunal then concluded that, by interfering with those limited remaining rights, the government interfered with the Claimant's entire investment (para. 489). Consequently, *Biwater* seems to lower the threshold for claimants to prevail in expropriation claims and, paradoxically, also seems to do so when the investor has played a significant role in eviscerating its own rights.

*Biwater* seems to also lower the bar for government exposure to expropriation claims by finding that statements by government officials (1) to the public relating to such fundamental issues of public importance as water infrastructure and (2) to staff regarding the future of their employment could give rise to liability even where there is no evidence that such statements had any impact at all on the investment (paras. 696, 699, 800). *Biwater*, therefore, raises questions regarding when government statements are legitimate efforts to manage the public's and employees' legitimate expectations and when those statements could be deemed wrongful under international investment law.

## **2.5 | Protection of public interests and the margin of appreciation**

Tanzania argued that its actions in taking over the facilities and management of City Water could not support any liability under the BIT because they were justified under the Project contract's provision allowing the Water Authority to "take *any measures...necessary...to ensure continuity of water supply and sewerage services*" when facilitating change to "a new system of management" (para. 428). More specifically, Tanzania argued that City Water's lack of funds prevented it from performing properly and created a "real threat to public health and welfare" (para. 436). In light of that threat, when City Water refused to turn over its operation of the Project at the end of May, the government had contractual



discretion—in addition to moral and arguably legal obligations—to take actions it thought necessary to regain possession and control of City Water’s assets and operations (paras. 429, 434). Tanzania further contended it was entitled to a “measure of appreciation” by the Tribunal reviewing its actions (paras. 434–435).

The Tribunal, however, dismissed those defences and apparently did not accord the government its requested level of deference. Even though it recognized that, “viewed at that time, this crisis [with City Water] could have threatened a vital public service and...had to be resolved one way or the other” (para. 654), it nevertheless held that there was “no necessity or impending public purpose to justify the Government’s intervention in the way that took place” (para. 515). This holding suggests both a lack of deference to governments and a strict requirement for them to adhere to contractual procedures, irrespective of whether such adherence is compatible with their broader obligations to the public.

## **2.6 | Causation and damages: Finding liability even without losses**

Although the Tribunal found for the Claimant on four of its five claims, it held that Tanzania was not liable for any damages because any losses suffered by the Claimant were caused by the Claimant’s own failures in the performance of the Project contract (para. 773–808). This approach, which places the causation analysis in the context of assessing whether and what amount of damages are due, differs notably from the approach used in other cases such as *Lauder v. Czech Republic*,<sup>11</sup> which require proof of causation in order to establish there has been a violation of the BIT at all (paras. 757–758). The difference in the two approaches is not just analytical, but can have practical impacts. A tribunal’s conclusion that a respondent state has violated the BIT, for example, can result in it imposing a larger share of the parties’ and tribunal’s legal fees and costs on the respondent state or can damage the host state’s reputation as a safe and desirable place for foreign investment.

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<sup>11</sup> Final Award (3 September 2001), paras. 233–234.





# **CME Czech Republic B.V. v. Czech Republic, UNCITRAL** *(CME v. Czech Republic)*

## **Ronald S. Lauder v. Czech Republic, UNCITRAL** *(Lauder v. Czech Republic)*

Lise Johnson

Awards available at [http://ita.law.uvic.ca/alphabetical\\_list\\_content.htm](http://ita.law.uvic.ca/alphabetical_list_content.htm)

**Keywords:** Abuse of process, actionable measures, arbitrary and discriminatory conduct, broad dispute resolution provision, causation, expropriation, fair and equitable treatment, jurisdiction, multiple/parallel proceedings

### **Key dates:**

#### **Lauder v. Czech Republic**

Request for Arbitration: 19 August 1999  
Constitution of Tribunal: 5 November 1999<sup>1</sup>  
Award: 3 September 2001

#### **CME v. Czech Republic**

Request for Arbitration: 22 February 2000  
Constitution of Tribunal: 21 July 2000  
Partial Award: 13 September 2001<sup>2</sup>

### **Arbitrators:**

#### **Lauder v. Czech Republic**

Mr. Robert Briner (president)  
Mr. Lloyd N. Cutler (claimant appointee)  
Mr. Bohuslav Klein (respondent appointee)

#### **CME v. Czech Republic**

Dr. Wolfgang Kühn (president)  
Mr. Stephen M. Schwebel (claimant appointee)  
Mr. Jaroslav Hándel (respondent appointee)

### **Forum and applicable procedural rules:**

United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules  
International Bar Association Rules on the Taking of Evidence in Commercial Arbitration

### **Applicable treaties:**

#### **Lauder v. Czech Republic**

United States–Czech Republic Bilateral Investment Treaty (BIT)

#### **CME v. Czech Republic**

Netherlands–Czech Republic BIT

### **Alleged treaty violations:**

- Expropriation (*Lauder & CME*)
- Fair and equitable treatment (*Lauder & CME*)
- Full protection and security (*Lauder & CME*)
- Obligation to treat investments in accordance with international law (*Lauder & CME*)
- Obligation to not impair investments through arbitrary and discriminatory measures (*Lauder & CME*)

### **Other legal issues raised:**

- Causation
- Degree of scrutiny
- Jurisdiction—broad dispute resolution provision
- Jurisdiction—multiple/parallel proceedings

<sup>1</sup> The award does not state the date on which the *Lauder* Tribunal was constituted. 5 November 1999 is the date that the Tribunal issued its first procedural order provisionally fixing the place of arbitration.

<sup>2</sup> Jaroslav Hándel filed a dissenting opinion criticizing various aspects of the Partial Award.



## 1. CASE SUMMARY

### 1.1 | Factual background

In October 1991, the Czech Republic passed legislation allowing private parties—domestic or foreign—to broadcast radio and television programs in the country. The law also created a “Media Council” to implement the law and issue broadcasting licences.

In January 1993, the Media Council granted a broadcasting licence (the “Licence”) to CET 21, a Czech company that claimant Ron Lauder, an American citizen, had agreed to invest in and finance. The Media Council’s decision, however, drew immediate political fire from those opposed to the significant and direct involvement by foreign capital in the Licence holder. To resolve the controversy, the Media Council, CET 21 and Mr. Lauder<sup>1</sup> worked to create an entirely new entity that would avoid Mr. Lauder’s direct participation in the Licence holder, CET 21. Under the new arrangement, instead of Mr. Lauder investing directly in CET 21, Mr. Lauder and CET 21 agreed to form a new Czech company, CNTS. In exchange for their respective ownership interests in that new company, CET 21 provided CNTS with “irrevocable and exclusive” rights to use the Licence, and Mr. Lauder provided CNTS with financing.

After the new company, CNTS, launched its television station using the CET 21 Licence, the station became extremely popular and profitable. Beginning in 1994, however, various government entities including the Czech Parliament, the police and ultimately the Media Council began to investigate and/or express concerns that CNTS was improperly broadcasting television without a licence. To address those concerns, throughout 1996 and 1997 CNTS and CET 21 made various amendments to their contractual relationship to clarify that CET 21 held the Licence and

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<sup>3</sup> For purposes of simplicity, “Mr. Lauder” refers both to Mr. Lauder, the individual, and CEDC, a German company over which Mr. Lauder had voting control.



operated the broadcasting, while CNTS merely arranged services for CET 21's broadcasting activities.

In 1999, disputes began to arise between CET 21 (97.5 per cent owned by its five original Czech investors) and CNTS (99 per cent held by Mr. Lauder's company, CME) because CET 21 no longer wanted to contract exclusively with CNTS for broadcasting services relating to the Licence. In order to gain leverage and legal authority for its efforts to purchase services from third parties, in March 1999 CET 21 approached the Media Council and requested a letter from that body making clear that CNTS did not have exclusive rights to use or provide services related to the Licence. The Media Council supplied such a letter that same month, stating its belief that relationships between broadcasting operators and service providers are not exclusive.

The tension between CNTS and CET 21 continued to escalate. On 4 August 1999 CNTS failed to submit to CET 21 the "Daily Log," which listed the programming for broadcast the following day. Based on that breach, on 5 August CET 21 terminated the contract with CNTS. Because CNTS's services for CET 21 were essentially its only activities and source of income, CET 21's action effectively destroyed CNTS's once profitable business.

## **1.2 | Summary of legal issues and awards**

Roughly two weeks after CET 21 terminated its contract with CNTS, Mr. Lauder initiated his arbitration action against the Czech Republic under the United States–Czech Republic Bilateral Investment Treaty (BIT). Six months later, CME (the Dutch company held by Mr. Lauder that owned 99 per cent of the interest in CNTS) initiated a separate arbitration action against the Czech Republic under the Netherlands–Czech Republic BIT. In each case, the claimant alleged the Czech Republic violated its obligations under the relevant treaty to (1) not expropriate investments without paying compensation, (2) accord investments fair and equitable treatment, (3) provide investments full protection and security, (4) treat investments in accordance with international law and (5) refrain from impairing investments through arbitrary and discriminatory measures. And in each case, the Czech Republic raised, among other defences, a



jurisdictional defence that the tribunals lacked the power to hear the claims because Mr. Lauder’s attempt to seek the same relief from the two separate tribunals was improper and an abuse of process. Both tribunals rejected those jurisdictional arguments. Turning to the merits, the *Lauder* Tribunal rejected all of the claimant’s requests for relief; the *CME* Tribunal, however, found for the claimant on each of its causes of action.

## 2. SELECT LEGAL ISSUES

The facts set forth above gave rise to two separate investor–state arbitrations, *Lauder* and *CME*, as well as several domestic civil and criminal proceedings. This procedural aspect of *Lauder* and *CME* thus illustrates how, under international investment law as currently interpreted and applied, the same conduct by a single host state toward a *single* investment may cause the host state to have to concurrently defend itself in a number of different forums—a burden that could be especially weighty and yet one that host states might frequently have to bear.

The substantive aspects of the *Lauder* and *CME* cases are also significant for a number of reasons. Most obviously, these cases are notable because the two tribunals came to opposite conclusions regarding whether the Czech Republic should be held liable under the governing BITs. With respect to their interpretations of the facts, the *Lauder* Tribunal demonstrated deference to the governmental Media Council’s actions that stands in stark contrast to the *CME* Tribunal’s skepticism of the Media Council’s motives. And with respect to the law, although both tribunals often recited similar general statements regarding the meaning of the relevant treaty provisions, they diverged in certain key areas such as when setting forth and applying the elements of expropriation claims, examining whether there was an offending “measure,” and requiring proof of causation. Each of those issues has implications for governments’ abilities to implement and enforce their domestic rules and policies without exposing them to liability under international law; each is explained in more detail below.



## 2.1 | Allowing investors to pursue actions based on the same conduct in multiple forums

In both *Lauder* and *CME*, the Czech Republic argued that the tribunal lacked jurisdiction because the claimant was seeking resolution of the *same* investor–state dispute involving the *same* parties before another arbitral tribunal. In each case, however, the tribunal rejected those arguments based on formalistic interpretations of what constitutes the same “dispute” and who are the relevant “parties” (*Lauder* 160–180; *CME* 412). More specifically, the tribunals held that the disputes were different from each other because, notwithstanding the same facts and “virtually identical claims” (*CME* 412), each dispute was covered by a different BIT (*Lauder* 160–180; *CME* 412). They also stated that the parties were different because Mr. Lauder was the claimant in one case, while CME was the claimant in the other (*Lauder* 165, 171; *CME* 412). Neither tribunal deemed it legally significant for purposes of jurisdiction that Mr. Lauder exercised control over CME (*Lauder* 77, 165; *CME* 412). Both tribunals, however, noted that the Czech Republic did not agree to consolidate the proceedings as requested by the claimants, a fact that might have influenced the tribunals’ receptiveness to the Czech Republic’s arguments on the jurisdiction issue (*Lauder* 173; *CME* 412).

If followed, the approach taken in *CME* and *Lauder* toward jurisdiction may similarly require other host states to have to defend the same acts in a number of different forums, causing them to incur what may be substantial defence costs while allowing investors to take multiple “bites at the apple.”

## 2.2 | The scope of expropriation provisions: *CME* finds the Czech Republic liable, while *Lauder* rejects liability

The *Lauder* and *CME* cases also are significant due to their diverging interpretations of governments’ obligations not to unlawfully expropriate or deprive investors of their property. Beginning with *Lauder*, when assessing the claimant’s expropriation allegations, the Tribunal explained that three elements must be satisfied for such a claim to succeed: (1) There must be an action or measure taken by the state, (2) for the benefit of the



state, (3) that seriously interfered with the investor's property rights (*Lauder* 202). The *Lauder* Tribunal then found that the facts of the case did not establish any of those elements. The first and the third elements failed because, according to the Tribunal, it was the private company with which CNTS had contracted, CET 21, not the Czech Republic that seriously interfered with Mr. Lauder's property rights when it terminated the contract. Any prior interference by the Media Council or other government officials was not severe enough to constitute a taking (*id.* at 202). Moreover, according to the *Lauder* Tribunal, even if it could be said the Media Council's actions were the cause of Mr. Lauder's losses, those actions would not support an expropriation claim because they "did not benefit the Czech Republic or any person or entity related thereto, and [were] not taken for any public purpose" (*id.* at 203).

The *CME* Tribunal likewise stated the general rule that an expropriation will only be found if the state has substantially interfered with or deprived the investor of the value of its investment (*CME* 150). As compared to *Lauder*, however, the *CME* Tribunal interpreted what constitutes a substantial interference or deprivation much more broadly, holding that the requisite level of interference was satisfied when the Czech Republic "coerced" CNTS to give up its *contractual protections and legal certainty* and thereby caused a "substantial devaluation of the Claimant's investment" (*CME* 599). The *CME* Tribunal also differed from *Lauder* by stating that, when determining whether an expropriation has occurred, it is "immaterial whether the State itself...economically benefits from its actions" (*CME* 150).

It is important to note, however, that the *CME* Tribunal's broad interpretation of the expropriation provision—an interpretation that could expose a wide range of government actions to investor challenges—may have only limited application in future investor–state disputes. This is because the *CME* Tribunal based its reading of the scope of the obligation on the specific language of the governing Dutch–Czech BIT, which "*track[ed] the broadest expropriation provisions* in bilateral investment treaties, specifically, and in international law, generally" (*CME* 150) (emphasis added). The *CME* Tribunal noted that the BIT did not even use the term "expropriation," but



instead stated that neither “...Contracting Party shall take any measures *depriving*, directly or indirectly, investors of the other Contracting Party of their investments” (*CME* 149) (emphasis added).

### **2.3 | The causation requirement: A barrier to liability in *Lauder* but not in *CME***

Another issue that impacts the extent to which host states may be liable for actions impacting foreign investors, and on which the *CME* and *Lauder* tribunals again diverged, is the issue of causation. As a general rule, before holding a host state accountable for damages suffered by an investor, the investor must not only show that the state breached its obligations under the treaty, but also prove that the state’s actions actually *caused* the investor harm. *Lauder* illustrates the role this requirement can play in narrowing host–state liability. In that case, the Tribunal held that the Czech Republic acted discriminatorily and arbitrarily toward the claimant when, in response to political opposition, it required Mr. Lauder to invest in broadcasting activities by forming a new entity with CET 21 rather than investing directly in CET 21 as Mr. Lauder had originally intended (*Lauder* 222–232). The *Lauder* Tribunal then explained that in order to hold the Czech Republic liable for damages based on that breach of the BIT, Mr. Lauder was required to prove that the Czech Republic’s arbitrary and discriminatory conduct caused the harm he ultimately suffered (*Lauder* 234). According to the Tribunal, in order to establish the necessary causal link, Mr. Lauder had to show not only that the Czech Republic’s conduct was a “but for” cause of his harm (i.e., the harm would not have occurred “but for” the government’s conduct), but also that the wrongful conduct was a legal or proximate cause of the harm (i.e., the harm was foreseeable) (*Lauder* 234). Applying those tests of causation, the Tribunal held that, although the Czech Republic’s efforts to change the nature of Mr. Lauder’s investment were a “but for” cause of CET 21’s termination of the contract and Mr. Lauder’s resulting damages, they were “too remote” from the harm Mr. Lauder eventually suffered to qualify as the legal or proximate cause (*Lauder* 235). Accordingly, the *Lauder* Tribunal concluded that the Czech Republic was not liable for any damages based on its breach. The *Lauder*



Tribunal then similarly cited the lack of causation as one of the factors supporting its rejection of Mr. Lauder’s other claims (*Lauder* 243, 274, 288, 304, 313).

In contrast, the *CME* Tribunal concluded that the Media Council caused “the collapse of CME’s investment” by “coercing” CNTS to amend its legal agreement with CET 21 and by issuing the March 1999 letter (*CME* 575). Although it did not explicitly require that both “but for” and proximate causation be established, the *CME* Tribunal stated its belief that the Media Council “must have foreseen” that its actions would lead to CET 21’s termination of the contract and CME’s losses (*CME* 585). With respect to the issue of damages, the *CME* Tribunal looked to principles in tort law and decided that the Czech Republic would be “liable to pay for *all* of the harm...caused, notwithstanding that there was a concurrent cause of that harm and that another is responsible for that cause” (*CME* 581–582) (emphasis added).

#### **2.4 | The tribunals’ different awards and approaches: Exacerbating uncertainty for host states and investors**

In addition to their respective interpretations of the causation requirement and holdings on each of the claimants’ five claims, *CME* and *Lauder* differ from each other in key areas and approaches, including:

- *The degree of deference accorded to host states’ justifications:*

When evaluating the claimants’ allegations that the Czech Republic expropriated property, breached the fair and equitable treatment standard, and acted arbitrarily and discriminatorily, the two tribunals both stated that there is a difference between measures that violate those international law obligations and permissible “ordinary measures of the State and its agencies in proper execution of the law” (*CME* 503). Yet each tribunal came to significantly different conclusions regarding into which category the Czech Republic’s actions fell. The *Lauder* Tribunal accepted the Czech Republic’s characterization of the government’s actions as legitimate regulatory efforts to ensure compliance with the law (*Lauder* 253, 255, 264, 291, 296–99, 310–14). In contrast, the *CME*





Tribunal conducted its own review of the documents and witness statements and concluded that the government did not have any legitimate concerns and was acting unlawfully in an attempt to pressure CNTS to give up its legal rights (*CME* 514, 515, 520, 534, 603, 611–614). These divergent outcomes illustrate the different levels of deference the tribunals were willing to grant the Czech Republic’s justification of the government’s challenged actions.

- *What constitutes an actionable “measure”:*

In *Lauder*, the claimant argued that the Czech Republic impaired its investment through various “arbitrary and discriminatory measures” including statements, reports and the March 1999 letter by the Media Council that questioned or were critical of CNTS’s activities (*Lauder* 216, 237). The *Lauder* Tribunal, however, held that none of those communications qualified as “measures” actionable under the BIT (*Lauder* 244–247, 275–288). In contrast, the *CME* Tribunal grouped all of the challenged actions and communications into one “course of dealing” that, together, supported liability (*CME* 170).

Due to these differences in reasoning and findings, *CME* and *Lauder* exacerbate uncertainty regarding what acts and measures host states can legitimately take without incurring liability under international investment law. This uncertainty also arguably tilts the investor–state dispute system in favour of investors, incentivizing them to file even questionable claims, especially given that there is no formal penalty for pursuing unsound or frivolous actions.



# **CMS Gas Transmission Co. v. Republic of Argentina, ICSID Case No. ARB/01/8 (CMS v. Argentina)**

Fiona Marshall

Decisions and award available at [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC687\\_En&caseId=C4](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC687_En&caseId=C4)

**Keywords:** Fair and equitable treatment, jurisdiction, minority shareholders, multiple/parallel proceedings, necessity defence, standard for annulment, umbrella clause

## **Key dates:**

Request for Arbitration: 26 July 2001

Decision on Jurisdiction: 17 July 2003

Award: 12 May 2005

Argentine Republic's Application for Annulment: 8 September 2005

Decision on Argentine Republic's Request for a Continued Stay of Enforcement of the Award: 1 September 2006

Decision on Annulment: 25 September 2007

## **Arbitrators:**

Prof. Francisco Orrego Vicuña (president, appointed under article 38 of the ICSID Convention, as parties failed to agree)

Mr. Marc Lalonde (claimant appointee)

Judge Francisco Rezek (respondent appointee)

## **Composition of Annulment Committee (appointed under Rule 52(2), ICSID Rules of Procedure for Arbitration Proceedings):**

Judge Gilbert Guillaume (president)

Judge Nabil Elaraby

Prof. James Crawford

## **Forum and applicable procedural rules:**

International Centre for Settlement of Investment Disputes (ICSID)

ICSID Rules of Procedure for Arbitration Proceedings

## **Applicable treaty:**

United States–Argentina Bilateral Investment Treaty (BIT)

## **Alleged treaty violations:**

- Arbitrary or discriminatory treatment
- Expropriation
- Fair and equitable treatment
- Umbrella clause

## **Other legal issues raised:**

- Challenges to awards—ICSID annulment proceedings—standard for annulment
- Jurisdiction—definition of “investment”—minority shareholders
- Necessity defence



## 1. CASE SUMMARY

### 1.1 | Factual background

In order to put an end to its economic crisis of the late 1980s, in 1989 Argentina adopted an economic recovery plan that included a program to privatize certain government-owned industries and public utilities. It also enacted various new laws, including a 1991 Currency Convertibility Law, a 1991 Decree pegging the Argentine currency to the United States dollar and a 1992 Gas Law establishing the legal framework for the privatization of the gas industry and regulation of the transport and distribution of natural gas.

Under the Gas Law, the national state-owned gas monopoly was divided into a number of companies to be privatized, one of which was Transportadora de Gas del Norte (TGN). In December 1992, TGN was granted a licence to transport gas in Argentina. By 1999, CMS Gas Argentina, a wholly owned subsidiary of claimant CMS Gas Transmission Company (CMS), a United States company, had purchased close to 30 per cent of TGN's shares. According to CMS, under the regime established by the above laws and decrees and by the licence granted to TGN to transport gas, its tariffs were to be calculated in dollars, converted to pesos at the time of billing and adjusted every six months in accordance with the United States Producer Price Index (US-PPI).

In the late 1990s, a serious economic crisis began in Argentina. In January 2000 and again in July 2000, the representatives of the gas companies agreed, subject to certain conditions, to defer the adjustment of the gas tariffs in accordance with the US-PPI. On several occasions, the public regulatory authority of the gas industry confirmed the continuing freeze of the US-PPI adjustment and, in August 2000, an Argentine court issued an injunction for the suspension of the July 2000 agreement. In late 2001, the crisis deepened and, on 6 January 2002, a law declaring a public emergency was passed. Under the Emergency Law, the right of licensees of public utilities to adjust tariffs according to the US-PPI was terminated, as



well as the calculation of tariffs in dollars. The tariffs were redenominated in pesos, at the rate of one peso to one dollar.

## 1.2 | Summary of legal issues and decisions

CMS commenced arbitration proceedings against Argentina at ICSID under the United States–Argentina Bilateral Investment Treaty (BIT) regarding the actions taken in 2000 to defer the application of the US–PPI to gas industry tariffs, Argentina’s Emergency Law and other measures adopted during the crisis. CMS claimed violations of the BIT with respect to expropriation and fair and equitable treatment. The Tribunal rejected CMS’s claims on expropriation, but ruled that Argentina had breached its obligations on fair and equitable treatment and the umbrella clause (by violating stabilization clauses in a licence). The Tribunal also rejected Argentina’s preliminary objection to jurisdiction and did not accept Argentina’s necessity and emergency defences relating to the severe economic, social and political crisis that unfolded in Argentina in 2000.

The Tribunal awarded CMS US\$133.2 million and gave Argentina the option to purchase all CMS’s shares in TGN by payment of a further US\$2.148 million within one year. It held that each party should pay half of the arbitration costs and its own legal costs.

Argentina applied for an annulment of the award, claiming that the Tribunal had manifestly exceeded its powers and failed to state the reasons for its decision. The Annulment Committee upheld one of Argentina’s claims for annulment and rejected all the others. The Committee held that the Tribunal had correctly decided that it had jurisdiction to decide CMS’s claim and that the Tribunal had not manifestly exceeded its powers when considering CMS’s claim regarding breach of fair and equitable treatment. On the Tribunal’s decision regarding Argentina’s necessity defence, the Annulment Committee found two manifest errors of law but also declared that, given its limited jurisdiction, it could not annul the Tribunal’s holding on that point. The Committee annulled the Tribunal’s ruling on the umbrella clause, however, for failure to state reasons.



## 2. SELECT LEGAL ISSUES

The CMS Annulment Committee's decision is important in a number of respects. First, it confirmed that, where a treaty's definition of "investment" includes equity, stock or shares in a company, a minority shareholder has a direct right of action against the host state that can be asserted independently from the rights of the company itself. Second, it held that an umbrella clause that requires a host state to observe "any obligations it may have entered into with regard to investments" is concerned with consensual obligations not entered into *erga omnes*, but with regard to particular persons. It held that the effect of an umbrella clause is not to transform the relied-upon obligation into something else; the content of the obligation is unaffected and likewise the *parties* to the obligation (i.e., the persons bound by it and entitled to rely upon it) are not changed. Third, it held that a host state is not required to satisfy the requirements of the customary law defence of necessity, codified in article 25 of the Articles on State Responsibility, in order to rely on a defence of necessity contained in the treaty (if there is one). Fourth, the CMS decision has produced one of the most extensive interpretations of the fair and equitable treatment obligation, extending host states' obligations under the clause well beyond the level of customary international law. Finally, it confirmed that the powers of annulment in an ICSID arbitration are limited to those set out in Article 52 of the ICSID Convention. In particular, an annulment committee is not an appeal mechanism and it has no power to correct manifest errors of law, even where it recognizes these.

### 2.1 | Allowing minority shareholders to bring claims

Argentina objected to jurisdiction on the ground that Article 25(1) of the ICSID Convention covers "any legal dispute arising *directly* out of an investment" and that CMS was claiming not for direct damages but for *indirect* damages resulting from its minority shareholding in TGN after TGN suffered damage regarding its licence. Argentina argued that because TGN was the licensee, only TGN could claim directly for any damage suffered regarding its licence. The Tribunal rejected Argentina's objection.



The Annulment Committee held that the Tribunal had correctly decided that it had jurisdiction to decide CMS's claim. It held that the BIT defined "investment" broadly to include "every type of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party," and included "a company or shares of stocks or other interests in a company." The Annulment Committee observed that this definition did not require the shareholder to own a majority of the stock or control the company. It affirmed the Tribunal's finding that CMS was an investor within the meaning of the BIT and held that the Tribunal had not manifestly exceeded its powers by assuming jurisdiction over CMS's claims (paras. 68–76, Annulment Decision).

Pursuant to the approach taken in this case, a minority shareholder has a direct right of action against the host state that can be asserted independently from the rights of the company itself, provided that the relevant treaty's definition of "investment" includes equity, stock or shares in a company. This interpretation can have the practical impact of permitting numerous different shareholders to bring claims against a single host state based on the same allegedly wrongful treatment of a single company.

## **2.2 | Fair and equitable treatment: A stable legal and business environment as an essential element**

CMS alleged that Argentina had breached the fair and equitable treatment standard and had not ensured full protection and security to the investment, particularly insofar as Argentina had profoundly altered the stability and predictability of the investment environment, the certainty of which was key to CMS's decision to invest (paras. 266–269, Award).

The Tribunal noted that the BIT, like most bilateral investment treaties, did not define the standard of fair and equitable treatment. It reasoned, however, that because a principal objective of the BIT's preamble was "to maintain a stable framework for investments and maximum effective use of economic resources," there could be no doubt that a stable legal and business environment was an essential element of fair and equitable treatment. The Tribunal accepted that the guarantees given in the legal framework



regarding the tariff regime were crucial for the investment decision and that the measures complained of did, in fact, entirely transform the legal and business environment under which the decision to invest and the investment were made. The Tribunal concluded that the measures adopted by Argentina were a breach of its obligation to accord the investor fair and equitable treatment under Article II(2)(a) of the BIT (paras. 273–281, Award). The Annulment Committee upheld the Tribunal’s finding.

### **2.3 | The umbrella clause: The Annulment Committee rejects the Tribunal’s broad interpretation**

The Tribunal also held that Argentina had breached the umbrella clause in Article II(2)(c) of the BIT, which required Argentina to observe “any obligations it may have entered into with regard to investments.” It held that there were two stabilization clauses contained in the licence, namely provisions not to freeze the tariff regime or subject it to price controls and not to alter the basic rules governing the licence without TGN’s written consent. The Tribunal concluded that by failing to observe these clauses, Argentina was in breach of the BIT’s umbrella clause (paras. 299–303, Award).

The Annulment Committee took a different view, holding that there were a number of difficulties with the Tribunal’s broad interpretation of the umbrella clause in Article II(2)(c) of the BIT. The Committee noted that CMS had conceded that the obligations of Argentina under the licence were obligations to TGN but had then claimed that, while it was not entitled as a minority shareholder to invoke those obligations under the licence, the effect of Article II(2)(c) was to give it standing to invoke them under the BIT. The Committee noted that it seemed that the Tribunal may have accepted CMS’s reasoning, but the award did not address this expressly (paras. 90–94, Annulment Decision). In contrast, the Committee held that an umbrella clause that requires a host state to observe “any obligations it may have *entered into* with regard to investments” is concerned with consensual obligations with regard to particular persons, not obligations *erga omnes*. It held that the effect of such a clause is not to transform the obligation relied upon into something else; the content of the obligation is



unaffected, as is its proper law, and likewise the *parties* to the obligation (i.e., the persons bound by it and entitled to rely on it) are not changed by reason of the umbrella clause (para. 95, Annulment Decision). The Committee concluded that it was quite unclear how the Tribunal arrived at its conclusion that CMS could enforce the obligations of Argentina to TGN and that the Tribunal's finding on Article II(2)(c) must be annulled for failure to state reasons (paras. 96–97, Annulment Decision).

#### **2.4 | Defence of necessity: The Annulment Committee upholds the Tribunal's rejection of the defence**

The Tribunal did not accept Argentina's defences based on either the customary international law defence of necessity or the necessity defence in Article XI of the BIT. The Tribunal held that Article 25 of the International Law Commission's Draft Articles on State Responsibility reflected customary international law on necessity.<sup>1</sup> In respect of whether Argentina had met the requirements of the defence of necessity under customary law, the Tribunal held that, while the crisis may have placed an essential interest of the state at grave and imminent peril, it was not clear that, as would be required to be covered by the customary international law defence, the measures adopted were the only means available (paras. 315–324, Award). Moreover, to qualify for the customary law defence, the state should not have contributed to the situation of necessity, although such contribution must be "sufficiently substantial and not merely incidental or peripheral." The Tribunal held that while external factors fuelled additional difficulties, the crisis had its roots in Argentina's earlier crisis in the 1980s and shortcomings of its government policies in the 1990s

<sup>1</sup> Article 25 provides:

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





(paras. 328–329, Award). Noting that all the conditions of the customary law defence had to be “cumulatively” satisfied, the Tribunal held that these had not been fully met so as to preclude the wrongfulness of the acts (paras. 330–331, Award).

Regarding the defence of necessity contained in Article XI of the BIT,<sup>2</sup> the Tribunal stated that while the text of Article XI did not refer to economic crises, there was nothing in customary international law or the object and purpose of the BIT that on its own excluded major economic crises from its scope (para. 359, Award). The Tribunal held, however, that a BIT is clearly designed to protect investments at times of economic difficulties or other circumstances leading to adverse measures by the government and that, in the absence of such profoundly serious conditions as total collapse, the BIT would prevail over any plea of necessity. The Tribunal concluded that the Argentine crisis was severe but did not result in total economic and social collapse and that such crises in other countries had not seen those countries derogate from their international obligations. The Tribunal then stated that although not excusing liability or precluding wrongfulness, the crisis ought to be considered when determining compensation (paras. 353–356, Award).

The Annulment Committee noted that the Tribunal had considered that Article 25 of the International Law Commission’s Articles on State Responsibility reflected the defence of necessity under customary international law and that it had examined and taken a decision on each of the conditions in Article 25, clearly stating its reasons. The Committee held that it had no jurisdiction to consider whether, in doing so, the Tribunal made any error of fact or law (para. 121, Annulment Decision). With respect to the defence based on Article XI of the BIT, the Committee held that the Tribunal should have been more explicit that it considered Article XI be interpreted in light of customary international law on

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<sup>2</sup> Article XI of the BIT provides: “This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.”



necessity and that, if the conditions fixed under that law were not met, Argentina's defence under Article XI was likewise to be rejected. The Committee noted, however, that both parties had understood the award in that sense and, although the award could have been clearer, a careful reader could follow its implicit reasoning. It held that annulment could therefore not be upheld on this point (paras. 122–127, Annulment Decision).

The Annulment Committee found that the Tribunal had made two manifest errors of law when considering whether Argentina qualified for the defence of necessity under Article XI of the BIT. First, the Tribunal had incorrectly held that the requirements of the defence of necessity under Article XI were the same as those under customary international law. Second, the Tribunal did not examine whether the conditions laid down by Article XI were fulfilled (paras. 130–132, Annulment Decision). The Committee held that these two errors made by the Tribunal could have had a decisive impact on the operative part of the award and that if the Annulment Committee were a court of appeal, it would have to reconsider the award on this ground. The Committee noted, however, that its limited jurisdiction under Article 52 of the ICSID Convention meant that it could not simply substitute its own view of the law and facts for those of the Tribunal. Notwithstanding the identified errors, the Tribunal had applied Article XI of the BIT, albeit cryptically and defectively. The Committee held there was thus no manifest excess of powers permitting annulment of that aspect of the award (paras. 135–136, Annulment Decision).



# Continental Casualty Co. v. Republic of Argentina, ICSID Case No. ARB/03/9 (*Continental Casualty v. Argentina*)

Fiona Marshall

Decisions and award available at [http://ita.law.uvic.ca/alphabetical\\_list\\_respondant.htm](http://ita.law.uvic.ca/alphabetical_list_respondant.htm)

**Keywords:** Expropriation, fair and equitable treatment, legitimate expectations, margin of appreciation, necessity defence, reference to other bodies/principles of law, umbrella clause

## Key dates:

Request for Arbitration: 17 July 2003

Decision on Jurisdiction: 22 February 2006

Award: 5 September 2008

Decision on Preliminary Objection to Application for Annulment: 23 October 2009

Decision on Stay of Enforcement of Award: 23 October 2009

Decision on Annulment: Pending<sup>1</sup>

## Arbitrators:

Prof. Giorgio Sacerdoti (president)

Mr. V. V. Veeder (claimant appointee)

Lic. Michell Nader (respondent appointee)

## Forum and applicable procedural rules:

International Centre for Settlement of Investment Disputes (ICSID)

ICSID Rules of Procedure for Arbitration Proceedings

## Applicable treaty:

United States–Argentina Bilateral Investment Treaty (BIT)

## Alleged treaty violations:

- Expropriation
- Fair and equitable treatment
- Transfers relating to an investment
- Umbrella clause

## Other legal issues raised:

- Interpretation—reference to other bodies/principles of law
- Margin of appreciation
- Necessity defence

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<sup>1</sup> As of 31 December 2010.



## 1. CASE SUMMARY

### 1.1 | Factual background

This case is one of the more than forty investment treaty arbitrations brought by investors challenging measures taken by Argentina in response to its 2001–2002 financial crisis. In June 1997, prior to the crisis, Continental Casualty (“Continental”), a U.S. company, acquired a 70 per cent shareholding in one of Argentina’s leading providers of workers’ compensation insurance services. In December 2000, Continental increased ownership of its Argentine subsidiary to 99.9995 per cent and the subsidiary’s name was changed to CNA ART.

According to Continental, prior to March 2001, the CNA ART investment portfolio was primarily in assets denominated in Argentine pesos, which were at the time fully convertible to U.S. dollars at a one-to-one exchange rate. In order to hedge the risk of devaluation during the financial crisis, CNA ART’s management decided to invest assets within Argentina in low-risk U.S.-denominated assets. Continental claimed that commencing in December 2001, Argentina enacted a series of decrees and resolutions that destroyed the legal security of the assets held by CNA ART and frustrated CNA ART’s ability to hedge against the risk of the devaluation of the peso. Inter alia, Argentina restricted transfers out of its territory, pesified U.S. dollar deposits, and pesified and defaulted on its debt instruments. Continental claimed that, due to these measures, it suffered losses of US\$46,412,000 (paras. 16–19).

### 1.2 | Summary of legal issues and decisions

The Tribunal held that Continental failed entirely in its claims based on freedom of transfer and the umbrella clause (regarding non-contractual obligations). The Tribunal further held that the defence of necessity in the United States–Argentina Bilateral Investment Treaty (BIT) precluded Argentina’s liability for breaching the BIT’s umbrella clause (regarding contractual obligations) and for failing to ensure fair and equitable treatment (other than regarding certain treasury bills). The sole claim on



which Continental prevailed was that of breach of fair and equitable treatment regarding the 2004 restructuring of certain treasury bills (known as “LETES”). For this breach, the Tribunal held Argentina liable to pay compensation of US\$2,800,000 plus interest (paras. 304–305).

Both Continental and Argentina have sought annulment of the award; a decision on annulment is pending as of 31 December 2010.

## 2. SELECT LEGAL ISSUES

This case is important in two main respects. First, it is notable for its discussion of umbrella clauses requiring the host state to observe “any obligations it may have entered into with regard to investments.” The Tribunal held that obligations contained in the general law of the host state are not covered by umbrella clauses; rather, to be covered, laws must address a specific business sector and its investors. Moreover, the Tribunal held that obligations contained in a contract entered into regarding the investment may be covered, even if the claimant was not a party to the contract. This contrasts with the finding of the tribunal in *Siemens v. Argentina*, which held that an umbrella clause did not cover obligations contained in a contract to which the host state was not a party. The *Continental Casualty* award is also notable for its finding that Argentina qualified for the defence of necessity under Article XI of the BIT, in particular its view that the standard of “necessary” should be based not on the customary law standard set out in Article 25 of the Draft Articles on State Responsibility, but rather on the standard used in World Trade Organization (WTO) law regarding Article XX of the General Agreement on Tariffs and Trade (GATT).



## 2.1 | Accepting Argentina's defence of necessity

The Tribunal held that the ordinary meaning of Article XI<sup>2</sup> of the BIT indicated that any measure properly taken because it was necessary “for the maintenance of the public order” or for “the protection of essential security interests” would lie outside the scope of the BIT, so that the party taking it would not be in breach of the treaty (para. 164). The Tribunal differentiated Article XI of the BIT from the defence of necessity under customary international law and held that Article XI was not subject to the same strict requirements as the plea of necessity under customary international law (para. 167). The Tribunal noted that the parties disagreed over the application of Article XI, in particular (i) whether the 2001–2002 crisis involved the “maintenance of public order” and/or the protection of Argentina’s “essential security interests,” (ii) whether Article XI was “self-judging,” and (iii) whether the challenged measures were “necessary” in order to maintain the public order and protect the essential security interests of Argentina (para. 169).

The Tribunal held that “maintenance of public order” was intended as a synonym for “public peace,” which could be threatened by insurrections, riots and violent disturbances of the peace. Actions by central government to preserve or restore civil peace, even when due to significant economic and social difficulties, could fall within the scope of Article XI. As to “essential security interests,” the Tribunal recalled that international law was not blind to states’ needs to exercise their sovereignty in the interest of their populations, free from internal as well as external threats to security. Such national interests might include protecting the health, safety and welfare of a state’s people.

The Tribunal held that it was impossible to deny that, inter alia, the near collapse of the domestic economy, the social hardships bringing more than

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<sup>2</sup> Article XI states that “[t]his Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or the restoration of international peace or security, or the protection of its own essential security interests.”



half the population below the poverty line, the real risk of political disturbances, the abrupt resignations of successive presidents, and the resort to emergency legislation, taken together, qualified as a situation where the maintenance of public order and the protection of essential security interests of Argentina were vitally at stake. According to the Tribunal, the protection of essential security interests under Article XI does not require “total collapse” of the country “before responsible national authorities may have recourse to its protection.... There is no point in having such protection if there is nothing left to protect” (para. 180). The Tribunal adds, “Moreover, in the Tribunal’s view, this objective assessment [of the scope of the exception] must contain a significant margin of appreciation for the state applying the particular measure: a time of grave crisis is not a time for nice judgments, particularly when examined by others with the [advantage] of hindsight” (para. 181).

The Tribunal held that, contrary to Argentina’s assertion, Article XI of the BIT was not self-judging (para. 187).

The Tribunal disagreed with the tribunal in *Enron v. Argentina* that the standard of “necessary” under the BIT was inseparable from the customary law meaning of “necessary.”<sup>3</sup> Rather, the Tribunal held that because the text of Article XI reflected the formulation of Article XX of the GATT, it was more appropriate to refer to WTO case law. With regard to the necessity test under Article XX of the GATT, the Tribunal held that it was well established that “necessary” is not limited to that which is “indispensable,” although it was located on a continuum significantly closer to “indispensable” than merely “making a contribution to.” To determine whether a measure that is not indispensable may nevertheless be “necessary,” one should weigh the relative importance of interests furthered by the measure, the measure’s contribution to realizing the ends pursued, and the impact of the measure on international commerce.

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<sup>3</sup> According to the International Law Commission’s Commentary on the Draft Articles on State Responsibility, paragraph 15, a plea of necessity under customary international law “is excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient.”



Under WTO law, a measure is not necessary if another treaty-consistent or less inconsistent alternative measure that the concerned member state could reasonably be expected to employ is available. An alternative measure is not “reasonably available” where it is merely theoretical in nature, e.g., where the member state is not capable of taking it or where the measure imposes an undue burden, such as prohibitive costs or technical difficulties. Moreover, a “reasonably available” alternative must be a measure that would preserve the state’s right to achieve its desired level of protection with respect to the objective pursued (paras. 191–195).

The Tribunal assessed each of the challenged measures in light of the principles drawn from WTO law. It noted that it was not called upon to make any political or economic judgment on Argentina’s policies but only to evaluate if the plea of necessity was well-founded (paras. 196–199). The Tribunal concluded that for all but one of the challenged measures, there were no reasonably available alternatives. The one exception was Argentina’s restructuring of certain treasury bills (LETES) in December 2004. The Tribunal rejected the defence of necessity under Article XI with respect to the restructuring of the LETES, *inter alia*, because of the late date in which the swap was offered, when Argentina’s financial conditions were evolving toward normality. The Tribunal held that the same factor meant that Argentina could not avail itself of the alternative defence of necessity in customary international law, either (paras. 220–221).

## **2.2 | Fair and equitable treatment and the issue of non-discriminatory laws of general application**

Continental claimed that “a stable legal and business environment” was an essential element of the fair and equitable treatment standard and that as an investor it had a “legitimate expectation” that the convertibility regime of Argentina would not be changed. The Tribunal, however, held that Continental’s situation was significantly different from some of the other investor claims against Argentina regarding measures taken during the financial crisis. In particular, the legal or contractual measures at issue in the present case were addressed either to the generality of Argentina’s





public or to a wide range of depositors and subscribers of financial instruments. Moreover, Continental had not relied on the general legislative “assurances” in making its investment in Argentina, since it had entered into that market before these assurances were made.

In light of the above, the Tribunal concluded that Continental could not invoke legitimate expectations regarding the change of the currency convertibility regime, notwithstanding political declarations that convertibility would not be abandoned. As far as the pesification of debt securities contracts being considered contrary to fair and equitable treatment, the Tribunal noted that these measures were general and not discriminatory and moreover the necessity defence under Article XI precluded Argentina’s liability. The Tribunal did find, however, that Argentina had breached fair and equitable treatment with respect to its 2004 restructuring of the LETE treasury bills and, as noted above, the Tribunal also held that, due to the late date of this restructuring, the defence of necessity was not available. The Tribunal held that the terms of the unilateral restructuring were unfair, in particular because they required holders to take substantial losses and to waive all rights, including the protection of the BIT (paras. 249–265).

### **2.3 | Adopting a broad interpretation of the umbrella clause as encompassing a wide array of contractual commitments**

The Tribunal noted that arbitral tribunals’ interpretations of umbrella clauses requiring a host state to observe “any obligations it may have entered into with regard to investments” remained inconsistent. It held that to be covered, obligations must address the investments with some degree of specificity, i.e., obligations contained in the general law of the host state would not be covered. The clause may however, cover unilateral commitments arising from the host state’s law regulating a particular business sector and addressed specifically to the foreign investors therein. Provided that the obligations had been entered “with regard” to investments, they might be entered into with persons or entities other than



the investor itself, so that a contractual undertaking by Argentina to Continental's subsidiary CNA ART would not, in principle, be excluded.

The Tribunal held that the legislative assurances relied upon by Continental were not covered by the umbrella clause because they were directed either to Argentina's general public or to a wide range of depositors and subscribers. Regarding contractual assurances contained in the debt securities, the Tribunal held that such obligations were guaranteed by the umbrella clause, but that liability was precluded by Argentina's defence of necessity under Article XI. With respect to the LETE treasury bills, the Tribunal held that because it had already found a breach of fair and equitable treatment regarding the bills, it did not need to investigate further whether Argentina's actions regarding the LETEs also breached the umbrella clause (paras. 287–303).



# **Glamis Gold Ltd. v. United States of America**

*(Glamis v. United States)*

Howard Mann

Award and other documents available at <http://www.state.gov/s/l/c10986.htm>

**Keywords:** Amicus curiae, cultural measures, environmental measures, expropriation, fair and equitable treatment/minimum international standards of treatment, legitimate expectations, transparency

**Key dates:**

Notice of Arbitration: 9 December 2003

Constitution of Tribunal: 12 November 2004

Final Award: 8 June 2009

**Arbitrators:**

Mr. Michael Young (president)

Mr. Kenneth Hubbard (replacing Mr. Donald Morgan, claimant appointee)

Prof. David Caron (respondent appointee)

**Forum and applicable procedural rules:**

International Centre for Settlement of Investment Disputes (ICSID)

United Nations Commission on International Trade Law

(UNCITRAL) Arbitration Rules

**Applicable treaty:**

North American Free Trade Agreement (NAFTA), Chapter Eleven, Investment

**Alleged treaty violations:**

- Expropriation
- Fair and equitable treatment/minimum international standards of treatment

**Other legal issues raised:**

- Procedure—amicus curiae participation
- Procedure—transparency



## 1. CASE SUMMARY

### 1.1 | Factual background

Glamis Gold Limited (“Glamis” or “Claimant”) is a Canadian-based mining company that had sought permission to develop a mine site in California using “traditional” open pit techniques. In this case, Glamis alleged that the United States had breached the investor protections in NAFTA through the adoption of measures by the state of California that established strict rules on how mining could be undertaken, required complete backfill and restoration of the site, aimed to protect the Native American religious and cultural heritage sites, and effectively precluded the open pit production process that Glamis had originally intended to use. Other techniques to mine the property remained available, though at greater operating cost.

Beginning in the mid-1990s, Glamis began efforts to secure the permits and approvals necessary to operate its mining project. Changes in government and the undertaking of extensive and complex environmental and cultural impact assessment processes, including the assessment of potential effects on ancient Native American religious and cultural sites, impacted the permitting processes. These processes themselves were subject to significant controversy and attracted much public attention. While they were proceeding, California adopted more stringent standards, which would apply to other possible mines as well as to the Glamis project, than previously had existed for such types of mining. Glamis was the first company subject to these new standards. One reason these higher standards were adopted was that the scale of mining with the proposed, more traditional, open pit techniques was larger than had occurred before in California. Another was the proximity to the traditional Native American religious grounds.

The new regulations did not dispossess Glamis of the property or preclude its development through other possible mining processes; however, they did impact the level of profits that could be anticipated if Glamis were to proceed with the project. In July 2003, without waiting for the permitting



process—which was then still ongoing—to conclude, Glamis initiated its NAFTA action.

## 1.2 | Summary of legal issues and award

Glamis alleged that the adoption of new measures precluding the type of mining that previously had been allowed in California and establishing other constraints breached two obligations under Chapter Eleven of NAFTA:

1. The obligation to accord minimum international standards of treatment to protected investors, including fair and equitable treatment, as per Article 1105 of NAFTA.
2. The obligation not to take measures tantamount to expropriation without paying compensation, in accordance with Article 1110 of NAFTA.

The Tribunal rejected each of these claims for a final award in favour of the respondent United States.

## 2. SELECT LEGAL ISSUES

### 2.1 | Amicus curiae participation and transparency

*Glamis* continued and expanded the acceptance of amicus curiae submissions in NAFTA investor–state disputes, a practice begun in *Methanex v. United States*. In *Glamis*, at least three sets of written arguments were accepted, one by a coalition of non-governmental organizations, one by a business association and one by the locally-based Quechan Indian Tribe, whose sacred sites and traditions were affected by the proposed mining project. The amicus process in this case was perhaps one of the most difficult for the Tribunal to manage, with multiple non-parties seeking to make submissions.

In this regard, *Glamis* stands as an important benchmark for the recognition of the capacity of a tribunal to manage more complex amicus curiae submission processes. This arbitration was subject to intense media scrutiny and public interest. Unlike the *Biwater v. Tanzania* amicus curiae



process, however, the Tribunal imposed no restriction on access to materials or on the process. Thus, the *Glamis* process stands as a practical repudiation of the need for secrecy and strict “prudential measures” to protect the functioning of the tribunal.

## **2.2 | Expropriation: Finding that the investor’s losses were not significant enough to support its claim<sup>1</sup>**

The *Glamis* decision on expropriation is distinct from previous decisions on this issue. It noted that two elements were required to determine whether an indirect expropriation, or measure tantamount to expropriation, had taken place. One was a significant economic impact on the investment; the other was that the measure be expropriatory in nature, as opposed to a bona-fide regulation. This two-step approach stands in marked contrast to the economic impact test that appears to be set out in the *Metalclad v. Mexico* award (also under NAFTA) nine years earlier and provides a considerably greater purview to government policy space than the approach in *Metalclad*.

With respect to the first step, the Tribunal determined that it had to assess whether property was “in fact taken” (para. 356). It further stated that where the alleged taking is indirect, the test would require an inquiry into the degree of interference with the property right claimed to be impacted, based upon the “severity of the economic impact and the duration of that impact” (para. 356). Citing the *Tecmed v. Mexico* award, the Tribunal stated, importantly, that “[i]t must first be determined if the claimant was radically deprived of the economical use and enjoyment of its investment, as if the rights related thereto...had ceased to exist” (para. 357). The Tribunal noted further that “[m]ere restrictions on the property rights do not constitute takings” (para. 357). In a slightly different formulation, the Tribunal stated its assessment of the impact of the measures should “determine whether [the] Claimant’s investment...has been so radically deprived of its

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<sup>1</sup> The legal standards discussed here are set out in Part V of the award, paragraphs 353–366 in particular. Following this, the Tribunal undertakes an extensive review of the question of the economic impact of the measure on the proposed project.



economic value to [the] Claimant as to potentially constitute an expropriation and violation of Article 1110 of NAFTA...” (para. 358).

After very detailed consideration on the first issue (the impact), the Tribunal ruled that the anticipated diminished levels of profit, approximately US\$28–29 million over the span of the project (out of a previously anticipated US\$49 million), did not create an expropriation: “...the Tribunal holds that the first factor in any expropriation analysis is not met: the complained of measures did not cause sufficient economic impact...to effect an expropriation of the Claimant’s investment” (para. 536).

This case is one of the few to seek to define the impact of a regulatory measure, in the assessment of whether an expropriation has taken place, in such detail. The finding that a diminishment of profit by some US\$28 million, or approximately 55–59 per cent of anticipated profits, did not constitute an expropriation is extremely significant. Moreover, it should also be recalled that *Glamis* does not stand for the proposition that the sole factor is the economic impact, but only that it may be assessed first before moving on (if needed) to assess the second primary factor, that of whether the nature of the measure is expropriatory or regulatory.

### **2.3 | Minimum international standards of treatment: Reining in the standard under NAFTA and customary international law<sup>2</sup>**

The Tribunal’s ruling on the interpretation of the minimum international standards of treatment article is significantly different and narrower than the *Metalclad* case, *S.D. Myers v. Canada*, *Pope & Talbot v. Canada*,<sup>3</sup> *Tecmed* and others. To understand this, it is useful to note that the Tribunal begins its reasoning by summarizing the Claimant’s position that the standard “includes interrelated and dynamic obligations providing for, among other duties, protection against arbitrariness and discrimination, protection of

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<sup>2</sup> Summarized from Part F of the Final Award.

<sup>3</sup> *Pope & Talbot v. Canada*, Award on the Merits of Phase 2, 10 April 2001, available at <http://www.naftaclaims.com/Disputes/Canada/Pope/PopeFinalMeritsAward.pdf>.



legitimate investment-backed expectations, and a requirement of a transparent and predictable legal and business framework” (para. 542), language often associated with the *Tecmed* decision.

To begin with, the Tribunal took a firm position on the 2001 Interpretative Statement issued by the NAFTA Ministers, which asserted that the standard was intended to reflect the customary international law standard on treatment of aliens and was not an autonomous standard that incorporated elements outside of customary international law. Still, that left the difficult task of determining what was, and was not, included within the scope of customary international law.

What the *Glamis* Tribunal did differently in this regard was return to the root pronouncement on what this standard meant from the 1926 decision in the *Neer* case<sup>4</sup>—conduct that is so egregious or outrageous as to shock the conscience of the independent observer. From there, it held *Glamis* to a strict standard of proof, as the Claimant, of the evolution of customary international law in order to establish that a broader range of conduct, or a different standard by which to test conduct, had become part of customary international law. It ruled that no such new or additional standard had been made out by the Claimant. The Tribunal did note that, while the threshold standard remained the same in approach as the *Neer* case, what might be considered to meet this standard today may well have evolved and become a broader set of acts than what was seen as shocking in 1926.

The Tribunal’s approach reflects the binding interpretative statement issued by the NAFTA Parties in 2001, as noted above. Thus, it is open to some discussion as to whether the articulation of the fair and equitable standard in different treaties may lead to different approaches. This risk displays the importance of proper drafting of any fair and equitable treatment standards (or formulation of interpretative statements regarding those standards).

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<sup>4</sup> *Neer v. Mexico*, 4 R. Int’s Arb. Awards, 60–62 (1926), referenced several times in the award, as well as in the filings of the Respondent and Claimant.



The Tribunal, however, did not leave the matter there. In its own summary, the Tribunal set out the basics of its subsequently detailed reasoning: that a breach of the fair and equitable treatment or minimum international standard obligation could be made out when there was a sufficiently egregious or shocking act, such as “a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons...or the creation by the State of objective expectations in order to induce investment and the subsequent repudiation of those expectations” (para. 22, emphasis added, and see para. 627). Later on, it highlights, “In this way, a State may be tied to the objective expectations that it creates *in order to induce investment*” (para. 621, original emphasis, and para. 766).

Because it found that the state had not made any objective commitments to induce investment, there was no breach of this branch of the standard. The Tribunal then explained that it therefore did not have to assess what level of breach, or what form of commitment, would be required for a violation to be established. Importantly, however, the Tribunal does note that in the absence of at least “a quasi-contractual relationship” (paras. 766, 813) setting out the commitment, “the Claimant cannot have a legitimate expectation that the host country will not pass legislation that will affect it” (para. 813).

On the one hand, therefore, the Tribunal adopted a strict and generally high standard of interpretation of fair and equitable treatment, requiring egregious or shocking acts. This provides a significant cushion for ensuring respect for government policy space and law making. But, on the other hand, it added or reinforced a second category or type of act that could also constitute a breach of the standard: “the creation by the State of objective expectations *in order to induce investment* and the subsequent repudiation of such expectations” (para. 627).

Here, it appears to go a bit further than other cases such as *Parkerings v. Lithuania* by stating in an affirmative way that a breach of an objective expectation would constitute a breach of the fair and equitable standard,



as opposed to being a factor to consider. This is a broad and potentially overly embracing approach and one to be taken with some caution because no such commitment existed in this case, and no degree of breach or requirements for establishing the commitment were determined.

As noted in the discussion on expropriation in *Methanex*, the Tribunal's approach in *Glamis* provides for a more flexible interpretation in favour of government regulatory space as a general principle, but against it where additional commitments outside the treaty have been given to an investor. A concern with this approach lies in the reality that such specific commitments are almost uniquely given by developing countries that, over time, are most in need of the policy space that developed countries have for decades enjoyed. This potential *de facto* division between one standard for developed countries and a different one for developing countries, and the impacts such a division may have on the two groups of countries' respective abilities to exercise their regulatory prerogatives, is a critical development to follow.



**Emilio Agustín Maffezini v.  
Kingdom of Spain,  
ICSID Case No. ARB/97/7 (Decision on Jurisdiction)  
(*Maffezini v. Spain*)**

Mahnaz Malik

Decision available at [http://ita.law.uvic.ca/alphabetical\\_list\\_content.htm](http://ita.law.uvic.ca/alphabetical_list_content.htm)

**Keywords:** Dispute resolution provisions, exhaustion of remedies, most favoured nation treatment

**Key dates:**

Request for Arbitration: 30 October 1997

Constitution of Tribunal: 24 June 1998

Decision on Jurisdiction: 25 January 2000

Award: 9 November 2000

Rectification of the Award: 21 January 2001

**Arbitrators:**

Prof. Francisco Orrego Vicuña (president,  
appointed by the chairman of ICSID's Administrative Council)

Judge Thomas Buergenthal (claimant appointee)

Mr. Maurice Wolf (respondent appointee)

**Forum and applicable procedural rules:**

International Centre for Settlement of Investment Disputes (ICSID)

ICSID Rules of Procedure for Arbitration Proceedings

**Applicable treaty:**

Argentina–Spain Bilateral Investment Treaty (BIT)

**Legal issues raised in the Decision on Jurisdiction:**

- Jurisdiction—exhaustion of remedies
- Jurisdiction—most favoured nation treatment



## 1. SUMMARY OF THE DECISION ON JURISDICTION

Mr. Emilio Agustín Maffezini, a national of Argentina, brought a claim against Spain under the Argentina–Spain Bilateral Investment Treaty (BIT). Mr. Maffezini had invested in a Spanish company engaged in the production and distribution of chemical products. The dispute resolution clause in the BIT required that a dispute between the investor and state be referred to the courts of the host state (in this case, Spanish courts) before it could be brought to international arbitration. Spain contested the Tribunal’s jurisdiction on, among other grounds, the basis that the investor had not submitted the claim to Spanish courts as required by the Argentina–Spain BIT.

The investor, however, argued that he had not needed to go to Spanish courts to pursue local remedies because the most favoured nation (MFN) clause in the BIT allowed him to go straight to international arbitration. Like other typical MFN clauses, the Argentina–Spain MFN clause provided that each treaty party must not treat the investor of the other treaty party less favourably than it treats an investor from any third state. Based on this, Maffezini argued that the MFN clause in the Argentina–Spain BIT allowed him to invoke more favourable provisions in the Chile–Spain BIT, because the latter did not include a requirement to seek local remedies prior to recourse to international arbitration.

The Tribunal rejected Spain’s objections to jurisdiction, agreeing with Maffezini that the MFN clause included in the Argentina–Spain BIT allowed the investor to rely on the more favourable arrangement contained in the Chile–Spain BIT regarding dispute resolution. In contrast to Spain’s BIT with Argentina, its BIT with Chile permitted the investor to submit the dispute to ICSID arbitration *without* first accessing the Spanish courts.

After confirming it had jurisdiction over the investor’s claim, the Tribunal issued its decision on the merits in an award dated 9 November 2000, finding Spain liable for breaches of the BIT.



## **2. SELECT LEGAL ISSUE: USING THE MOST FAVOURED NATION CLAUSE TO BROADEN DISPUTE SETTLEMENT RIGHTS**

The Tribunal's decision on the application of the MFN clause to dispute resolution provisions in BITs was a "first" and triggered a debate on the scope of MFN clauses. In particular, the decision raised concerns that MFN clauses could undermine dispute resolution clauses negotiated in treaties if investors were permitted to rely on more favourable provisions granted in third party treaties. Some countries reacted by adopting specific treaty texts stipulating that the MFN clause did not apply to procedural matters. The analysis below focuses on the Tribunal's findings regarding the MFN clause and its application to dispute resolution provisions.

The Tribunal noted that the Argentina–Spain BIT provided domestic courts with the opportunity to deal with a dispute for a period of eighteen months before the matter could be submitted to international arbitration. Based on this provision, the Tribunal acknowledged that the investor's failure to submit the case to the Spanish courts prior to bringing the claim to international arbitration as required by the Argentina–Spain BIT would, in principle, have prevented the Tribunal from assuming jurisdiction. The investor, however, argued that, pursuant to the MFN clause in the Argentina–Spain BIT, the investor could rely on more favorable provisions in Spain's BITs with third parties. The MFN clause read, "In all matters subject to this Agreement, this treatment shall not be less favourable than that extended by each Party to the investments made in its territory by investors of a third country." According to the investor, the reference to "all matters" encompassed not only the BIT's substantive provisions, but also its procedural provisions, such as the clauses regarding dispute settlement. Based on that interpretation, the investor sought to rely on the Chile–Spain BIT, and argued that he was consequently allowed direct access to ICSID arbitration without first going to Spanish courts.



Spain countered by arguing that the reference in the MFN clause to “matters” in the Argentina–Spain BIT referred only to substantive or material aspects of the treatment granted to investors and not to procedural or jurisdictional questions.

The Tribunal started with analyzing the subject matter to which the MFN clause applied in the “basic” treaty (in this case, the Argentina–Spain BIT). It found that if the matters covered by the MFN clause in the basic BIT were more favourably treated in a third party treaty, then, by operation of the MFN clause, that better treatment should also be accorded to the beneficiary under the basic BIT. The Tribunal then turned to the issue of whether dispute resolution was a matter covered by the MFN clause in the Argentina–Spain BIT. It referred to treaties such as the U.K.–Albania BIT that contained MFN clauses expressly covering dispute resolution. The Tribunal also referred to MFN clauses in other treaties that did not expressly cover dispute resolution provisions, such as MFN clauses relating to “all rights contained in the present Agreement” or “all matters subject to this Agreement” (in the Argentina–Spain BIT). The Tribunal noted that, although such MFN clauses did not expressly provide that dispute resolution was covered, “there [were] good reasons to conclude that... dispute settlement arrangements are inextricably related to the protection of foreign investors” and therefore such MFN clauses would cover the enforcement of procedural rights in the treaties (para. 54).

The Tribunal then concluded that, because the Chile–Spain BIT contained provisions for the settlement of disputes more favourable to the protection of the investor’s rights and interests than those in the Argentina–Spain BIT, Maffezini could rely on those provisions and submit the dispute to arbitration without first accessing the Spanish courts. The Tribunal rejected the idea that the requirement to first resort to domestic courts reflected a fundamental question of public policy considered in the context of the Argentina–Spain BIT and the negotiations relating to it.

The Tribunal’s view that an MFN clause can apply to dispute resolution provisions, as opposed to only substantive matters, provides an example of



an expansive interpretation of the MFN clause. The Tribunal's decision has the potential of making nuances in treaties' dispute settlement clauses in large part irrelevant. It should be noted, however, that the MFN clause in the Argentina–Spain BIT was indeed broadly drafted because it specifically applied to “all matters” subject to the BIT. It is therefore uncertain whether a more narrowly worded MFN clause would have been interpreted in the same expansive fashion. Further, the Tribunal identified a number of public policy considerations and circumstances that might in other cases prevent use of the MFN clause to distort the dispute resolution mechanism agreed upon by the parties in the basic treaty.<sup>1</sup> The Tribunal noted, however, that these public policy considerations did not apply to the Argentina–Spain BIT.

The scope of the rights and benefits provided under the MFN clause to dispute-resolution mechanism clauses by the tribunal remains an issue of debate and uncertainty in investment treaty arbitration. Although some tribunals such as that in *Siemens v. Argentina* have followed the *Maffezini* Tribunal's broad reading of the MFN clause, others, such as that in *Plama Consortium v. Bulgaria*,<sup>2</sup> have adopted a narrower view of MFN provisions, holding that they do not generally cover issues of procedure and dispute settlement.

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<sup>1</sup> The public policy considerations were as follows:

- First, if a party had conditioned its consent to arbitration in the basic treaty on the exhaustion of local remedies, that requirement could not be bypassed by invoking the MFN clause in relation to a third party agreement that did not contain a requirement to exhaust local remedies, because the stipulated condition reflected a fundamental rule of international law.
- Second, if the basic treaty included a so-called “fork-in-the-road” clause, pursuant to which the investor was provided a choice, for example, between submission to domestic courts or to international arbitration, and where the choice, once made, became final and irreversible, that stipulation could not be bypassed by invoking the MFN clause.
- Third, if the basic treaty provided for a particular arbitration forum such as ICSID, for example, that option could not be changed by invoking the MFN clause in order to refer the dispute to a different system of arbitration.
- Finally, if the treaty contained a highly institutionalized system of arbitration that incorporated precise rules of procedures such as NAFTA, those rules could not be altered by operation of the MFN clause because these were very specific provisions reflecting the precise will of the treaty parties.

<sup>2</sup> ICSID Case No. ARB/03/24.



# **Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1 (*Metalclad v. Mexico*)**

Howard Mann

Award and judicial review decisions available at [http://ita.law.uvic.ca/alphabetical\\_list.htm](http://ita.law.uvic.ca/alphabetical_list.htm)

**Keywords:** Environmental measures, expropriation, fair and equitable treatment/minimum international standards of treatment, judicial review, legitimate expectations, “sole effects” test

### **Key dates:**

Notice of Arbitration: 2 January 1997

Constitution of Tribunal: 19 May 1997

Award: 30 August 2000

Decision by British Columbia Supreme Court: 2 May 2001

### **Arbitrators:**

Prof. Sir Elihu Lauterpacht, QC, CBE (president)

Mr. Benjamin Civiletti (claimant appointee)

Mr. Jose Luis Siqueiros (respondent appointee)

### **Forum and applicable procedural rules:**

International Centre for Settlement of Investment Disputes (ICSID)

ICSID Additional Facility Rules

### **Applicable treaty:**

North American Free Trade Agreement (NAFTA), Chapter Eleven, Investment

### **Alleged treaty violations:**

- Expropriation
- Fair and equitable treatment/minimum international standards of treatment

### **Other legal issues raised:**

- Challenges to awards—judicial review





## 1. CASE SUMMARY

### 1.1 | Factual background

*Metalclad* involved two separate government “measures.” The first was a set of events that cumulatively denied the company a permit to operate a hazardous waste disposal facility in the village of La Pedrera, municipality of Guadalcazar, in the Mexican state of San Luis Potosi. The second was a state-level act that essentially converted the property into an ecological reserve, taking all private use rights away from *Metalclad*.

In 1990, the Mexican federal government issued a permit for a hazardous waste transfer station to be built by a Mexican company, COTERIN, in La Pedrera. In January 1993, the permit was extended to build and operate a hazardous waste landfill.

In April 1993, *Metalclad* entered into a purchase option for COTERIN, subject to the approvals to build the landfill being fully issued. In May 1993, the state government issued a land use permit for the landfill, which did not constitute an operating or building permit. In June 1993, *Metalclad* met with the governor of the state and believed it had obtained his support for the landfill. On 10 September 1993, *Metalclad* exercised its purchase option of COTERIN, on the basis of the apparent support for the project by federal and state level officials.

Shortly after *Metalclad* purchased COTERIN, *Metalclad* asserted that the state governor started a campaign against the landfill. Nevertheless, in May 1994, *Metalclad* again believed it had the support of the state government, and began construction. In October 1994, municipal officials ordered a halt to construction due to the absence of a construction permit. In November 1994, the company resumed construction while applying for the permit. Federal officials were alleged to have said it would be issued as a matter of course, and that in any event *Metalclad* had all the permits needed to proceed.

A further federal permit was issued for the final elements of the facility in January 1995. In February 1995, an environmental impact assessment was



completed, approving the facility subject to some mitigation measures. This was confirmed by the federal environmental agency in March 1995. Construction was completed in March 1995, but the facility never became operational. A demonstration took place on its intended inaugural day, which allegedly blocked entry to the site with the assistance of state officials and police officers.

In November 1995, Metalclad reached an agreement with the federal officials for the operation of the facility, including additional environmental steps to be taken by Metalclad. The state government did not participate in the process and denounced the agreement after it was reached.

In December 1995, the municipality rejected Metalclad's application for the construction permit, noting that it had denied a similar permit to COTERIN prior to its purchase by Metalclad in both 1991 and 1992. Metalclad was not notified of the meeting at which the decision not to give the permit was made.

In January 1996, the municipality initiated a legal action in Mexico's constitutional court to challenge the federal agreement with Metalclad that purported to allow Metalclad to operate the facility. While this challenge was ongoing, the federal officials issued a permit authorizing the expansion of Metalclad's landfill operations from 36,000 tons per year to 360,000, a ten-fold increase. The state and municipal officials, however, continued to oppose the facility and, in January 1997, Metalclad initiated the arbitration proceedings.

The above series of events was taken together to constitute the first ground of complaint of Metalclad. The second measure is far simpler: In September 1997, the state governor issued an Ecological Decree declaring the property a Natural Area for the protection of rare cacti. The decree, which created what can be understood as the equivalent of a national or state level nature reserve or park in most jurisdictions, had the effect of precluding any use by Metalclad of its facility.



## 1.2 | Summary of legal issues and decisions

Metalclad's claims focused on three violations of NAFTA: (1) that the series of acts leading to the denial of the construction permit and inability to operate the hazardous waste landfill constituted a breach of NAFTA's Article 1105 on minimum international standards of treatment, (2) that the same acts also amounted to an indirect expropriation under Article 1110 of NAFTA, and (3) that the Ecological Decree in itself also constituted a breach of Article 1110 of NAFTA.

The Tribunal found in favour of Metalclad on each of these three claims and awarded Metalclad damages of US\$16.5 million, essentially the amount of its sunken costs in the investment; however, Mexico sought judicial review of the decision in the court of British Columbia, Canada, where the arbitration was legally seated. On judicial review, the first two findings concerning the events leading up to the rejection of the municipal permit were annulled, but the third finding on expropriation in relation to the Ecological Decree was maintained.

## 2. SELECT LEGAL ISSUES

### 2.1 | Minimum standard of treatment: Applying wide-ranging requirements on host states

The Tribunal equated NAFTA's Article 1105, entitled "Minimum Standard of Treatment," with the more broadly known language of fair and equitable treatment (FET); however, it made two broad findings that appear to have gone beyond known expressions of the FET standard as understood at that time. First, it stated that FET encompasses the obligations on government transparency that are found in Article 102 of NAFTA. It held that this combination requires the host state to ensure

...that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily



known.... There should be no room for doubt or uncertainty on such matters. Once the authorities of the central government of any Party... become aware of any scope for misunderstanding or confusion in this connection, it is their duty to ensure that the correct position is promptly determined and clearly stated so that investors can proceed with all the appropriate expedition in the confident belief that they are acting in accordance with all relevant laws. (para. 76)

The Tribunal held that the absence of any clear rule on the need or process for obtaining a construction permit in the municipality constituted a breach of Article 1105. While other tribunals have noted that neither NAFTA nor other treaties guarantee the success of an investment, the *Metalclad* decision places a heavy burden on governments to ensure legal certainty relating to the investment for all levels of government within a jurisdiction, including those over which they have no authority.

The second, related critical element of the FET ruling was the Tribunal's finding that Metalclad was legally entitled to rely upon the representations of the government officials relating to all aspects of the investment, including the need for other permits and the likelihood they would be issued. This echoes the Tribunal's point on transparency, but also goes beyond it to create a legal obligation on states flowing from the statements of government officials, even when such statements relate to matters within the jurisdiction of another level of government over which they have no legal sway.

The Tribunal added, "Mexico failed to ensure a transparent and predictable framework for Metalclad's business planning and investment"<sup>1</sup> (para. 99). This notion has become more developed in subsequent cases, into a broader doctrine of protecting the reasonable expectations of the investor

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<sup>1</sup> The Tribunal continued: "The totality of these circumstances demonstrates a lack of orderly process and timely disposition in relation to an investor or a Party acting in the expectation that it would be treated fairly and justly in accordance with the NAFTA" (para. 99). Interestingly, the Tribunal referred to a treaty that was not even in effect at the time the investment by Metalclad in purchasing COTERIN took place in early September 1993—over three months before NAFTA came into effect and two months prior to the political approval of NAFTA by the U.S. Senate. Thus, it could not reasonably be assumed that the investment was made in any expectation of NAFTA's protections.

in relying upon government representations relating to the investment. (This doctrine finds one of its widest expressions in *Tecmed v. Mexico* and one of its narrowest in *Glamis v. United States*.)

The Tribunal also ruled, importantly, that Mexico's domestic environmental law placed all matters related to hazardous waste into federal jurisdiction, leaving little to no space for the municipal permit to be required. To the extent there may be a residual local jurisdiction, the Tribunal ruled it had not been exercised for any reason related to the actual construction, but instead was exercised in response to social and environmental concerns related to the site's intended use as a hazardous waste landfill. The finding that followed—that there was no legal basis for not issuing the permit or that it was not in any event needed—led to the finding that Mexico also acted contrary to its domestic law and that this also amounted to a breach of Article 1105.

The Tribunal's decision sparked a fear that the FET standard could be used to read in elements of other international treaties, such as the World Trade Organization (WTO) Agreements, as a basis for a complaint by an investor. To address and prevent this, the NAFTA Parties adopted an interpretative statement in relation to Article 1105, stating that it referred only to customary international law and thus did not include international treaties as a basis for a claim. The statement, however, did not define the scope of or tests for what was included in customary international law.

## **2.2 | Expropriation: Applying a test that focuses on the economic impacts of the measures and the protection of the investors' expectations**

### **2.2.1 | Denial of the construction permit**

In relation to the series of events leading to the denial of the construction permit by the municipality, the Tribunal held that the denial of fair and equitable treatment in breach of Article 1105 also amounted to a breach of Article 1110 on expropriation. In particular, the denial of the construction permit, “notwithstanding the fact the project was fully approved and



endorsed by the federal government,” was held to be an act “tantamount to expropriation” under the language of NAFTA, one that denied Metalclad the right it would otherwise have had under the federal permits to operate the landfill (para 104). That the acts of the municipality were seen as outside Mexican law further led to the view that it had effectively and unlawfully prevented the operation of the landfill, in a manner that amounted to an expropriation. This reasoning was subsequently annulled by the judicial review.

The most critical issue in the *Metalclad* decision was the key test used to establish whether an expropriation had taken place. At paragraph 103, the Tribunal states:

Thus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour 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 property even if not necessarily to the obvious benefit of the host State.

This economic impact test provides a very stark test for an expropriation that would capture virtually every type of government measure. For example, most environmental protection measures, at least in the short term, impose some costs or limit some economic benefit of a business. This test therefore raised immediate concerns as to the applicable international law standard on expropriation.

The Tribunal added that Metalclad’s “justified reliance” on the federal government’s representations about the required permits, taken with the other government acts, also supported the finding of expropriation. This notion of reliance on governmental representation as a basis for a finding of expropriation comes back several times in later cases.



### 2.2.2 | The Ecological Decree

The Tribunal ruled that a separate ground for an expropriation under Article 1110 lay in the Ecological Decree. It added a critical note here to its economic impact test for an expropriation as it relates to regulatory measures, stating, “The tribunal need not decide or consider the motivation or intent or the adoption of the Ecological Decree” (para. 111).

Taken with the singular economic impact test as the principle test for an expropriation, this combination would significantly limit, if not completely eliminate, the use of the traditional notion in international law of “police powers” of the state as a basis for legitimate regulation of all investors. This places *Metalclad* in direct conflict with later cases, most notably the *Methanex v. United States* decision, on this point. The different approaches adopted by tribunals with respect to expropriation have contributed greatly to the uncertainty in the field of international investment law.

Unfortunately, this could have been avoided if the purpose and nature of the measure had been considered, as it was in *Methanex*: this was, in fact, an indirect taking by regulation of all use of the property in order to effectively convert it to part of the public patrimony as an ecological reserve area to protect rare cacti found in the area. This is not illegal or inappropriate in itself; however, such measures, or similar measures to, for example, take land for a school or hospital, require compensation to be paid for the lost rights to use the property. This is the normal process, even when land is taken to be used for environmental purposes. This type of measure differs significantly in form and purpose from a measure designed, for example, to limit water and air pollutant emissions. Under the *Metalclad* approach, it would appear these types of distinctions are not relevant, putting governments into an impossible situation in terms of making new regulations. This has been the source of primary concern with the *Metalclad* decision.



### **2.3 | Judicial review: National courts' limited authority to address problems with arbitral awards**

On judicial review at the Supreme Court of British Columbia, Canada, the Court held that the Tribunal acted outside its jurisdiction in reading other parts of NAFTA—i.e., NAFTA's provisions on transparency in Article 102—into the obligations under Chapter 11. Thus, the Canadian Court annulled all of the elements relating to transparency, and because this infected a significant part of the reasoning on Chapter 11, the Canadian Court likewise annulled the Tribunal's finding of a breach of Article 1105, as well as its finding that the breach of Article 1105 amounted to a breach of Article 1110.

The Court upheld the award, however, as it relates to the finding on expropriation as a result of the Ecological Decree. The Court stated, "The Tribunal gave an extremely broad definition of 'expropriation' for the purposes of Article 1110" (para. 99) based on the use of the economic impact test. The Court added that this approach was sufficiently broad to include a legitimate rezoning of property by a government. The Court found, however, that since this broad interpretation was not "patently unreasonable"—the standard a court was to apply on judicial review of an arbitral tribunal's legal findings under Canadian law—there was no basis on review to overturn this part of the award.





# **Methanex Corp. v. United States of America**

*(Methanex v. United States)*

Howard Mann

Decision and awards available at [http://ita.law.uvic.ca/alphabetical\\_list\\_respondant.htm](http://ita.law.uvic.ca/alphabetical_list_respondant.htm)

**Keywords:** Amicus curiae, corruption, environmental measures, expropriation, fair and equitable treatment/minimum international standards of treatment, legitimate expectations, like circumstances, public hearings, reference to other bodies/principles of law, transparency

#### **Key dates:**

Statement of Claim: 3 December 1999

Constitution of Tribunal: 18 May 2000

Decision on Acceptance of Amicus Curiae: 15 January 2001

Partial Award on Jurisdiction: 7 August 2002

Final Award: 3 August 2005

#### **Arbitrators:**

Mr. V. V. Veeder (president)

Mr. William F. Rowley (claimant appointee)

Prof. W. Michael Reisman (respondent appointee,  
replacing Warren Christopher, who had resigned)

#### **Forum and applicable procedural rules:**

International Centre for Settlement of Investment Disputes (ICSID)

United Nations Commission on International Trade Law  
(UNCITRAL) Arbitration Rules

#### **Applicable treaty:**

North American Free Trade Agreement (NAFTA), Chapter Eleven, Investment

#### **Alleged treaty violations:**

- Expropriation
- Fair and equitable treatment/minimum international standards of treatment
- National treatment

#### **Other legal issues raised:**

- Interpretation—reference to other bodies/principles of law
- Procedure—amicus curiae participation
- Procedure—transparency



## 1. CASE SUMMARY

### 1.1 | Factual background

Methanex Corporation (“Methanex”) is a Canadian-based manufacturer of methanol, an ingredient in a gasoline additive commonly called MTBE (methyl tert-butyl ether). Methanex does not manufacture the MTBE itself; however, a significant percentage of the methanol it produces was used in the making of MTBE. Methanex was a leading maker of methanol for the American market, but some 47 per cent of the market was supplied by domestic U.S. companies.

The facts giving rise to the dispute are summarized very briefly here. After concerns raised by environmental groups and noted in expert studies, the state of California banned the use of MTBE as a gasoline additive because it was polluting surface water and groundwater in the state. Methanex argued, however, that the state imposed the ban due to a political deal with a rival company that makes ethanol, a substitute for methanol and MTBE as a gasoline additive. Methanex did not allege any violation of U.S. law, but argued that the ethanol producer, Archer Daniels Midland (ADM), had used political donations to improperly influence the decision of Governor Davis of California in a manner that breached the protections of foreign investors under Chapter Eleven of NAFTA in favour of domestic producers of ethanol. Methanex also argued that California had and should have used alternative approaches less damaging to Methanex’s investment, including stopping gasoline leakage by requiring repair or replacement of underground storage tanks.

### 1.2 | Summary of legal issues and decisions

Methanex alleged that the ban on MTBE constituted a breach of three obligations on the host state under NAFTA’s Chapter Eleven: (1) the national treatment obligation in Article 1102 of NAFTA, which requires a NAFTA party to accord foreign investors “treatment no less favorable” than that it accords, “in like circumstances,” domestic investors in the host state; (2) the obligation to accord minimum international standards of treatment



to protected investors, including fair and equitable treatment, as per Article 1105 of NAFTA; and (3) the obligation not to take measures tantamount to expropriation without paying compensation, in accordance with Article 1110 of NAFTA.

The Tribunal rejected each of these arguments, finding in favour of the United States on each claim. In addition, the *Methanex* decision was the first published decision in which the Tribunal awarded full costs to the defending state party following the final award in its favour.

## 2. SELECT LEGAL ISSUES

### 2.1 | Transparency and amicus curiae

*Methanex* made an important contribution to the issue of public access to international investor–state arbitrations. On 25 August 2000, the International Institute for Sustainable Development (IISD) submitted the first recorded petition for access to the investor–state proceedings as an amicus curiae. At the same time, IISD sought access to the parties’ pleadings and to the oral hearings. The IISD petition was shortly followed by a second petition from other, American-based, non-governmental organizations (NGOs).

Following a round of submissions by the litigating parties, Canada and Mexico as NAFTA parties, and the groups who had filed the two amicus curiae petitions, the Tribunal issued a decision in January 2001 declaring that it had the jurisdiction to accept amicus curiae submissions and indicating its intent to do so when the merits phase was reached. (At the time, the arbitration was in its preliminary jurisdiction phase.) This historic ruling has since been applied and followed in multiple international investment arbitration proceedings.

Despite this very positive element of the Tribunal’s decision, the balance of the petitioners’ requests was rejected. Against the opposition of Methanex, the Tribunal did not permit open hearings or issue an order



enabling access to documents. Nonetheless, the United States released all the pleadings pursuant to its domestic law on freedom of information, allowing the civil society organizations to obtain the materials and setting a precedent for future NAFTA-based cases. In addition, following a change in Methanex's counsel and a further request by IISD in its final amicus submission, the Tribunal did permit open hearings with the consent of both parties, broadcasting the proceedings live to members of the public on a closed-circuit television system.

## **2.2 | National treatment and state discretion to distinguish between investors for environmental or other public purposes<sup>1</sup>**

Methanex was a major test of the meaning and scope of Article 1102 of NAFTA on national treatment. The key issue was the meaning of the phrase “in like circumstances,” which defines the scope for comparison of domestic and foreign investors under Article 1102, because a NAFTA investor can only seek “no less favorable” treatment when compared to domestic investors (or other foreign investors under the most favoured nation treatment clause) with which it is in like circumstances.

The previous NAFTA case of *S.D. Myers v. Canada*<sup>2</sup> also had faced this issue and had taken a very broad competitive business approach to assessing “likeness,” so that businesses loosely in competition with one another were seen as “in like circumstances.” This approach drew on jurisprudence under the General Agreement on Tariffs and Trade (GATT) and World Trade Organization (WTO) Agreements relating to the “like products” test used in disputes dealing with trade in goods. In *Methanex*, however, the Tribunal expressly rejected the general appropriateness of directly applying trade law concepts to investment law obligations, opting instead for a much narrower and more refined approach in which it required a comparison to

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<sup>1</sup> This summary is based on the reasons found in Part IV, Chapter B, of the Final Award.

<sup>2</sup> The tribunal in *S.D. Myers* addressed the issue of “like circumstances” in its Partial Award, dated 13 November 2000. The Partial Award, as well as other decisions and awards issued in *S.D. Myers*, is available at [http://ita.law.uvic.ca/alphabetical\\_list\\_content.htm](http://ita.law.uvic.ca/alphabetical_list_content.htm).

other existing domestic investments in the same situation. Pursuant to that approach, Methanex was not entitled to be compared to a manufacturer of any gasoline additive, but only to U.S.-based manufacturers of methanol. Here, California's treatment of Methanex was identical to its treatment of U.S.-based methanol producers.

The Tribunal did go on, however, to note that even a broader assessment would still lead to the same finding because methanol and ethanol had different chemical, environmental and other factors. The implication accompanying this finding is that the purposes behind challenged regulatory measures can also be examined to determine "like circumstances." Thus, if company A were producing a product or emissions that were environmentally harmful and that company B was not producing, companies A and B could be distinguished from each other on this basis.

This approach taken by the Tribunal in *Methanex* provided a much less expansive view of the national treatment obligation than was seen in the *S.D. Myers* case, thus leaving governments broader domestic policy space to tailor regulations to the specific circumstances of investors or sub-sectors of business activity based on actual need and policy goals rather than on artificial barriers in trade or investment agreements.

### **2.3 | Minimum international standards of treatment: Narrowing the scope of the obligation<sup>3</sup>**

Methanex had two major lines of argument to support its claim regarding the breach of NAFTA's Article 1105. The first was the discrimination claim advanced under Article 1102 of NAFTA and discussed above. The second was, essentially, that the inappropriate influence of ADM over the decision-making process was akin to corruption (although no illegal act was claimed under U.S. law), led to arbitrary decision-making and deprived Methanex of fair and equitable treatment.

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<sup>3</sup> Based on Part IV, Chapter C, of the Final Award.



As regards the first issue, the Tribunal dismissed it on the basis that no discrimination had been found. It noted, however, that a finding of discrimination was not necessarily equivalent to a finding of a breach of the minimum standards of treatment, including fair and equitable treatment. This was again inconsistent with and narrower than other decisions in international investment law, which had sought to apply the fair and equitable standard as equivalent to a non-discrimination standard. The *Methanex* Tribunal declared that discrimination between domestic and foreign investors is not, in itself, a breach of any standard in customary international law.

On the second issue, the Tribunal suggested that if the acts of California had been motivated by corruption of government officials, this could indeed amount to a breach of the minimum international standards in violation of NAFTA and customary international law. The Tribunal embarked on an extensive review of the facts adduced by Methanex, employing an evidentiary burden that allowed Methanex and the Tribunal to draw logical inferences from the proven facts. The Tribunal labelled this a “connect the dots” approach, given that it would be virtually impossible to adduce direct evidence of corruption; however, after its extensive review of the evidence, the Tribunal found no pattern from which corruption could be adduced or inferred.<sup>4</sup> Thus, on the evidence, no claim for a breach of fair and equitable treatment was supportable.

This part of the award is important, as it sets an approach and standard for determining how corruption in this or other circumstances may be adjudicated in an arbitration where subpoena power is generally lacking. This is of great significance when the issue is one of corruption in the making or attaining of an investment in the first place through the use of bribes or other incentives from the investor to government officials, an issue that continues to arise with all too much regularity in foreign investment situations.

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<sup>4</sup> Drawn from Part III, Chapter IIIB, of the Final Award.



## 2.4 | Expropriation: Applying the customary international law police powers rule to protect laws and regulations, with a caveat

The *Methanex* award, in relation to expropriation, is best seen in comparison to the *Metalclad v. Mexico* award on this issue. Recall that *Metalclad* preceded the *Methanex* award by five years, igniting the debate on the meaning and scope of measures tantamount to expropriation and whether this concept of indirect expropriations could include any regulatory measure that had a significant economic impact on the investor, regardless of the measure's motivation.

The *Methanex* Tribunal rejected the *Metalclad* approach, opting instead for a more traditional understanding of the international law on expropriation as inherently not including measures taken by governments in the exercise of their customary police powers. Although it did not use those exact words, the Tribunal held:

But as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation. (Part IV, Chapter D, page 4, para. 7)

Taking this passage in its parts, the first part restates the notion that normal regulations, even if they have an impact on an investor, are not an expropriation when taken in a bona fide manner. The purpose and effect of the measure thus must be considered in determining whether it is, *ab initio*, a measure tantamount to an expropriation or an indirect expropriation. The ruling makes a clear point: such measures are not an expropriation, direct or otherwise, and therefore do not require compensation to be paid (as opposed to a notion advanced by some that regulatory measures to protect the environment, human health, etc., should



be seen as expropriatory if they have a significant economic impact on an investor, but the amount of compensation may be adjusted depending on the purpose behind it). This interpretation is critical to preserving regulatory space for governments in the face of investment treaty provisions on expropriation and puts *Methanex* into considerable contrast with *Metalclad* in terms of its analytical starting point.

The one point on which *Methanex* and *Metalclad* align, however, arises from the caveat that forms the final part of the paragraph noted above. This is the notion that a measure that is inconsistent with a previous promise by a potential host government not to take that measure can amount to an expropriation even if, absent the promise, it would not otherwise do so. In this case, however, the Tribunal noted not only that no such guarantees were given, but also that California is an active jurisdiction on environmental matters, often leading in environmental legislation.

Importantly, the *Methanex* Tribunal's reasoning rejects any general notion that prohibitions on indirect expropriation or on measures tantamount to expropriation require or imply some form of regulatory standstill obligation. Rather, the Tribunal noted that, seen in its fuller context, California was a jurisdiction well known for being a front-runner on environmental matters, and that all investors in California should anticipate that its activities, if found to be detrimental to the environment, would become the subject of public debate and regulation. The Tribunal also noted the complex and very public nature of law-making in California, with its engagement of multiple stakeholders. The decision's emphasis on the predictability of regulatory change is again a critical re-enforcement of the need to balance investor rights with the realities of government rights and responsibilities to respond to and protect the public welfare.

Nevertheless, the decision remains problematic from a sustainable development perspective, due to its description of the expropriation standard as one where the presence or absence of a specific commitment or promise by a host government entity may be determinative. The problem is that such commitments are almost never made by developed countries,





but are often included in investment contracts or agreements between foreign investors and developing country host states.<sup>5</sup> As a result, the needed policy space found in the *Methanex* award's approach may become easily constrained under the investment treaty if a contract includes a provision not to regulate in that manner. Because such provisions almost always come from developing country governments, which are often most in need of future policy space, it is likely that under the *Methanex* approach many developing countries will not have the policy space that most developed countries enjoy.

Moreover, although here this notion regarding the importance of a commitment or promise comes into play in the Tribunal's understanding of expropriation, an analogous principle can be seen in other cases' descriptions of requirements for protecting investors' "legitimate expectations" as an aspect of the fair and equitable treatment standard (see, e.g., *Parkerings v. Lithuania*). In practice, it is submitted that this approach creates a serious issue for the equal application of international law—in particular, international investment law—between developed and developing countries. Taking the *Metalclad* and *Methanex* cases on expropriation and, e.g., the *Parkerings* and *Tecmed v. Mexico* cases on fair and equitable treatment, we see two different, largely irreconcilable approaches to each of these issues. A state cannot be sure which will be applied, as it will depend on the predilections of the arbitral tribunal and, in particular, the presiding arbitrator. If a government breaches a commitment it has made regarding its future regulatory actions (or inactions), however, under both approaches, a finding of expropriation on the one hand, or fair and equitable treatment on the other hand, is available.

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<sup>5</sup> See A. Shemberg (2009), *Stabilization Clauses and Human Rights*.



**Occidental Petroleum Corp.  
and Occidental Exploration  
and Production Co. v.  
Republic of Ecuador,  
ICSID Case No. ARB/06/11 (Decision on Jurisdiction)  
(*Occidental v. Ecuador*)**

Fiona Marshall

Decision available at [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC810\\_En&caseId=C80](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC810_En&caseId=C80)

**Keywords:** Contractual waiver of treaty rights, jurisdiction, waiting periods

**Key dates:**

Request for Arbitration: 17 May 2006

Constitution of Tribunal: 6 February 2007

Decision on Provisional Measures: 17 August 2007

Decision on Jurisdiction: 9 September 2008

Award: Pending<sup>1</sup>

**Arbitrators:**

Mr. L. Yves Fortier (president)

Mr. David A. R. Williams (claimant appointee)

Prof. Brigitte Stern (respondent appointee)

**Forum and applicable procedural rules:**

International Centre for Settlement of Investment Disputes (ICSID)

ICSID Rules of Procedure for Arbitration Proceedings

**Applicable treaty:**

United States–Ecuador Bilateral Investment Treaty (BIT)

**Alleged treaty violations:**

- Not yet in public domain

**Other legal issues raised:**

- Jurisdiction—contractual waiver of treaty rights
- Jurisdiction—waiting periods

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<sup>1</sup> As of 31 December 2010.



## 1. CASE SUMMARY

### 1.1 | Factual background

In May 1999, Occidental Exploration and Production Company (OEP) entered into a “Participation Contract” with Ecuador and its state-owned oil company, Petroecuador, under which OEP was granted the exclusive right to carry out hydrocarbon exploration and exploitation in the area of the Ecuadorian Amazon known as “Block 15.” In October 2000, OEP entered into two agreements with a subsidiary of EnCana Corporation (a major Canadian oil and gas company). Under these two agreements, OEP granted EnCana’s subsidiary a 40 per cent economic interest in the share of production from Block 15, in return for annual payments toward capital investments and operating costs over the following four years. The agreements envisaged that OEP would assign legal title of the 40 per cent interest to EnCana’s subsidiary at the end of the four years.

Four years later, however, when OEP requested approval from the Ecuadorian government to proceed with the transfer of legal title to EnCana’s subsidiary, the government refused. Rather, the Attorney General of Ecuador issued orders to the Ministry of Mines and Energy to terminate the Participation Contract through a declaration of “*Caducidad*” (meaning “expiration”). The Attorney General alleged that OEP had, inter alia, transferred rights and obligations under the Participation Contract without ministerial approval and repeatedly committed violations of the Hydrocarbons Law and regulations.

During the following roughly 18 months, OEP sought to rebut the allegations made by the Attorney General, but to no avail. In May 2006, the Minister of Energy and Mines notified OEP of his decision to terminate the Participation Contract by declaring its *Caducidad*. OEP and its corporate parent, Occidental Petroleum Corporation (together, “the Claimants”), filed their Request for Arbitration two days later (paras. 10–20<sup>2</sup>).

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<sup>2</sup> All references to paragraphs are from the Tribunal’s Decision on Jurisdiction.



## 1.2 | Summary of legal issues and Decision on Jurisdiction

In the arbitration proceedings, still ongoing at the time of this summary's publication, the Claimants have asked the Tribunal to declare that Ecuador breached its obligations under the United States–Ecuador Bilateral Investment Treaty (U.S.–Ecuador BIT), the Participation Contract, international and Ecuadorian law. The Claimants have sought an order for Ecuador to pay the fair market value of the Participation Contract (US\$2.705 billion) plus consequential damages (US\$201.2 million) (para. 22).

Subsequent to filing their request for arbitration, the Claimants also sought provisional measures, *inter alia*, to order Ecuador to immediately cease its occupation of Block 15 and OEP's facilities and to enjoin Ecuador from entering into a contract with another party to carry out exploration and exploitation activities on Block 15. In its Decision on Provisional Measures dated 17 August 2007, however, the Tribunal declined to order the requested provisional relief on the ground that the Claimants failed to demonstrate that damages would not be an adequate remedy.

Ecuador subsequently filed preliminary objections to jurisdiction. By decision dated 9 September 2008, the Tribunal rejected all of Ecuador's objections to jurisdiction and held that it had authority to determine the claims brought under both the U.S.–Ecuador BIT and the Participation Contract. Although the Tribunal's award on the merits is still pending, its Decision on Jurisdiction, dated 9 September 2008, considered several interesting legal issues.



## 2. SELECT LEGAL ISSUES

The Decision on Jurisdiction in this case is important in two respects. First, the decision is notable for the Tribunal's finding that, to be effective, a contractual clause under which an investor waives its right to arbitration under a BIT must be clear and unequivocal; silence is not enough. Moreover, the host state cannot use its domestic law to get around its international obligations. The import of this finding is that if host states wish to exclude certain types of investment disputes from international arbitration under a BIT, they must do so in clear and unequivocal language within the BIT itself.

Second, the decision is notable for the Tribunal's view that where negotiations are bound to be futile, there is no need for the investor to wait out the full waiting period set out in a BIT's dispute resolution clause before commencing arbitration proceedings. In doing so, the Tribunal chose to disregard the clear and express wording of the U.S.–Ecuador BIT.

### 2.1 | Contractual waiver of investment treaty arbitration

In its first objection to jurisdiction, Ecuador argued that the ICSID Tribunal did not have jurisdiction over the parties' dispute because the Participation Contract "carved out" and/or waived *Caducidad* decrees from arbitration. Ecuador asserted that, pursuant to the Participation Contract and Ecuadorian law (which stipulates that *Caducidad* decrees may only be challenged before the Ecuadorian administrative courts), the Tribunal could not hear the case.

Ecuador cited Clauses 21.4 and 22.2.1 of the Participation Contract in support of its position. Clause 21.4 stated:

The termination of this Participation Contract for any reason other than those that result in *caducidad* may be requested by either of the Parties, subject to procedures stipulated in Clause 20 in the event that they fail to reach agreement.



Clause 20 provided, inter alia, for disputes related to the performance of the contract to be resolved by ICSID arbitration.<sup>3</sup>

Clause 22.2.1 of the Participation Contract stated:

In the event of controversies that may arise as a result of the performance of this Participation Contract, in accordance with Ecuadorian law, Contractor expressly waives its right to use diplomatic or consular channels, or to have recourse to any national or foreign jurisdictional body not provided for in this Participation Contract, or to arbitration not recognized by Ecuadorian law or provided for in this Participation Contract. Lack of compliance with this provision shall constitute grounds for the forfeiture of this Participation Contract.

Ecuador claimed that through Clauses 21.4 and 22.2.1, OEPC had waived its recourse to ICSID arbitration in the event of a Caducidad-related dispute under the Participation Contract and that, in accordance with Ecuadorian law, the Ecuadorian administrative courts had exclusive jurisdiction over such disputes. Ecuador admitted that Clause 21.4 did not address the resolution of Caducidad-related disputes per se, but submitted that this was a “purposeful” omission:

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<sup>3</sup> Clause 20 of the Participation Contract, entitled “Consultants and Arbitrations,” states:

**20.3** Notwithstanding the foregoing provisions, from the date on which the Agreement on the Settlement of Differences Relative to Investments among States and the Nationals of Other States (the “Agreement”) signed by the Republic of Ecuador as a Member State of the International Bank for Reconstruction and Development, on January 15, 1986 and published in Official Gazette No. 386 of March 3, 1986, is ratified by Congress of Ecuador, the *Parties agree to submit their controversies or differences that are related to or arise from the performance of this Participation Contract, to the jurisdiction and competence of the International Center for the Settlement of Investment-Related Differences (“CIADI”)* so that they be arranged and resolved according to the provisions of said Agreement. Under this system of arbitration, the following provisions shall be applied: [...]

**20.4** Additionally, and without prejudice to the provisions in Clauses 20.2 and 20.3 of this Participation Contract, the Parties agree to submit any difference relating to investments to Treaties, Conventions, Protocols and other acts under international law, signed and ratified by Ecuador in accordance with the Law. [emphasis added]

Clause 21 deals with termination in general, and it states that with respect to a non-Caducidad termination, arbitration is available. *It does not, however, speak to a Caducidad determination, and we believe that the omission is purposeful, and that it reflects the point of Ecuadorian law, that one cannot have arbitration with respect to Caducidad.* (para. 84, emphasis in original)

The Tribunal, however, considered Ecuador's view to be a misreading of the Participation Contract, particularly of Clause 20, which provided for ICSID arbitration in the event of any dispute related to the Participation Contract's performance. The Tribunal held that, under elementary principles of contract interpretation, any exception to the availability of ICSID arbitration for the resolution of disputes arising under the Participation Contract required clear language to this effect. The Tribunal affirmed the view of the tribunal in the earlier case of *Aguas del Tunari v. The Republic of Bolivia*,<sup>4</sup> which stated, "The Tribunal will not read an ambiguous clause as an implicit waiver of ICSID jurisdiction; silence as to the question is not sufficient" (para. 85). After affirming this view, the Tribunal added that more fundamentally, the Respondent could not invoke its domestic law for the purpose of avoiding ICSID jurisdiction under the U.S.–Ecuador BIT. The Tribunal held that, had the parties wished to exclude Caducidad-related disputes from ICSID jurisdiction and confer exclusive jurisdiction to the Ecuadorian administrative courts in this regard, they could have done so through express wording. They did not, and the Tribunal would not imply such wording into the clauses (paras. 63–89).

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<sup>4</sup> ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction dated 21 October 2005.

## 2.2 | Disregarding the required treaty waiting period before commencing arbitration

Ecuador's second jurisdictional objection was that the Claimants had commenced arbitration proceedings without waiting six months as required by the U.S.–Ecuador BIT. Article VI.3 stated:

Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration.

The Tribunal noted that the Caducidad procedure at issue in this arbitration was, in fact, initiated in 2004 and that for approximately eighteen months prior to the issuance of the actual Caducidad decree in May 2006, OEPC had sought to rebut the government's allegations, but to no avail. The Tribunal noted that a number of earlier tribunals had confirmed that where negotiations are bound to be futile, there is no need for the waiting period to fully lapse.<sup>5</sup> The Tribunal accepted that attempts at reaching a negotiated solution in this case were indeed futile, and Ecuador's second jurisdictional objection was accordingly denied (paras. 90–95).

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<sup>5</sup> *Lauder v. Czech Republic*, Award dated 3 September 2001 at paragraphs 187–191; *Conorzio Groupement L.E.S.I. DIPENTA v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/03708, Award dated 10 January 2005 at paragraph 32(iv); *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/10/13, Decision on Jurisdiction dated 6 August 2003 at paragraph 184; and *Ethyl Corp. v. The Government of Canada*, Award on Jurisdiction dated 24 June 1998 at paragraph 84.





# **Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8 (*Parkerings v. Lithuania*)**

Lise Johnson

Award available at <http://ita.law.uvic.ca/documents/Pakerings.pdf>

**Keywords:** Broad dispute resolution provision, cultural measures, due diligence, environmental measures, exhaustion of remedies, expropriation, fair and equitable treatment, good faith, investor obligations, jurisdiction, legitimate expectations, like circumstances, most favoured nation treatment, protection

### **Key dates:**

Request for Arbitration: 11 March 2005

Constitution of Tribunal: 12 October 2005

Award: 11 September 2007

### **Arbitrators:**

Dr. Laurent Lévy (president)

Julian D. M. Lew, QC (claimant appointee)

Hon. Marc Lalonde, PC, OC, QC (respondent appointee)

### **Forum and applicable procedural rules:**

International Centre for Settlement of Investment Disputes (ICSID)

ICSID Rules of Procedure for Arbitration Proceedings

### **Applicable treaty:**

Norway-Lithuania Bilateral Investment Treaty (BIT)

### **Alleged treaty violations:**

- Equitable and reasonable treatment/fair and equitable treatment
- Expropriation
- Most favoured nation treatment
- Protection/full protection and security

### **Other legal issues raised:**

- Interpretation—reference to other bodies/principles of law
- Investor obligations—due diligence
- Investor obligations—exhaustion of remedies
- Jurisdiction—broad dispute resolution provision



## 1. CASE SUMMARY

### 1.1 | Factual background

On December 30, 1999, the Lithuanian city of Vilnius (“the City”) and the Egapris Consortium (a group of entities that included the Claimant’s wholly-owned Lithuanian subsidiary) signed an agreement (“the Agreement”) pursuant to which the Egapris Consortium would design, build and operate a “modern, integrated parking system” in the City (paras. 51–52).

In relevant part, the Agreement required the Egapris Consortium to develop and secure City approval of a public parking plan; design, construct and operate multiple multi-storey car parks (MSCPs); collect parking fees and penalties; and transfer a portion of the sums collected and a separate fixed fee to the City (paras. 96–105). In turn, the Agreement obligated the City to, among other things, assign the Egapris Consortium the right to collect local charges and penalties for parking and provide the Egapris Consortium with information necessary to prepare the parking plan (paras. 94–97).

Subsequent to the Agreement’s execution, multiple developments impaired its performance. In particular, (1) the National Government successfully challenged aspects of the Agreement in court on the grounds that allowing the Egapris Consortium to collect and retain a portion of the parking fees violated national law (paras. 123–126, 180), (2) the National Government enacted a decree restricting municipalities’ authority to enforce parking violations (paras. 130–132, 178, 192), (3) Parliament passed legislation limiting municipalities’ power to contract with private entities (paras. 133–134, 157–166), and (4) various government agencies objected to the Egapris Consortium’s proposed development of an MSCP in the City’s historic Old Town, an area designated as a World Heritage site by the United Nations Educational, Scientific and Cultural Organization (UNESCO) (paras. 135–156, 389). Due to those issues regarding the legality of various key activities contemplated by the Agreement, the parties attempted to renegotiate the deal (paras. 172–187). Yet in January 21, 2004, after more than a year of negotiations, the City decided to terminate the Agreement (para. 188).



## 1.2 | Summary of legal issues and award

The Claimant, Parkerings–Compagniet AS (“Parkerings”), initiated its ICSID action on the grounds that in negotiating, performing and terminating the Agreement, Lithuania (through its central and municipal authorities) breached its obligations to Parkerings under the governing bilateral investment treaty (BIT) between Lithuania and Norway. More specifically, Parkerings argued that Lithuania violated its obligations under the BIT to (1) grant the investment equitable and reasonable treatment, (2) protect the investment, (3) treat the investor no less favourably than it treated investors from third states, and (4) pay compensation for indirectly expropriating the investor’s property (para. 197). Parkerings asserted that the ICSID Tribunal had jurisdiction over the case because the governing BIT allowed parties to submit to ICSID any disputes arising “in connection with” covered investments (para. 236).

After ruling that it had jurisdiction over the case, the ICSID Tribunal rejected each of Parkerings’ four claims.

## 2. SELECT LEGAL ISSUES

The Tribunal’s treatment of Parkerings’ four claims has several notable implications for sustainable development. In particular, in its examination of the equitable and reasonable treatment standard, *Parkerings* elaborates upon states’ regulatory flexibility and investors’ obligations under international investment law; in its analysis of the most favoured nation (MFN) obligation, *Parkerings* illustrates how states may take social and environmental concerns into account in distinguishing between foreign investors. And throughout the case, the Tribunal addresses whether and to what extent contract-based investor–state disputes should be resolved in appropriate local fora before being pursued as treaty claims before international tribunals. These issues are discussed more fully below.



## 2.1 | Equitable and reasonable treatment/fair and equitable treatment: Protecting investors' legitimate expectations

Parkerings contended that Lithuania violated the “equitable and reasonable treatment” (fair and equitable treatment, or FET)<sup>1</sup> standard because, among other failings, Lithuania failed to maintain a stable and predictable legal framework and consequently frustrated Parkerings’ legitimate expectations (paras. 321–322). Evaluating that claim, the Tribunal began by stating that an investor’s expectations are generally only legitimate and protectable under international law if they arise from either the host state’s explicit promises or implicit assurances that the “investor took into account in making the investment” (para. 331). The Tribunal also emphasized that investors *should expect* legislative and regulatory changes to affect their investments, and must exercise due diligence and structure those investments to ensure that they can “adapt...to the potential changes of legal environment” (para. 333); “any businessman or investor knows that laws will evolve over time. What is prohibited however is for a state to act unfairly, unreasonably or inequitably in the exercise of its legislative power” (paras. 332, 337).

Based on those considerations, the Tribunal noted there was no evidence that Lithuania had “give[n] any explicit or implicit promise that the legal framework of the Agreement would remain unchanged” (para. 335). The Agreement contained no “provision stabilizing the [applicable] legal regime” and specifically “exempt[ed] the City from responsibility for actions taken by the Lithuanian Government” (para. 324). Additionally, as explained by the Tribunal, given that the country was one in transition at the time of the investment, “legislative changes, far from being unpredictable, were in fact to be regarded as likely” (para. 335). Consequently, “no expectation that the laws would remain unchanged was legitimate” (para. 335).

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<sup>1</sup> Parkerings had argued that the “equitable and reasonable” treatment standard set forth in the BIT was different from and stricter than the “fair and equitable” treatment standard used in many other international investment agreements (para. 198). The Tribunal held that the two standards were in fact identical (para. 278).



*Parkerings'* FET analysis thus suggests that investors are responsible for assessing the certainty of host states' specific political circumstances and legal frameworks and for contractually protecting themselves against perceived and real risks (paras. 333–335). The legitimacy of investors' expectations depends on the investors' exercise of due diligence (para. 333). States, in comparison, do not owe a general duty under international law to inform investors about their own legal concerns or regulatory uncertainties (paras. 340–342, 345–346). Unless a state has specifically contracted away its right to regulate through a “stabilization” clause or there is evidence that the state enacted its measure(s) “specifically to prejudice” a foreign investment, it may alter its laws and regulations affecting foreign investments (paras. 332–337).

That conclusion has several key implications. For one, the Tribunal's language regarding contractual “stabilization” clauses indicates that the terms of an applicable contract will be relevant to assessing whether there has been a breach of the FET obligation, and further suggests that existence of “stabilization” clauses may be *necessary* for an investor's expectations about the stability of the legal framework to be legitimate. The Tribunal, however, also makes clear elsewhere in its decision that contract breaches (which could include breaches of stabilization obligations) are generally *not sufficient* to give rise to FET violations (paras. 344, 360–361, 448).

Moreover, the Tribunal's language regarding measures aiming “specifically to prejudice” foreign investments indicates that the state's intent in enacting allegedly offending measures may be important when determining whether the measures will be deemed unfair and inequitable, in violation of international law (para. 337). In this respect, *Parkerings* arguably diverges from a number of other cases holding that even measures enacted in good faith may be inconsistent with the FET obligation if they harm covered investments.<sup>2</sup>

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<sup>2</sup> See, e.g., *Occidental Exploration & Prod. Co. v. Ecuador*, Final Award, 1 July 2004 (LCIA Case No. UN3467), at paras. 185–86 (noting that the requirement of “fair and equitable treatment” was “an objective requirement that does not depend on whether the Respondent has proceeded in good faith or not”); *The Loewen Group, Inc. v. U.S.A.* (ICSID Case No. ARB(AF)/93/3, 26 June 2003), 42 ILM 811 (2003), at para. 132 (noting that “bad faith” does not need to be shown to establish a violation of fair and equitable treatment).



## **2.2 | Most favoured nation obligation: Permissible differentiation between investors**

Another significant aspect of this decision is that, when analyzing whether Lithuania violated the MFN obligation, the Tribunal indicated states may validly differentiate between investors based on (1) the social, cultural and environmental impacts of the investors' investment projects, and (2) the costs and benefits the investors' projects would provide for the host state (paras. 392–396, 410, 430).

Parkerings had claimed Lithuania violated the BIT's MFN provision by according more favourable treatment to Pinus Proprius, another foreign investor in allegedly similar circumstances to the Egapris Consortium. Parkerings argued there were two examples of purportedly improper disparate treatment: (1) the City contracted with Pinus Proprius to build an MSCP in the Old Town, but had rejected Parkerings' proposal to construct an MSCP in a similar area; and (2) the City sought to avoid legal restrictions on contracting with private entities by entering into a "Cooperation Agreement" with Pinus Proprius but refused to conclude such an agreement with Parkerings (para. 374).

To judge those claims, the Tribunal applied the rule that a breach of the MFN obligation arises when a state accords different treatment to another foreign investor in "like circumstances" (para. 369). It clarified that investors will only be in "like circumstances" if they are "in the same economic or business sector" (para. 371). The Tribunal also added that if the state possesses a legitimate objective for treating the two investors differently, no violation of the MFN provision will be found (paras. 371, 375–376).

The Tribunal held that Lithuania did not breach the MFN obligation because, although it treated Parkerings and Pinus Proprius differently, it possessed legitimate reasons for distinguishing between the two investors' investments. In particular, the Tribunal stated:



The fact that [Parkerings'] MSCP project extended significantly more into the Old Town as defined by the UNESCO is decisive....The [goals of] historical and archaeological preservation and environmental protection could be and in this case were a justification for the refusal of the project. The potential negative impact of the [Parkerings] project in the Old Town was increased by its considerable size and its proximity with the culturally sensitive area of the Cathedral. Consequently, [Parkerings'] MSCP...was not similar with the MSCP constructed by Pinus Proprius. (para. 392; see also 393–396)

The Tribunal similarly concluded that due to the substantive differences between the City's contract with Pinus Proprius and the proposed Cooperation Agreement with Parkerings, the City justifiably decided to conclude a Cooperation Agreement with the former, but not the latter (paras. 411, 430).

*Parkerings* thus seems to allow environmental concerns, cultural values, domestic and international obligations, and other assessments of relative costs and benefits to influence “likeness” determinations.<sup>3</sup> It also suggests that characteristics of the actual *investment projects* are relevant to determining whether the investors are in “like circumstances” for purposes of MFN analysis (para. 410).

### 2.3 | Contract claims as breaches of international law

Another notable aspect of the Tribunal's decision is its emphasis on the need for foreign investors to seek relief in the appropriate contractually specified legal forum before pursuing IIA-based claims in international arbitration.

One example of this can be seen in the Tribunal's resolution of Parkerings' expropriation claim. Parkerings had argued that Lithuania indirectly expropriated its property when the City wrongfully terminated the Agreement (para. 440). The Tribunal acknowledged that breaches of

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<sup>3</sup> This approach is analogous to that used by tribunals in other investor–state disputes to refer to or draw from other bodies of law when evaluating the scope of investors' rights and states' obligations. See, e.g., *World Duty Free v. Kenya*, ICSID Case No. ARB/00/7, Award dated 4 October 2006, IIC 277 (2006); *SPP v. Egypt*, ICSID Case No. ARB/84/3, Award dated 20 May 1992, 32 ILM 933 (1993).



contract may in some circumstances give rise to expropriation claims, but clarified that to do so, the party alleging breach must generally have first sought relief in the forum selected by the contracting parties (paras. 437–456). The Agreement specified that disputes would be resolved in Lithuanian courts (para. 453). Because Parkerings had neither sought relief for any alleged breach before those courts nor provided any “objective reason to question Lithuanian courts’ ability to dispose of the case fairly,” its expropriation claim failed (paras. 453–454).

The Tribunal similarly cited Parkerings’ failure to resort to Lithuanian courts (or to show why such efforts would have been futile) as a key reason for rejecting the investor’s FET and protection claims (paras. 344, 360–361, 448). *Parkerings* consequently might counsel other foreign investors to refrain from framing what are fundamentally contract-based claims as IIA violations. The decision’s emphasis on the need to pursue local, contract-based remedies also may help counterbalance the “umbrella clause” effect that broad grants of ICSID jurisdiction in governing IIAs might have. Based on the Tribunal’s reasoning regarding jurisdiction and the merits, it seems that even if the Agreement had specified that contractual disputes be resolved through arbitration (as opposed to domestic courts), the Tribunal still would have rejected Parkerings’ claims, because allegations of contract breach need to be pursued as such before rising to violations of international law.





# Phoenix Action Ltd. v. Czech Republic, ICSID Case No. ARB/06/5 (*Phoenix v. Czech Republic*)

Mahnaz Malik

Award available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=viewCase&reqFrom=Home&caseId=C74>

**Keywords:** Abuse of process, definition of “investment,” good faith, investor obligations, jurisdiction, “*Salini*” test

#### Key dates:

Request for Arbitration: 23 March 2006

Constitution of Tribunal: 8 January 2007

Award on Jurisdiction: 9 April 2009

#### Arbitrators:

Prof. Brigitte Stern (president, appointed by the ICSID Administrative Council)

Prof. Andreas Bucher (respondent appointee)

Prof. Juan Fernández-Armesto (appointed by ICSID Administrative Council)

#### Forum and applicable procedural rules:

International Centre for Settlement of Investment Disputes (ICSID)

ICSID Rules of Procedure for Arbitration Proceedings

#### Applicable treaty:

Czech Republic–Israeli Bilateral Investment Treaty (BIT)

#### Alleged treaty violations:

- Denial of justice
- Expropriation
- Fair and equitable treatment

#### Other legal issues raised:

- Interpretation—reference to other bodies/principles of law
- Investor obligations—obligations to act in good faith
- Investor obligations—obligations to comply with domestic/international law
- Jurisdiction—definition of “investment”—bona fide and made in good faith
- Jurisdiction—definition of “investment”—compliance with host state law
- Jurisdiction—definition of “investment”—definition under the ICSID Convention



## 1. CASE SUMMARY

### 1.1 | Factual background

In April 2001, Czech officials commenced criminal investigations of Mr. Vladimir Beno relating to tax and customs duty evasions. Mr. Beno fled to Israel, where he thereafter, in October 2001, registered a new company, Phoenix Action Limited (“Phoenix”). On 26 December 2002, that Israeli company, Phoenix, acquired all the interests in a Czech company Benet Praha, Spol S.R.O. (“Benet Praha”) and its corporate subsidiary, Benet Group, A.S. (“Benet Group”). Mr. Beno had been Benet Praha’s executive officer at the time he fled from the Czech Republic. Phoenix purchased those companies from Mr. Beno’s family members, and paid only nominal sums for the acquisition.

At the time of the purchase, both Benet Praha and Benet Group were involved in ongoing legal disputes—Benet Group with a Czech national over the ownership of its two subsidiaries, and Benet Praha with Czech authorities regarding their actions freezing Benet Praha’s accounts and seizing its documents in connection with the criminal proceedings against Mr. Beno.

On 15 February 2004, Phoenix submitted a request for arbitration at ICSID, alleging that the Czech Republic’s treatment of its investment in Benet Praha and Benet Group violated the bilateral investment treaty (BIT) between the Czech Republic and Israel.

### 1.2 | Summary of legal issues and award

The Czech Republic objected to the Tribunal’s jurisdiction, contesting that Phoenix’s interest in Benet Praha and Benet Group was not a protected investment under either the ICSID Convention or the Czech–Israeli BIT. It argued that “Phoenix [was] nothing more than an ex post facto creation of a sham Israeli entity created by Czech fugitive from justice, Vladamir Beno, to create diversity of nationality” (para. 34).



The Tribunal agreed with the Czech Republic's objections to jurisdiction on the grounds that the investment was not made in good faith and constituted an abuse of the ICSID system. Further, the Tribunal held that in view of the circumstances of the case, Phoenix should bear all costs of the ICSID proceedings (estimated to be US\$356,000), as well as the Czech Republic's legal fees and expenses (CZK 21,417,199.13).

## 2. SELECT LEGAL ISSUES

The Tribunal's decision is important because it details criteria required for investments to qualify as such under the ICSID Convention. As explained by the Tribunal, in order to fall under ICSID jurisdiction, an investment must not only be covered by the applicable BIT or other relevant state-state or investor-state agreement, but must also meet the definition of an "investment" under the ICSID Convention (para. 74). Consequently, satisfying the elements of an "investment" under the ICSID Convention is a prerequisite to ICSID jurisdiction that cannot be waived in a BIT. States can "confirm the ICSID notion [of an investment] or restrict it [through their BITs or other investment agreements], but they cannot expand it in order to have access to ICSID....As long as it fits within the ICSID notion, the BIT definition is acceptable, it is not if it falls outside of such definition" (para. 96).

In assessing whether the Claimant's investment was an "investment" under the ICSID Convention, the Tribunal emphasized two important conditions that must be met. The first requirement is that the investment must be made in accordance with host state laws and regulations; the second is that it must be made in good faith. The Tribunal's reasoning and holding on this jurisdictional issue are discussed further below.

The Tribunal's findings on the criteria of investment under the ICSID Convention emphasize the implications of selecting ICSID arbitration in BITs. A fundamental principle of arbitration is that for an arbitral tribunal to have jurisdiction over a case, the disputing parties must have consented to that form of dispute settlement. Often the parties issue their consent to arbitrate



in a contract; states also make broad, general offers of consent to arbitrate investment disputes in their BITs. When the disputing parties opt to arbitrate the dispute under the ICSID system, the ICSID Convention imposes jurisdictional requirements that are separate from, and that must be satisfied in addition to, jurisdictional requirements set forth in the underlying investor–state contract, BIT or other arbitration agreement. Arbitration through other arbitral systems, such as ad hoc arbitration under the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules, in contrast, does not impose such independent jurisdictional tests. As shown in this case, the ICSID Convention’s requirements for accepting jurisdiction can serve as a filter preventing arbitration of some disputes—a role that respondent states may find welcome.

This is also a welcome ruling for states because it illustrates that investors may be effectively penalized for bringing improper claims. Although in a number of investor–state arbitrations tribunals have required the state to bear its own arbitration costs even when the case was decided against the investor at the jurisdictional phase, here the Tribunal ruled that the investor must bear the costs of the arbitration and the Czech Republic’s legal costs, as jurisdiction was denied in view of the investor’s misuse of the ICSID system.

## **2.1 | Definition of “investment” under the investment treaty and the ICSID Convention**

Pursuant to the ICSID Convention, ICSID tribunals can only accept jurisdiction over disputes arising directly out of “investments.” The Tribunal noted that ICSID case law had identified various criteria required to establish an “investment” under the ICSID Convention (para. 83). It began by revisiting the so-called “*Salini*” test, which sets out four criteria for an investment to qualify as such under the ICSID Convention: a contribution (1) of money or other assets of economic value, (2) for a certain duration, (3) with an element of risk, and (4) that makes a contribution to the host state’s development (para 83).<sup>1</sup>

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<sup>1</sup> In *Biwater v. Tanzania*, the *Salini* test was described as having five criteria: (1) adequate duration; (2) regularity of profit and return; (3) risk; (4) substantial commitment of resources, financial or otherwise; and (5) contribution to the host state’s development.



The *Phoenix* Tribunal also noted, however, that there were divergent views on the *Salini* test including, in particular, whether satisfying the fourth criterion was required (para. 84). Addressing that debate, the Tribunal concluded that “the contribution of an international investment to the *development* of the host State is impossible to ascertain—the more so as there are highly diverging views on what constitutes ‘development,’” and that, consequently, the Tribunal should employ a “less ambitious” approach “centered on the contribution of an international investment to the *economy* of the host State” (para 85) (emphasis in original).

The Tribunal did not find itself strictly bound by the *Salini* criteria and thus proposed its own rendition of the elements that must be taken into account for an investment to be protected under the ICSID Convention:

1. a contribution in money or other assets;
2. a certain duration;
3. an element of risk;
4. an operation made in order to develop an economic activity in the host State;
5. assets invested in accordance with the laws of the host State;
6. assets invested *bona fide*. (para. 114)

The Tribunal explained its reasons for requiring the fifth and sixth criteria of the above-mentioned requirements:

The purpose of the international mechanism of protection of investment through the ICSID arbitration cannot be to protect investment made in violation of the laws of the host state or investment not made in good faith, obtained for example through misrepresentations, concealment or corruption, or amounting to an abuse of the international ICSID arbitration system. In other words, the purpose of international protection is to protect legal and bona fide investments. (para. 100)

Applying each of the six criteria, the Tribunal found that it could not deny Phoenix’s purported investment on the first five. As is discussed further below, however, it rejected jurisdiction on the basis of the sixth criterion, the requirement that the investment be made in good faith.



## 2.2 | The requirement of good faith in making the investment

The Tribunal found that the “protection of international investment arbitration cannot be granted if such protection would run contrary to the general principles of international law, among which the principle of good faith is of utmost importance” (para. 106). Consequently, accordance with international principles of good faith was required for investments to be covered by the ICSID Convention. Yet compliance with those international principles of good faith was not necessarily sufficient to satisfy this sixth criterion: According to the Tribunal, in addition to international principles of good faith, domestic principles of good faith were factors to be considered when determining whether a protectable “investment” was made (paras. 109–112).

Based on these considerations, the Tribunal then assessed whether Phoenix’s purported investment qualified as one under the ICSID Convention. The Tribunal noted that the relevant issue was not whether there had been corruption or deceitful conduct, but whether the investor made the investment in an attempt to misuse “*the international arbitration mechanism of ICSID*” (para. 113) (emphasis in original).

To determine whether Phoenix’s investment was a bona fide investment, the Tribunal looked at various factors including the timing of the investment, the initial request to ICSID, the timing of the claim, the substance of the transaction in which the investor purchased and transferred its investment, and the nature of the investment’s operations (or lack thereof) (paras. 136–144). The Tribunal then concluded that “the Claimant made an ‘investment’ not for the purpose of engaging in economic activity, but for the sole purpose of bringing international litigation against the Czech Republic” (para. 142). It noted that the unique goal of the investment was to transform a pre-existing domestic dispute into an international dispute subject to ICSID arbitration under a BIT. The Tribunal held that this kind of transaction was not a bona fide transaction and therefore could not be protected under the ICSID system (para. 142).



In addition to being important due to its elaboration of the criteria necessary for an “investment” to be covered by the ICSID Convention, this decision is also significant because it reflects a certain degree of scrutiny applied by the Tribunal. Although the acquisition of the Czech companies by an Israeli company (Phoenix) appeared *prima facie* a covered investment, the Tribunal was willing to assess the overall facts to ensure that an abuse of access to the ICSID system had not occurred. It remains to be seen, however, whether and to what extent future ICSID tribunals will follow the Tribunal’s approach of implying a robust requirement of a *bona fide* investment together with the requirement to comply with host state laws and regulations, even absent such provisions in the BIT itself. It is also uncertain how future tribunals will approach the principle of good faith discussed as part of the general principles of international and domestic law.



# SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13 (Decision on Objections to Jurisdiction) (*SGS v. Pakistan*)

Mahnaz Malik

Decision available at [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC622\\_En&caseId=C205](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC622_En&caseId=C205)

**Keywords:** Contractual forum selection clause, definition of “investment,” “fork-in-the-road” clause, jurisdiction, multiple/parallel proceedings, umbrella clause, waiting periods

#### Key dates:

Request for Arbitration: 12 October 2001

Constitution of Tribunal: 9 August, 2002<sup>1</sup>

Decision on Jurisdiction: 6 August 2003

#### Arbitrators:

Judge Florentino P. Feliciano (president)

Mr. André Faurès (claimant appointee)

Mr. J. Christopher Thomas QC (respondent appointee)

#### Forum and applicable procedural rules:

International Centre for Settlement of Investment Disputes (ICSID)

ICSID Rules of Procedure for Arbitration Proceedings

#### Applicable treaty:

Switzerland–Pakistan Bilateral Investment Treaty (BIT)

#### Alleged treaty violations:

- Expropriation
- Fair and equitable treatment
- Impairment
- Investment promotion
- Protection
- Umbrella clause

#### Other legal issues raised:

- Jurisdiction—broad dispute resolution provision
- Jurisdiction—definition of “investment”
- Jurisdiction—effect of a contractual forum selection clause
- Jurisdiction—multiple/parallel proceedings
- Jurisdiction—umbrella clause
- Jurisdiction—waiting periods

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<sup>1</sup> The Tribunal was originally constituted on 25 April 2002, with Mr. Toby Landau serving as the respondent appointee. Mr. Thomas was appointed after Mr. Landau resigned.





## 1. CASE SUMMARY

### 1.1 | Factual and procedural background

On 29 September 1994, the Government of Pakistan entered into a pre-shipment inspection agreement (the “PSI Agreement”) with SGS Société Générale de Surveillance S.A. (“SGS”), pursuant to which SGS agreed to provide pre-shipment inspection services with respect to goods to be exported from certain countries to Pakistan. The objective of the inspection was to ensure that goods were classified properly for duty purposes and to enable Pakistan to increase the efficiency of its customs revenues collection.

On 12 December 1996, the Government of Pakistan notified SGS that the PSI Agreement would be terminated with effect from 11 March 1997. In January 1998, SGS initiated a claim against Pakistan in the Swiss courts with respect to the termination of the PSI Agreement and non-payment of its invoices. Various lower Swiss courts rejected SGS’s claims, and the Swiss proceedings finally concluded with the Swiss Federal Tribunal’s denial of SGS’s appeal on 23 November 2000.

On 11 September 2000, Pakistan commenced arbitration proceedings (the “Pakistan Arbitration”) in Pakistan relating to the dispute and seeking to enforce arbitration provisions in the PSI Agreement. SGS filed preliminary objections in the Pakistan Arbitration and a counter-claim against Pakistan for alleged breaches of the PSI Agreement.

On 12 October 2001, SGS filed a Request for Arbitration with ICSID against Pakistan for violations of the Switzerland–Pakistan Bilateral Investment Treaty (BIT) and the PSI Agreement. On 4 January 2002, SGS sought an injunction against the Pakistan Arbitration in the Pakistani courts. SGS’s application was rejected at various lower court levels until the matter finally reached the Supreme Court of Pakistan. On 3 July 2002, the Supreme Court granted Pakistan’s request to proceed with the Pakistan Arbitration and restrained SGS from participating in the ICSID arbitration. The Supreme Court of Pakistan noted that the Switzerland–Pakistan BIT



had no legal effect under Pakistani law because it had not been implemented into municipal law and that the parties' contractual agreement to arbitrate in Pakistan should be enforced. Notwithstanding that decision of the Pakistani Supreme Court, the ICSID Tribunal ("the Tribunal") decided to proceed with hearing the matter. On 12 November 2002, the sole arbitrator in the Pakistan Arbitration agreed to stay proceedings until the Tribunal determined whether it had jurisdiction to consider SGS's claims.

## **1.2 | Summary of legal issues and Decision on Jurisdiction**

SGS asserted that the Tribunal had a broad jurisdiction that encompassed both the alleged breaches of the BIT and the PSI Agreement. SGS submitted that Pakistan's violations of the Switzerland–Pakistan BIT included a failure to promote SGS's investment, impairment of the enjoyment of its investments, failure to accord fair and equitable treatment, and expropriation without compensation. SGS also argued that Pakistan had breached its obligations under Article 11 (the "umbrella clause") of the Switzerland–Pakistan BIT by violating the PSI Agreement. According to SGS, the umbrella clause had the effect of elevating violations of the PSI Agreement, which were contract claims, into treaty claims.

Pakistan argued against ICSID jurisdiction on the ground that the parties had previously agreed to arbitration in Pakistan under the PSI Agreement, which pre-dated the ICSID arbitration request. Pakistan submitted, in the alternative, that the Tribunal had no jurisdiction because SGS's claims were contract and not treaty-based claims. Pakistan also asserted that SGS's conduct in the Swiss legal proceedings and Pakistan Arbitration amounted to a waiver of its right to bring ICSID arbitration under the BIT and that, in any event, SGS's request for ICSID arbitration was premature because the BIT required a 12-month consultation period prior to arbitration. Pakistan also contested that SGS had failed to make an investment under the BIT.



The Tribunal accepted and rejected some of each party's arguments. It found it had jurisdiction to decide SGS's claims of violations of the Switzerland–Pakistan treaty. It held that the right to exercise jurisdiction over treaty claims did not depend on the findings of the Pakistan Arbitration (which was adjudicating issues of contract breach arising under the PSI Agreement), thereby permitting parallel proceedings arising from the same set of facts, albeit under different governing laws. The Tribunal similarly rejected several of Pakistan's other jurisdictional arguments. More specifically, it found that the expenditures made by SGS pursuant to the PSI Agreement constituted an "investment" within the meaning of the BIT and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) and that, because the BIT did not contain a "fork-in-the-road" clause, SGS had not waived its rights to arbitration under the BIT by participating in the Swiss and Pakistani legal proceedings; it also found that the 12-month consultation period in the BIT was directory and procedural rather than mandatory and jurisdictional in nature.

The Tribunal, however, declined jurisdiction with respect to claims based on alleged breaches of the PSI Agreement that did not amount to breaches of the BIT, rejecting SGS's assertion that it had jurisdiction to decide contract disputes under the broad offer to arbitrate at ICSID in the Switzerland–Pakistan BIT and noting that such a provision could not supersede or invalidate the jurisdiction clause in the PSI Agreement. The Tribunal likewise refused SGS's contention that the umbrella clause could convert breaches of Pakistan's contracts to violations of the BIT, noting that there was no evidence that this was the shared intention of both Switzerland and Pakistan.



## 2. SELECT LEGAL ISSUES

*SGS v. Pakistan* was the first case in which an ICSID tribunal ruled on the effect of an umbrella clause or “undertaking of obligations clause” that is now the subject of several conflicting decisions by tribunals. The term “umbrella clause” is commonly used to describe clauses in investment treaties in which states undertake to uphold *all or any obligations owed to investors*. The legal implications of the broad language used in such provisions was first considered in this decision when the Tribunal assessed whether such a clause would encompass all the obligations of a state toward an investor—whether under contract, domestic or international law—therefore making any contractual or domestic law breach a breach of a bilateral investment treaty, subject to the treaty’s dispute resolution mechanism. In addition to the important issues it addresses on this point, the ruling of the *SGS v. Pakistan* Tribunal also raises important issues for developing states, particularly with respect to the definition of “investment,” broad offers to arbitrate in treaties and the impact of treaty claims on jurisdiction clauses in investor–state contracts.

The Tribunal in *SGS v. Pakistan* did not find that the umbrella clause in the Switzerland–Pakistan BIT would place the state’s contractual and domestic law obligations under the treaty arbitration mechanism. It similarly refused to find that a broad arbitration clause in a treaty covering disputes “with respect to investments” would subject investor–state contractual disputes to the treaty arbitration mechanism in replacement of the agreed-upon dispute resolution mechanism in the investor–state contract. Notably, however, the so-called restrained approach in *SGS v. Pakistan* was not followed by the subsequent *SGS v. Philippines* Tribunal, which concluded that umbrella clauses and broad dispute resolution clauses (sometimes referred to as “procedural umbrella clauses”) could indeed give a treaty tribunal jurisdiction over contract claims.



## 2.1 | Accepting jurisdiction due to a broad interpretation of “investment”

The Tribunal noted that the ICSID Convention left the contracting parties with a large measure of freedom to define the term “investment” and that the definition of that term in the Switzerland–Pakistan BIT is broad, including “*every kind of asset*” and, in particular, “*claims to money or to any performance having economic value*” and “*concessions under public law...* as well as *all other rights given by law, by contract or by decision of the authority in accordance with law*” (para. 134, emphasis added by Tribunal). The Tribunal found that SGS made certain expenditures in the territory of Pakistan to carry out its obligations under the PSI Agreement that constituted an investment under the Switzerland–Pakistan BIT. Further, it held that the PSI Agreement amounted to a concession under public law within the BIT’s definition of “investment” (para. 140).

The Tribunal’s finding indicates the importance of how “investment” is defined in investment treaties. As is clear from the decision, a broad definition can be interpreted to cover a wide range of activities and expenditures made by investors, including, in this instance, a contract for services under which Pakistan (state) had hired SGS (claimant) for a period of time. This has important implications for the scope of investment agreements and host states’ obligations under those agreements.

## 2.2 | Interpreting broad investor–state arbitration clauses in BITs

The Tribunal noted the sparseness of language in the broad offer to arbitrate in the BIT (Article 9), which refers to “disputes with respect to investments between a Contracting Party and an investor of the other Party.” The Tribunal found that the offer to arbitrate disputes in the BIT did not specify whether it referred to violations of the BIT only or whether it also included breaches of contracts between the investor and state.

The Tribunal noted that disputes arising from violations of the BIT and the PSI Agreement can both be described as “disputes with respect to the investments,” the phrase used in the BIT. It added, however, that this phrase



alone did not necessarily imply “that both BIT and purely contract claims are intended to be covered by the Contracting Parties” (para. 161). It opined that such a clause could not “set at naught all otherwise valid non-ICSID forum selection clauses in all earlier agreements between Swiss investors and the Respondent” (para. 161). Based on that reasoning, the Tribunal held that it must respect the jurisdiction clause agreed upon by the parties in the PSI Agreement. The Tribunal concluded that it had no jurisdiction with respect to claims submitted by SGS based on the alleged breaches of the PSI Agreement that did not constitute or amount to breaches of the BIT.

According to the Tribunal, its jurisdiction was limited to deciding violations of the BIT. It thus declined to interpret a so-called broad dispute resolution clause to bring contract claims before the treaty tribunal. An opposing view, however, can be found in cases that follow the approach taken in *SGS v. Philippines*, which gives wide effect to such dispute resolution clauses by interpreting the phrase “disputes with respect to investments” as covering both treaty and contract claims.

The different interpretations of the broad dispute resolution clauses indicate the danger of using sparse and wide language; states may therefore want to consider clarifying the type of disputes covered by their offers to arbitrate in the treaties to which they are party.

Moreover, although the Tribunal took a view that broad offers to arbitrate in treaties did not bestow tribunals with jurisdiction to hear contract-based claims, its decision leaves the door open for parallel proceedings to take place on similar facts: the breaches of contract that also amount to treaty breaches can be raised before the treaty tribunal; in addition, those contract breaches can be adjudicated before the forum agreed upon by the parties in the investor–state contract.



### 2.3 | Adopting a narrow reading of umbrella clauses as not automatically transforming purely contractual claims into treaty claims

The Switzerland–Pakistan BIT includes a so-called “umbrella clause” (Article 11) that provides, “Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party.” Umbrella clauses have the potential to place all forms of domestic administrative, regulatory or contractual commitments under the “umbrella” of the treaty. The *SGS v. Pakistan* Tribunal was the first international arbitral tribunal to examine the legal effect of such a clause. It rejected SGS’s claim that the clause had the effect of entitling the investor to, notwithstanding the existence of a valid contractual forum selection clause, “elevate” its contract claims to claims grounded on the BIT, thereby allowing it to bring such contract claims to the ICSID Tribunal for resolution and decision. It reasoned that to read umbrella provisions as suggested by SGS—i.e., to be “so far-reaching in scope, and so automatic and unqualified and sweeping in their operation, [and] so burdensome in their potential impact upon a Contracting Party”—there should be “clear and convincing evidence” that that was what the parties had intended. Because SGS had adduced no such evidence of intent, its asserted interpretation of the umbrella clause failed (para. 167).

The Tribunal, however, did not close the door completely on the possibility of a treaty provision elevating contractual breaches to treaty breaches, by noting that “Article 11 of the BIT would have to be considerably more specifically worded before it can reasonably be read in the extraordinarily expansive manner submitted by the Claimant” (para. 171).

Subsequent tribunals, starting with the *SGS v. Philippines* decision, have taken a less restrictive view of the effect of umbrella clauses, leading to a split in investment treaty jurisprudence on this common provision in treaties.



# SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6 (Decision on Objections to Jurisdiction and Separate Declaration) (*SGS v. Philippines*)

Mahnaz Malik

Decision available at [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC657\\_En&caseId=C6](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC657_En&caseId=C6)

**Keywords:** Broad dispute resolution provision, contractual forum selection clause, definition of “investment,” jurisdiction, umbrella clause

#### Key dates:

Request for Arbitration: 6 June 2002  
Constitution of Tribunal: 18 September 2002  
Decision on Jurisdiction: 24 January 2004  
Award: 11 April 2008<sup>1</sup>

#### Arbitrators:

Dr. Ahmed Sadek El-Kosheri (president, appointed by the secretary-general of ICSID in the absence of an agreement between the parties)  
Prof. James R. Crawford, (respondent appointee)  
Prof. Antonio Crivellaro (claimant appointee)

#### Forum and applicable procedural rules:

International Centre for Settlement of Investment Disputes (ICSID)  
ICSID Rules of Procedure for Arbitration Proceedings

#### Applicable treaty:

Switzerland–Philippines Bilateral Investment Treaty (BIT)

#### Alleged treaty violations:

- Arbitrary and discriminatory treatment
- Fair and equitable treatment
- Full protection and security
- Most favoured nation treatment
- Umbrella clause

#### Other legal issues raised:

- Jurisdiction—broad dispute resolution provision
- Jurisdiction—definition of “investment”
- Jurisdiction—effect of a contractual forum selection clause
- Jurisdiction—multiple/parallel proceedings
- Jurisdiction—umbrella clause

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<sup>1</sup> The award embodied a settlement agreement that had been reached by the parties.





## 1. CASE SUMMARY

### 1.1 | Factual background

On 23 August 1991, SGS Société Générale de Surveillance S.A. (“SGS”) concluded an agreement with the Republic of the Philippines regarding the provision of comprehensive import supervision services (“the Contract”). Under the Contract, SGS agreed to provide specialized services to assist in improving the customs clearance and control processes of the Philippines. The Contract required SGS to provide pre-shipment inspection services of the Philippines’ imports in the country of export, including verification of the imports’ quality, quantity and price. Under the terms of the Contract, SGS was required to maintain a liaison office in the Philippines and to provide certain technical and training assistance to the country.

The Contract was extended three times, first in 1994 at the end of the initial three-year period, then in 1998 until 1999, and then finally from 31 December 1999 to 31 March 2000, at which point the Philippines government discontinued SGS’s services under the Contract. SGS submitted monetary claims to the Philippines government for unpaid sums under the Contract, amounting to approximately US\$140 million plus interest.

### 1.2 | Summary of legal issues and Decision on Jurisdiction

After unsuccessfully pursuing settlement, SGS commenced ICSID arbitration proceedings, alleging that the Philippines had violated several articles of the Switzerland–Philippines Bilateral Investment Treaty (BIT) by refusing to pay the amounts claimed under the Contract, failing to accord SGS fair and equitable treatment, unlawfully expropriating SGS’s property, and breaching the so-called “umbrella clause” (which required the host state’s observance of commitments made to specific investments). The Philippines objected to the Tribunal’s jurisdiction over the matter, arguing that there was no “investment” in its territory as required by the BIT, that the dispute was purely contractual in character and that the issues



in dispute were governed by the contractual dispute resolution clause, which referred the parties to Philippines courts.

The Tribunal ruled that SGS had made an investment in the territory of the Philippines and that both the umbrella clause and the broad dispute resolution clause in the BIT gave it jurisdiction to hear the contract claims. The Tribunal held, however, that the contract claims were inadmissible because priority was to be given to the forum selection clause in the Contract. The Tribunal stayed the proceedings in favour of the dispute resolution forum specified in the Contract.

## 2. SELECT LEGAL ISSUES

The Tribunal's decision came a few months after the *SGS v. Pakistan* decision, which considered similar facts and legal issues and involved the same claimant performing the same type of services for the respondent state. While *SGS v. Pakistan* took a restrictive view of the effects of the umbrella clause and broad dispute resolution clause, the Tribunal in *SGS v. Philippines* took a contrary view by deciding that it had jurisdiction based on both provisions. The apparently conflicting decisions of the two SGS tribunals have led to uncertainty regarding the impacts of umbrella clauses and broad dispute resolution provisions in investment treaties.

*SGS v. Philippines* raises critical concerns about how broad interpretations of these common provisions may elevate commitments states have made to investors under contracts or national laws to commitments enforceable under international law. The *SGS v. Philippines* Tribunal mitigated the impacts of its broad interpretation to some degree, however, by finding that, although it had jurisdiction to hear the contract claims under both the umbrella clause and the broad dispute resolution clause, it would give effect to the forum selection clause in the contract between the claimant and respondent and therefore stay the proceedings.



The Tribunal’s findings on the impact of the umbrella clause and broad dispute resolution provision in the BIT are analyzed below, as is (albeit more briefly) another aspect of the Tribunal’s decision impacting the scope of the BIT—the definition of a covered “investment.”

## **2.1 | Broad interpretation of “investment” as including a contract for the provision of services performed mostly outside the territory of the host state**

The BIT required that the investment be made in the territory of the host state, in accordance with its laws and regulations. SGS’s commitments under the Contract required the provision of services both within and outside the Philippines, although the majority of these were abroad. The Tribunal found that even though SGS carried out pre-inspection shipment services abroad, its liaison offices in the Philippines were a “substantial and non-severable aspect of the overall service” (para 102). It further stated that there “was no distinct or separate investment elsewhere than in the territory of the Philippines but a single integrated process of inspection arranged through the Manila Liaison Office, itself unquestionably an investment ‘in the territory of’ the Philippines” (para. 112). The Tribunal also placed emphasis on the scale and duration of SGS’s activity in the territory. It concluded that SGS’s activities constituted an investment made in the territory of the host state and in accordance with the BIT.

Similar to the tribunal’s decision in *SGS v. Pakistan*, the *SGS v. Philippines* Tribunal’s liberal interpretation of the requirement that the investment should be made in the territory of the host state means that even those activities that are primarily carried out abroad may still be covered under the BIT, provided they are connected to some activities in the host state’s territory. One effect of this interpretation is that it provides only a weak filtering mechanism to help limit the scope of a BIT’s protection to those investments that meaningfully contribute to host states’ economic developments.



## 2.2 | The power of umbrella clauses to transform purely contractual claims into treaty claims

SGS argued that the Philippines' failure to pay for services under the Contract constituted a breach of the BIT's umbrella clause, Article X(2), which provides, "Each Contracting Party shall observe *any obligation* it has assumed with regard to specific investments in its territory by investors of the other Contracting Party" (emphasis added).

The *SGS v. Philippines* Tribunal agreed, holding that the umbrella clause in the Switzerland–Philippines treaty meant what it said: that the host state would have to observe *any legal obligation* that the host state had or would assume with respect to specific investments covered by the BIT (para. 115). The Tribunal set forth a number of arguments to support that finding, as well as to support its decision to deviate from the "highly restrictive interpretation" given to the umbrella clause by the *SGS v. Pakistan* Tribunal (noting that there was no doctrine of binding precedent under international law requiring it to adhere to the other *SGS* decision) (para. 120). First, the Tribunal looked at the concrete wording of the clause in the Switzerland–Philippines BIT, which it held to "say, and to say clearly" that the host state would have to observe any legal commitment it had or would in the future assume with respect to any specific covered investments (para. 115). The Tribunal then pointed out that the language of the Switzerland–Pakistan BIT was "formulated in different and rather vaguer terms than [the umbrella clause] of the Swiss–Philippines BIT" (para. 119). Further significant to the *SGS v. Philippines* Tribunal was the text of the preamble, from which it concluded that any uncertainty regarding the scope of the clause should be resolved in favour of protecting investment. This underlines the importance of using broader preambular objectives in treaties, to avoid interpretations by tribunals that the singular objective of the BIT is the protection of foreign investment.

The *SGS v. Philippines* Tribunal also addressed the concern raised by the *SGS v. Pakistan* Tribunal that giving the umbrella clause the effect of bringing contract claims under a treaty tribunal's jurisdiction would



override the forum selection clauses negotiated by parties to applicable investor–state contracts. The *SGS v. Philippines* Tribunal found that while this was a valid concern, assuming jurisdiction over contract claims through the umbrella clause does not necessarily have to override contractual forum selection clauses.

Illustrating this theory, the Tribunal accepted jurisdiction under the umbrella clause over contract claims, but decided to give effect to the forum selection clause in the Contract, which mandated that domestic Philippine courts would have exclusive jurisdiction over contract disputes. The Tribunal emphasized that “*a binding exclusive jurisdiction clause in a contract should be respected, unless overridden by another valid provision*” (para. 138, emphasis added). The Tribunal decided that the BIT did not override the forum selection clause in the Contract, reasoning that general provisions such as the umbrella clause are generally not interpreted as overriding specific provisions of particular contracts freely negotiated between the parties.

By staying the proceedings in favour of the parties’ chosen forum in the Contract, the Tribunal addressed the concerns of the *SGS v. Pakistan* Tribunal over the impact broad interpretations of umbrella clauses would have on existing forum selection clauses in investor–state contracts. The dissenting arbitrator, however, disagreed with this particular aspect of the decision, finding that the Tribunal should have issued a decision on the merits, based on the broad scope of the umbrella clause and consent to ICSID arbitration under the BIT. This dissenting view leaves the door open for future decisions permitting the umbrella clause to effectively rewrite the dispute resolution clause in investor–state contracts.

The *SGS v. Philippines* and *SGS v. Pakistan* decisions are often cited as examples of ICSID decisions that result in divergent findings on similar treaty provisions. While some tribunals have followed the restrictive reading of the umbrella clause in *SGS v. Pakistan*, in decisions such as



*Eureko B.V. v. Poland*<sup>1</sup> and *Noble Ventures v. Romania*<sup>2</sup> tribunals favour the *SGS v. Philippines* findings on the effect of the umbrella clause regarding jurisdiction over contract claims.

### **2.3 | Does the general description of a “dispute concerning an investment” in the BIT’s investor-state arbitration clause encompass claims of an essentially contractual character?**

Article VIII(1) of the Switzerland–Philippines BIT provides for settlement of “disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party” (para. 130). Like its broad view of the umbrella clause, the Tribunal took a broad view of this dispute resolution clause by finding that the phrase “disputes with respect to investments” could apply to an expropriation claim under the BIT as well as to a dispute arising from an investment contract such as the SGS–Philippines Contract. Specifically, the Tribunal stated that “*the phrase ‘disputes with respect to investments’ naturally includes contractual disputes*” (para. 132, emphasis added).

The Tribunal went on to discuss the impact its assertion of jurisdiction over contract claims would have on the exclusive jurisdiction clauses in such contracts. And as noted above, it concluded that it was possible “for BIT tribunals to give effect to the parties’ contracts while respecting the general language of BIT dispute settlement provisions” (para. 134). The Tribunal ruled that the dispute resolution clause in the BIT provided it jurisdiction over the contract claims arising out of the SGS–Philippines Contract, but that it would nevertheless respect the exclusive forum selection clause in the Contract because that provision could not be waived or overridden by the broad dispute resolution clause in the BIT or by the consent to

<sup>1</sup> Partial Award and Dissenting Opinion dated 19 August 2005, available at <http://ita.law.uvic.ca/documents/Eureko-PartialAwardandDissentingOpinion.pdf>.

<sup>2</sup> ICSID Case No. ARB/01/11, Award dispatched to the parties 12 October 2005, available at <http://ita.law.uvic.ca/documents/Noble.pdf>.



arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

The *SGS v. Philippines* Tribunal took a different view than the *SGS v. Pakistan* Tribunal, which held that a similarly drafted dispute resolution clause in the applicable BIT did not give that tribunal jurisdiction over contract claims. The two conflicting interpretations in *SGS v. Pakistan* and *SGS v. Philippines* on this issue create significant uncertainty regarding hundreds of broad dispute resolution clauses in BITs and their impacts upon forum selection clauses in an unknown, but likely extensive, number of investor–state contracts.<sup>3</sup>

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<sup>3</sup> While some treaties' dispute resolution provisions specifically indicate that they cover breaches of treaty obligations, a large number (including the treaties at issue in the *SGS* cases) more generally state that they cover disputes “relating to investments,” without clarification regarding the inclusion—or, for that matter, exclusion—of contract claims.



# Siemens A.G. v. Republic of Argentina, ICSID Case No. ARB/02/8 (*Siemens v. Argentina*)

Fiona Marshall

Decision, award and other documents available at  
[http://ita.law.uvic.ca/alphabetical\\_list\\_respondant.htm](http://ita.law.uvic.ca/alphabetical_list_respondant.htm)

**Keywords:** Corruption, damages, expropriation, interpretation, investor obligations, margin of appreciation, most favoured nation, proportionality, umbrella clause

### Key dates:

Request for Arbitration: 23 May 2002

Decision on Jurisdiction: 3 August 2004

Award: 6 February 2007

Request by Argentina for Annulment of Award: 16 July 2007

Request by Argentina for Revision of Award: 9 July 2008

Order Taking Note of Discontinuance: 9 September 2009

### Arbitrators (original proceeding):

Dr. Andrés Rigo Sureda (president)

Judge Charles N. Brower (claimant appointee)

Prof. Domingo Bello Janeiro (respondent appointee)

### Ad hoc Annulment Committee:

Judge Gilbert Guillaume

Judge Florentino P. Feliciano

Judge Mohamed Shahabuddeen

**Arbitrators (revision proceeding):** same as original proceeding

### Forum and applicable procedural rules:

International Centre for Settlement of Investment Disputes (ICSID)

ICSID Rules of Procedure for Arbitration Proceedings

### Applicable treaty:

Germany–Argentina Bilateral Investment Treaty (BIT)

### Alleged treaty violations:

- Expropriation
- Fair and equitable treatment
- Full protection and legal security
- Obligation to not impair investments through arbitrary and discriminatory measures
- Umbrella clause

### Other legal issues raised:

- Damages
- Interpretation—reference to other bodies/principles of law
- Investor obligations—obligations to comply with domestic/international law
- Jurisdiction—most favoured nation treatment
- Margin of appreciation





## 1. CASE SUMMARY

### 1.1 | Factual background

This case is one of the more than forty arbitrations against Argentina related to measures taken during its financial crisis in 2001–2002, although the financial crisis was more peripheral to the facts of this case than it was to most of the others. In 1996, Argentina called for bids to provide an integrated immigration control system, personal identification system and electoral information system. In accordance with the bidding terms, Siemens A.G. incorporated an Argentine company (SITS) for the purposes of the bid. Argentina selected the SITS bid, taking into consideration Siemens' credentials and financial soundness.

The contract for the provision of the system (“the Contract”) was executed and approved by decree in October 1998. The Contract had a six-year term, automatically renewable for two further three-year terms, with parties agreeing to give notice of intent not to renew only if the purpose of the Contract had been fully met. The execution of the project had two stages: an engineering stage, which consisted of designing the specifications and acquiring all equipment necessary for its implementation, and an operation stage, managed by the government. Under the Contract, SITS would receive compensation only during the operation stage.

In August 1999, Argentina requested SITS postpone production of the new national identity cards for several months, allegedly due to fear that their introduction shortly before the upcoming national elections would burden the public with inconveniences that should be avoided. In January 2000, government officers indicated to SITS and Siemens that the government would seek to renegotiate the national identity card price and increase the number of free-of-charge national identity cards. The immigration control system started to operate in February 2000 but was halted by the government one day later and continued to be interrupted indefinitely. In late February 2000, Argentina suspended production and distribution of all new national identity cards because a system error had resulted in the



left thumbprint being printed where the right thumbprint should have been. Argentina prohibited SITS from introducing any modification to the system to correct this problem. In March 2000, the government set up a special commission under the Ministry of the Interior (“the Commission”) to review the Contract. Following negotiations, Siemens reached agreement with the Commission on a proposal in November 2000. The government gave Siemens a “Contract Restatement Proposal” in the renegotiated terms.

Also in November 2000, the Argentine Congress approved an Emergency Law to address the financial crisis that, inter alia, empowered the President to renegotiate public sector contracts. Siemens did not object to the government’s proposal to include the Contract under the provisions of the 2000 Emergency Law, allegedly hoping that this step would speed up approval of the Contract Restatement Proposal. In a meeting in December 2000, the President of Argentina promised Siemens to issue the decree approving the Contract Restatement Proposal by the end of the month; however, in March 2001, the Minister of the Interior claimed to have been unaware of the Contract Restatement Proposal. In early May 2001, SITS received a new Draft Proposal from the government, differing from the Contract Restatement Proposal. SITS was later informed that the new proposal was not negotiable. Two weeks later, the Contract was terminated by decree under the terms of the 2000 Emergency Law. SITS filed an administrative appeal, which was rejected by another decree. In May 2002, Siemens filed its request for arbitration at ICSID (paras. 81–97).

## **1.2 | Summary of legal issues, award and subsequent developments**

In its award dated 17 January 2007, the Tribunal held that Argentina had breached its obligations under the Germany–Argentina Bilateral Investment Treaty (BIT) by expropriating Siemens’ investment, failing to accord fair and equitable treatment to the investment, failing to provide full protection and legal security for the investment, and taking arbitrary measures with respect to the investment. The Tribunal ordered Argentina to pay Siemens compensation of approximately US\$208 million for its



investment, a further US\$9 million for consequential damages and US\$220,000 for unpaid bills for services by SITS to the government. The Tribunal also ordered Argentina to return the US\$20 million performance bond provided by SITS under the Contract. The Tribunal rejected Siemens' claim for US\$124.5 million in lost profits (paras. 378–379).

In July 2007, Argentina filed an application for annulment with ICSID. Additionally, in July 2008, Argentina filed an application for revision of the award on the basis that a Siemens senior executive had given evidence before German courts that Siemens had won the Contract with the Argentine government through bribery. Argentina asserted that if this evidence had gone before the Tribunal in the arbitration proceeding, it might have rendered Siemens' investments unlawful and ineligible for protection under the BIT.<sup>1</sup> In December 2008, Siemens A.G. and its Argentine subsidiary, Siemens Argentina S.A., each pleaded guilty to breaches of the U.S. Foreign Corrupt Practices Act. According to a statement of facts agreed to by the U.S. Department of Justice and Siemens Argentina, "Siemens Argentina made and caused to be made significant payments to various Argentine officials, both directly and indirectly, in exchange for favourable business treatment in connection with a \$1 billion national identity card project."<sup>2</sup> On 9 September 2009, following an undisclosed settlement between the parties, ICSID registered an order for the discontinuance of the arbitral proceeding.

## 2. SELECT LEGAL ISSUES

This case is notable in several respects. For one, it concludes that an investor can use a BIT's most favoured nation (MFN) clause to get access to a more favourable dispute resolution clause in another BIT to which the host state

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<sup>1</sup> L. E. Peterson (2008), "Argentina and Siemens ask annulment committee to suspend proceedings, following request by Argentina for revision of arbitral award in light of recent evidence of alleged bribes paid by German firm Siemens," *Investment Arbitration Reporter*, 28 July.

<sup>2</sup> L. E. Peterson (2008), "Siemens, and its Argentine subsidiary, plead guilty to certain breaches of Foreign Corrupt-Practices Act (FCPA) in deal that brings U.S. bribery investigation to a close," *Investment Arbitration Reporter*, 17 December.



is party. Additionally, it distinguishes the margin of appreciation that international human rights law allows states in meeting their human rights obligations,<sup>3</sup> holding that there is no such margin of appreciation in either customary international law or the BIT. And regarding umbrella clauses, it found that a clause that requires a host state to “observe any other obligation it has assumed with regard to investments” covered obligations contained in a contract, but only if both the host state and investor were party to the contract.

Important from the host state perspective, the award in *Siemens v. Argentina* clarified that not every breach of a contract is capable of being considered a potential expropriation, but rather only those interferences made through the use of the host state’s “superior governmental power.” Finally, although the award itself did not address investor corruption, the events in its aftermath support the growing view that investors should not be entitled to protection under a BIT when they have themselves acted unlawfully with respect to their investment. During the arbitration proceeding, Argentina had attempted to introduce evidence regarding the alleged corruption of Siemens, but the Tribunal refused on the basis that Argentina was raising the allegations too late.<sup>4</sup> However, the fact that the proceedings were settled and discontinued after Siemens’ senior executive gave evidence before the German courts that Siemens had won the Contract through bribery (and after Siemens pled guilty to violations of the U.S. Foreign Corrupt Practices Act) provides further support for the view that investors who have engaged in unlawful conduct should be ineligible for protection under a BIT. These issues are discussed further below.

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<sup>3</sup> Article 1 of the First Protocol states: “The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

<sup>4</sup> Peterson (2008), “Argentina and Siemens ask annulment committee.”



## 2.1 | Most favoured nation (MFN) treatment: Allowing a BIT's MFN clause to import rights related to dispute settlement

Siemens sought to use the MFN clause in the BIT to avoid the treaty's requirement that disputes be submitted to local courts for 18 months before investors can resort to arbitration. Siemens claimed that the BIT's MFN clause entitled it to import a more favourable dispute resolution clause from the Chile–Argentina BIT, which did not require recourse to local courts first. Argentina filed a preliminary objection to jurisdiction, *inter alia*, objecting to Siemens' use of the MFN clause in this way.

The Tribunal held that access to the special dispute settlement mechanism provided under the BIT was part of the “treatment” of foreign investors and investments protected under the BIT's MFN clause.<sup>5</sup> The Tribunal referred to the much-cited case of *Maffezini v. Spain*, where the investor was likewise allowed to use an MFN clause to access a more favourable dispute settlement clause in another Spanish BIT. The *Siemens* Tribunal noted that the MFN clause at issue in *Maffezini v. Spain* referred to “all matters subject to this Agreement,” while the MFN clause in the BIT applicable to the Siemens dispute (the Germany–Argentina BIT) referred only to “treatment.” The *Siemens* Tribunal concurred with the *Maffezini* Tribunal's finding that the formulation used in the Germany–Argentina BIT was a narrower formulation of the MFN obligation, but held that the term “treatment” and the phrase “activities related to the investments” were still sufficiently wide to include dispute settlement. The Tribunal, in fact, held that the term “treatment” was so general that its application could not be limited except as specifically agreed upon by the parties. The Tribunal

<sup>5</sup> Article 3(1) of the Germany–Argentina BIT states, “None of the Contracting Parties shall accord in its territory to the investments of nationals or companies of the other Contracting Party or to investments in which they hold shares, a less favorable treatment than the treatment granted to the investments of its own nationals or companies or to the investments of nationals or companies of third States.”

Article 3(2) of the Germany–Argentina BIT states, “None of the Contracting Parties shall accord in its territory to nationals or companies of the other Contracting Party a less favorable treatment of activities related to investments than granted to its own nationals and companies or to the nationals and companies of third States.”



concluded with the *Maffezini* Tribunal that an MFN clause may not override public policy considerations judged by the BIT's parties as essential, but held that the public policy considerations adduced by Argentina were not applicable (paras. 103–109, Decision on Jurisdiction). The Tribunal thus dismissed Argentina's preliminary objections to jurisdiction.

## **2.2 | Expropriation: Clarifying that a state can only be found to have expropriated property if it acted in its sovereign capacity**

The Tribunal held that not every breach of a contract was an expropriation and that, for the state to incur international responsibility, it must use its public authority, i.e., it must interfere with the contract using its “superior governmental power.” The Tribunal held, in this case, that Argentina had used its superior governmental power to interfere with the Contract in a number of ways, e.g., permanently suspending the printing of national identity cards, forcing changes in the Contract, and terminating the Contract by decree (paras. 245–260, Award). As to whether the expropriation was in accordance with Article 4(2) of the BIT, the Tribunal noted that this required the expropriation be for a public purpose and compensated. The Tribunal held that the 2000 Emergency Law (under which the decree terminating the contract was issued) was enacted to face the dire fiscal situation of the government and that the decree therefore met the public purpose requirement for expropriation under the BIT. The Tribunal held, however, that there was no evidence of a public purpose in the measures taken prior to the issuance of the decree (e.g., the permanent suspension of printing identity cards, and the forced contract changes). The Tribunal held that, in any case, Argentina had not paid compensation for the expropriation as required under the BIT. For these reasons, the expropriation was unlawful (para. 273, Award).



### **2.3 | The umbrella clause: Elevating contract breaches to treaty breaches only if both the state and investor are party to the contract**

The Tribunal held that the umbrella clause in Article 7(2) of the BIT meant what it said, namely, that a failure to meet *any* obligation undertaken by the state with respect to any particular covered investment is converted into a breach of the BIT.<sup>6</sup> However, to the extent that the obligations assumed by the state are of a contractual nature, such obligations must originate in a contract between the state and the foreign investor. The Tribunal noted that in this case Siemens was not a party to the Contract and SITS was not a party to the arbitral proceedings (paras. 204–206).

### **2.4 | Compensation: Addressing whether the amount of compensation owed is affected by the public interest nature of the state’s unlawful actions**

The Tribunal held that the BIT itself only provided for compensation with respect to expropriation and that the measure of compensation for the other breaches identified by the Tribunal therefore was to be determined in accordance with customary international law. The Tribunal noted that the International Law Commission’s Draft Articles on State Responsibility currently are considered to most accurately reflect customary international law on this point. Article 36 on Compensation provides<sup>7</sup>:

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

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<sup>6</sup> Article 7(2) states, “Each Contracting Party shall observe any other obligation it has assumed with regard to investments by nationals or companies of the other Contracting Party in its territory.”

<sup>7</sup> Article 36, “Compensation,” is based on the judgment of the Permanent Court of International Justice in the *Factory at Chorzów* case, which held:

The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is reparation must, so far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. (*Factory at Chorzów*, Merits, PCIJ, Series A, No. 17, 1928, p. 47)



2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

The Tribunal noted that the key difference between compensation under the Draft Articles and Article 4(2) of the BIT (on expropriation) is that under the former, compensation must take into account “all financially assessable damage” or “wipe out all the consequences of the illegal act” as opposed to compensation “equivalent to the value of the expropriated investment” under the BIT. Under customary international law, Siemens would be entitled not only to the value of its enterprise as of 18 May 2001 (the date of expropriation) but also to any greater value that enterprise gained up to the date of the award, plus any consequential damages to wipe out all the consequences of the illegal act.

Argentina argued that, when a state expropriates for social or economic reasons, fair market value should not apply because this would limit the sovereignty of countries, in particular poor countries, to introduce reforms. The Tribunal held that Argentina had not justified on what basis it would be considered a poor country, nor had it specified the reforms it sought to carry out. Argentina further relied on *Tecmed v. Mexico* to support its view of the need to consider the purpose and proportionality of the measures taken by the host state. Yet the Tribunal distinguished the *Tecmed* approach, observing that the *Tecmed* Tribunal considered the challenged measures’ purpose and proportionality when determining whether an expropriation had occurred and not when determining the compensation owed. The *Siemens* Tribunal further observed that neither the Germany–Argentina BIT nor customary international law permitted a margin of appreciation as found in Article I of the First Protocol to the European Convention on Human Rights (paras. 348–357).





# Tecnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2 (*Tecmed v. Mexico*)

Lise Johnson

Award available at [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC602\\_En&caseId=C186](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC602_En&caseId=C186)

**Keywords:** Environmental measures, expropriation, fair and equitable treatment, interpretation, legitimate expectations, proportionality, “sole effects” test

### **Key dates:**

Request for Arbitration: 28 July 2000

Constitution of Tribunal: 13 March 2001<sup>1</sup>

Award: 29 May 2003

### **Arbitrators:**

Dr. Horacio A. Grigera Naon (president)

Prof. José Carlos Fernández Rozas (claimant appointee)

Mr. Carlos Bernal Vera (respondent appointee)

### **Forum and applicable procedural rules:**

International Centre for Settlement of Investment Disputes (ICSID)

ICSID Additional Facility Rules

### **Applicable treaty:**

Spain–Mexico Bilateral Investment Treaty (BIT)

### **Alleged treaty violations:**

- Expropriation
- Fair and equitable treatment
- Full protection and security
- Most favoured nation treatment
- National treatment
- Promotion and admission of investments

### **Other legal issues raised:**

- Interpretation—reference to other bodies/principles of law

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<sup>1</sup> The Tribunal was reconstituted on 17 December 2001 after the Respondent’s initial appointee, Mr. Aguilar Alvarez, resigned due to the fact that he was also involved in another arbitration involving related legal matters (paras. 13–14, 17).



## 1. CASE SUMMARY

### 1.1 | Factual background

#### 1.1.1 | Terms of the transaction

In February 1996, Tecnicas Medioambientales Tecmed S.A. (“Tecmed”), a subsidiary of the Spanish claimant, purchased an existing hazardous waste landfill (“the Landfill”) and related assets from a Mexican agency for cash and other consideration worth roughly 34 million Mexican pesos (paras. 35, 78–91). Tecmed subsequently obtained the permit (“the Permit”) necessary to operate the Landfill from the federal agency in charge of Mexico’s national policy on ecology and environmental protection, referred to in this summary as the Environmental Protection Agency (para. 36). Tecmed’s Permit, however, differed from the permit that had been issued to the previous owner/operator: although Tecmed’s Permit was a renewable one-year permit, the prior owner/operator’s permit was valid for an indefinite duration (para. 36). Despite that difference, which later proved significant, when the permit was issued Tecmed did not protest or otherwise raise the issue of the Permit’s duration with relevant Mexican authorities (paras. 58, 92).

#### 1.1.2 | Regulatory violations and community opposition

In connection with its operation of the Landfill and the transport of waste to and from other facilities in Mexico, Tecmed<sup>2</sup> breached some terms of the Permit and applicable regulations, conduct for which it was investigated and fined by the Federal Environmental Protection Attorney’s Office, an agency that, like the Environmental Protection Agency, addressed environmental issues, but that had different powers and responsibilities for ensuring compliance with relevant laws (para. 43).

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<sup>2</sup> For purposes of simplicity, this summary uses the term “Tecmed” to refer to Tecmed as well as to its corporate affiliates, such as its corporate parent (the claimant in this action) and its subsidiary, Cytrar, which held Tecmed’s rights and obligations under the Landfill sale and which ran the Landfill operations (para. 35).



Concerned by those violations and other issues, community groups mounted strong opposition to continued operation of the Landfill (para. 43). In addition to protesting Tecmed's improper conduct in connection with its operations at the Landfill and other waste-transport activities, civil society groups protested the Landfill's close proximity to the population center of Hermosillo—8 kilometres—which was less than the 25-kilometre distance between urban centers and such landfills that Mexican regulations, enacted after the Landfill's 1988 construction, required (para. 106). Due to this community opposition, Tecmed and municipal, state and federal authorities began exploring in 1997 options to relocate the Landfill; Tecmed committed to provide the funds necessary for that move (para. 147, 160, 162).

### **1.1.3 | Revocation of the Permit**

After Tecmed's first year operating the Landfill, the Environmental Protection Agency granted Tecmed's request to renew the Permit, extending its duration to November 1998 (para. 38). When Tecmed sought a second renewal in November 1998, however, the agency denied that request and ordered Tecmed to close the facility (para. 39). In support of its decision denying renewal and ordering closure of the Landfill, the Environmental Protection Agency cited various factors, including (1) the wastes contained at the Landfill exceeded limits authorized by the Permit, (2) the Landfill temporarily stored waste destined for another facility without the authority to serve as such a "transfer center," (3) the Landfill received liquid and biological-infectious wastes despite lacking the necessary permit to do so, and (4) Tecmed had agreed to, but had not accomplished, relocation of the Landfill to a site farther away from Hermosillo's urban center (para. 99).

## **1.2 | Summary of legal issues and award**

Tecmed initiated this case on the grounds that municipal, state and federal actions including, in particular, the decision by the Environmental Protection Agency to deny renewal of the Permit and order the Landfill's closure, violated Mexico's obligations under the governing bilateral investment treaty (BIT) between Spain and Mexico (para. 93). More



specifically, Tecmed argued Mexico violated its obligations to (1) promote admission of investments, (2) provide full protection and security, (3) accord the investment fair and equitable treatment (FET), (4) provide the investment treatment no less favourable than treatment provided to nationals and investors from other foreign states, and (5) refrain from expropriating the investment without paying appropriate compensation (paras. 93–94). Tecmed also argued that even though the governing BIT only came into force on December 18, 1996, *after* original issuance of the one-year renewable Permit, the BIT’s most favoured nation (MFN) clause required retroactive application of Mexico’s international law obligations to Spanish investors so that those obligations would run concurrently with Mexico’s obligations to investors from other countries (para. 69).

After rejecting Tecmed’s argument that the MFN clause extended the BIT’s temporal coverage (which would have extended the BIT to apply to issuance of the less-favourable Permit), the Tribunal held that Mexico had both expropriated Tecmed’s investment and violated the FET standard. Based on those two violations, the Tribunal ordered Mexico to pay Tecmed approximately 5.3 million Mexican pesos, with interest accruing from the date of the Environmental Protection Agency’s resolution denying the Permit’s renewal (para. 201).

## 2. SELECT LEGAL ISSUES

This decision has multiple and varied implications for the interaction between investment law and sustainable development. Most obviously, it illustrates that non-discriminatory measures taken by states to respond to public concerns about threats to health and environmental protection may constitute expropriations and/or violate the FET standard. It also sets forth an expansive interpretation of the FET standard as imposing broad obligations on governments to act transparently and consistently in development and pursuit of their goals and regulations. The decision, however, also illustrates tribunals may take public interests into account



and balance them against the rights of investors when assessing whether there has been a breach of the applicable BIT. Also notable is that this decision supports incorporation of principles from other areas of law in the context of interpreting obligations under investment treaties—a practice that could permit tribunals to consider issues of sustainable development when assessing parties’ claims and defences. The text below elaborates upon each of these points.

## **2.1 | Expropriation: Looking beyond the “sole effects” of the measure to examine the proportionality between public interests involved and the impacts on the investment**

Tecmed argued that the Environmental Protection Agency’s decision to refuse renewal of the Permit and order closure of the Landfill effected an indirect expropriation of Tecmed’s investment in owning and operating the Landfill for the duration of the facility’s life (paras. 95–96). In response, Mexico contended that its decision did not amount to an expropriation because it was a legitimate regulatory action taken by a government agency consistent with its discretionary authority and in compliance with the “State’s police power...in the highly regulated and extremely sensitive framework of environmental protection and public health” (para. 97). Mexico further argued that Tecmed had no legitimate expectations that it would be able to operate the Landfill for the entirety of its useful life, given that the Permit was subject to renewal each year (para. 149).

The Tribunal began its assessment of the parties’ contentions by stating that to determine whether a measure amounted to an expropriation, it had to first look at the *effects* of the measure (para. 116). It explained that a measure would only be expropriatory if it “permanent[ly] and irreversib[ly]” “neutralized or destroyed” the “economic value of the use, enjoyment or disposition of [the investor’s] assets or rights” (para. 116). If the measure had those effects, the Tribunal then had to assess whether the measure was proportional in light of the public interest at stake and the impacts on the protected investment (paras. 118, 122). The Tribunal further



noted that in weighing those interests it had to, on the one hand, give “due deference” to the state’s identification of the issues it deemed important, as well as the appropriate means for protecting and furthering those interests (para. 122); on the other hand, it had to take account of the investor’s legitimate expectations (para. 122).

Applying those principles to the case before it, the Tribunal found that, notwithstanding the explicit one-year term of the Permit, the consideration Tecmed paid for the investment demonstrated Tecmed legitimately expected it had secured “a long-term investment” in the Landfill extending over “its entire useful life” (para. 149). The Tribunal further held that the Environmental Protection Agency’s decision on non-renewal of the Permit and closure of the Landfill, which appeared to be legitimate under domestic Mexican law (para. 120), permanently neutralized the value of the investment and therefore met the “effects” portion of the expropriation test (para. 139). With respect to the proportionality analysis, the Tribunal concluded that the facts of the case and justifications offered for the agency’s decision indicated that Tecmed’s breaches of the Permit’s terms and environmental regulations were generally minor and did not, even according to relevant Mexican authorities, “compromise public health, [or] impair ecological balance or protection of the environment” (para. 124; see also paras. 127, 130–32). Thus, according to the Tribunal, there were no weighty health or environmental concerns warranting the decision to deny renewal of the Permit or to require that the Landfill be closed. The Tribunal also considered whether public opposition to the Landfill had generated “a genuine social crisis” or “public emergency” justifying non-renewal of the Permit (paras. 124–133). Finding that the opposition did not rise to the level of an “emergency situation,” and that the opposition that did exist was due largely to the location of the Landfill rather than to wrongful conduct by Tecmed, the Tribunal held Mexico’s “socio-political” interests were likewise not sufficiently weighty to support the Environmental Protection Agency’s decision (paras. 139, 142, 147).

In sum, the Tribunal concluded that although the Environmental Protection Agency’s resolution on Permit non-renewal and Landfill closure



was apparently legitimate under domestic law, the measure permanently stripped Tecmed of the value of its investment, was not sufficiently justified by public interest concerns and, consequently, indirectly expropriated Tecmed's property in violation of the BIT.

A particularly noteworthy aspect of this decision is the *Tecmed* Tribunal's application of the "proportionality" test, which was the first time such a test had been used in modern investment treaty arbitration.<sup>3</sup> The proportionality test differs from the "sole effects" test used by some other tribunals to determine whether a regulatory measure or measures constitute an expropriation.<sup>4</sup> The "sole effects" test, as its name indicates, seems to leave little or no room for tribunals to consider the purpose of, or public interests underlying, challenged measures. In contrast, the proportionality test may enable tribunals to strike a better balance between investor rights and domestic environmental, health or other concerns when interpreting and applying BIT provisions.

## **2.2 | Fair and Equitable Treatment: Broadly reading the standard to require states to act consistently, transparently and without ambiguity**

Another notable aspect of this decision—and one for which it is frequently cited<sup>5</sup>—is the Tribunal's broad interpretation of the FET standard. The Tribunal read that BIT provision as requiring the state parties (including their various levels of domestic government) to act consistently, transparently and without ambiguity toward foreign investors and their investments (paras. 154–156). The Tribunal found that Mexico violated these obligations because, in particular, the Environmental Protection Agency failed to "report, in clear and express terms...its position as to the effect of [Tecmed's] infringements on the renewal of the Permit" and to provide "clear signs" of its intention to deny renewal (para. 162). What

<sup>3</sup> See A. K. Hoffman (2008), "Indirect expropriation," in Reinisch (Ed.), *Standards of Investment Protection*.

<sup>4</sup> See, e.g., *Biloune v. Ghana*, Award, 27 October 1989, 95 ILR 183, 209 (1989).

<sup>5</sup> See, e.g., UNCTAD (2006), "Latest developments in investor–state dispute settlement," 9, *IIA Monitor No. 4* (2006), noting that "several recent decisions have upheld and reinforced a broad acceptance of the FET standard in line with the often-cited *Tecmed* award in 2003."



seemed to concern the Tribunal more than a general failure by the agency to affirmatively disclose its intentions, however, was the Tribunal's belief that the agency was using environmental and health issues as pretexts for a decision that was essentially driven by social and political concerns (para. 157). As the Tribunal stated, Tecmed's "fair expectations...were that the Mexican laws applicable to [its] investment...would be used for the purpose of assuring compliance with environmental protection, human health and ecological balance goals," and not for the purpose of "clos[ing] down a site whose operation had become a nuisance for political reasons..." (paras. 157, 164). The Tribunal further noted that even though the Environmental Protection Agency's actions appeared to be consistent with national law, this did not prevent them from constituting a violation of international law under the BIT (paras. 120–121, 182).

### **2.3 | Tools of interpretation: Referring to principles set forth by the European Court of Human Rights**

To support its use of the proportionality test in determining whether the Environmental Protection Agency's decision not to renew the Permit effected an expropriation, the *Tecmed* Tribunal relied entirely on four different decisions of the European Court of Human Rights (paras. 122–123). This approach signals that tribunals can look to and rely upon other fields of law, such as human rights, labour law and environmental law, when relevant to interpreting parties' rights and obligations under international investment agreements.





**Compañía de Aguas del Aconquija S.A.  
and Vivendi Universal S.A. v.  
Republic of Argentina,  
ICSID Case No. ARB/97/3  
(*Vivendi v. Argentina*)**

Lise Johnson  
Fiona Marshall

Decisions and awards available at  
[http://ita.law.uvic.ca/alphabetical\\_list\\_respondant.htm](http://ita.law.uvic.ca/alphabetical_list_respondant.htm)

Keywords: Arbitrator independence, attribution, broad dispute resolution clause, contractual forum selection clause, damages, expropriation, fair and equitable treatment, jurisdiction, legitimate expectations

**Key dates:**

**Original proceeding (“Vivendi I”):**

Request for Arbitration: 26 December 1996

Constitution of Tribunal: 1 December 1997

Award (original proceeding): 21 November 2000

Request by Argentina for Annulment of Award: 23 March 2001

Decision on Challenge to President of Annulment Committee: 3 October 2001

Decision on Annulment: 3 July 2002

Request by Argentina for Supplementary Decisions and Rectification of Annulment Decision: 23 August 2002

Decision on Argentina’s Request for Supplementary Decisions and Rectification: 28 May 2003

**Resubmitted proceeding (“Vivendi II”):**

Request for Resubmission of Dispute to Arbitration: 24 October 2003

Decision on Jurisdiction in Resubmitted Proceeding: 14 November 2005

Award in Resubmitted Proceeding: 20 August 2007

Application for Annulment of Award in Resubmitted Proceeding: 19 December 2007

Decision on Argentina’s Request for a Continued Stay of Enforcement of Award: 4 November 2008

Hearing on Annulment: 15–17 July 2009

Decision on Annulment: 10 August 2010



**Arbitrators (original proceeding):**  
Judge Francisco Rezek (president)  
Mr. Peter D. Trooboff (claimant appointee)  
Judge Thomas Buergenthal  
(appointed by ICSID after Argentina failed to appoint an arbitrator)

**First ad hoc Annulment Committee:**

Mr. L. Yves Fortier (president)  
Prof. James R. Crawford  
Prof. José Carlos Fernandez Rozas

**Arbitrators (resubmitted arbitration proceeding):**

Mr. J. William Rowley (president)  
Prof. Gabrielle Kaufmann-Kohler (claimant appointee)  
Prof. Carlos Bernal Vera (respondent appointee)

**Second ad hoc Annulment Committee:**

Dr. Ahmed S. El-Kosheri (president)  
Prof. Jan Hendrik Dalhuisen  
Amb. Andreas J. Jacovides

**Forum and applicable procedural rules:**

International Centre for Settlement of Investment Disputes (ICSID)  
ICSID Rules of Procedure for Arbitration Proceedings

**Applicable treaty:**

France–Argentina Bilateral Investment Treaty (BIT)

**Alleged treaty violations:**

- Expropriation
- Fair and equitable treatment
- Protection and full security

**Other legal issues raised:**

- Challenges to awards—ICSID annulment proceedings—standard for annulment
- Conflicts of interests
- Damages
- Jurisdiction—attribution—authority to resolve claims involving conduct of federal states' political subdivisions
- Jurisdiction—broad dispute resolution provision
- Jurisdiction—effect of contractual forum selection clause



## 1. CASE SUMMARY

Originally filed in late 1996, this long-running ICSID case may have finally terminated with the second decision on annulment, issued in August 2010. The dispute arose out of the troubled relationship that developed between the parties to a 1995 concession agreement (the “Concession Contract”) to privatize the water and sewage services of the Province of Tucumán in Argentina. The claimants alleged that almost immediately after Compagnie Générale des Eaux (CGE, now Vivendi Universal S.A.) and its Argentine affiliate, Compañía de Aguas del Aconquija S.A. (CAA) (hereinafter referred to collectively as “the Claimants”) took over the water and sewage services concessions for Tucumán, they were systematically deprived of their rights under the France–Argentina Bilateral Investment Treaty (BIT) by the provincial authorities. The Claimants asserted, inter alia, that the provincial authorities acted wrongfully when they unilaterally modified tariffs contrary to the Concession Contract; used the media to generate local hostility toward them; made numerous, unjustified accusations against the concessionaire while themselves acting in flagrant violation of the agreement; interfered directly with CAA’s customer relationships, including inciting its customers not to pay their bills; and, after forcing the Claimants to renegotiate the Concession Contract, used their law-making powers to reject or undermine proposals that could have resolved issues with the concession and saved it from failure.

The Claimants argued that these alleged attacks destroyed the economic value of the Concession Contract and, by mid-1997, left them with no choice but to terminate the concession. The Claimants also asserted that, after the termination of the concession, they were held “hostage” by the provincial authorities and obliged to provide services for a further ten months. Even after they were released from their obligation in October 1998, the harassment continued, culminating in a series of targeted enactments to prevent CAA from collecting on outstanding invoices.

The Claimants initiated the ICSID action on the ground that these acts and omissions of the provincial authorities were legally attributable to the



Argentine Republic. They further argued that the federal government itself directly breached the BIT by failing to properly control and correct the actions of the provincial authorities. According to the Claimants, these actions and omissions constituted a violation of the fair and equitable treatment (FET) and full protection and security standards in Articles 3 and 5(1) of the BIT, and an expropriation of the Claimants' investment contrary to Article 5(2) of the BIT. The Claimants sought damages totalling US\$316.9 million, plus compound interest from November 1997, for the harms inflicted upon them (paras. 1.1.1, 3.2.1–3.2.4, *Vivendi II Award*).

Argentina defended on various grounds of jurisdiction and on the merits. It argued that this case involved exclusively contractual matters (i.e., disputes arising under the Concession Contract) and the actions of provincial authorities, over which the Tribunal did not have jurisdiction. Argentina also asserted that, shortly after starting the concession, CAA doubled the water bills to an impoverished population without warning and without noticeably improving service. CAA then proceeded to destroy the confidence of the population by negligently delivering black, undrinkable and potentially unhealthy water over a period of many weeks. Argentina contended that this situation understandably caused consumers to revolt and, in some cases, to refuse to pay vastly inflated bills. Argentina asserted that BITs were never intended to protect investors from the consequences of their own mistakes nor to provide them with an insurance policy against the due exercise of the state's regulatory activity and that this is even more so the case when the service provided is as vital as the provision of water and sewage services. Faced with Claimants' material breaches of the concession agreement, the Province had the right and the responsibility to take the requisite steps to ensure the availability of safe drinking water for its population on an affordable and accessible basis. Argentina claimed that, far from constituting an expropriation or unfair and inequitable treatment, the Province of Tucumán's conduct merely discharged the Province's responsibilities, both as a contracting party and as a government, and therefore the Claimants' case should be dismissed (paras. 3.3.1–3.3.6, *Vivendi II Award*).



On 21 November 2000, the tribunal in the original proceeding (the “*Vivendi I Tribunal*”) issued its award, in which it addressed Argentina’s jurisdictional objections and the merits of the dispute. It determined that it had jurisdiction over the dispute. In reaching that conclusion, it rejected Argentina’s argument that a forum selection clause in the Concession Contract, which required the contracting parties to submit all disputes regarding that contract to the exclusive jurisdiction of Tucumán’s local administrative tribunals, prevented it from hearing the case.

Nevertheless, the *Vivendi I Tribunal* found that proper evaluation of almost all of the claims under the BIT first required interpretation and application of the Concession Contract. Noting that, through the forum selection clause, the parties to the Concession Contract had assigned the task of interpreting and applying that contract expressly and exclusively to the administrative courts of Tucumán, the *Vivendi I Tribunal* dismissed the claims on the ground that the Claimants had to pursue their rights in those local courts before seeking relief under the BIT. With respect to the remaining claims whose resolution did not depend on interpretation and application of the Concession Contract, the *Vivendi I Tribunal* dismissed them on the merits, stating that the evidence failed to establish that Argentina had breached the BIT either through its own actions or omissions, or through the actions or omissions of provincial authorities attributable to the national government.

Pursuant to Article 52 of the ICSID Convention, Claimants applied for annulment of the portion of the award dismissing their claims.

In the first annulment proceeding (the *Vivendi I* annulment proceeding), the annulment committee annulled the award in part. It agreed with the Tribunal’s determination that it had jurisdiction over the dispute. It determined, however, that the Tribunal had exceeded its powers by failing to examine the merits of the claims regarding the actions of the Tucumán authorities, and that annulment was therefore warranted under Article 52(1)(b).



Claimants resubmitted the dispute to ICSID. In the resubmitted proceeding (*Vivendi II*), the Tribunal determined that Argentina had breached the BIT's provisions on FET, protection and full security, and expropriation. The *Vivendi II* Tribunal awarded damages of US\$105 million plus 6 per cent compound interest. It further determined that each party should be liable for its own costs with respect to the substantive proceeding on the merits but that Argentina should be liable for all costs regarding the jurisdictional phase, because its objections to jurisdiction had already been raised and found meritless (para. 10.2.6, *Vivendi II* Award).

Argentina responded to the award with an application for its annulment. It argued that annulment was warranted under Article 52 of the ICSID Convention, on the grounds (i) that the Tribunal had not been properly constituted, (ii) that the Tribunal had manifestly exceeded its powers, (iii) that there had been a serious departure from fundamental rules of procedure, and (iv) that the award failed to state the reasons on which it was based. Yet, after repeatedly emphasizing that the ICSID Convention only grants annulment committees very limited powers of review, the second Annulment Committee rejected Argentina's application for annulment of the *Vivendi II* award.

Notably, in contrast to the apparently very deferential stance it took toward the Tribunal's treatment of legal and factual issues in the proceedings, the second Annulment Committee rather severely criticized one of the arbitrators for her lack of good judgment in failing to investigate and disclose information to the parties regarding her possible conflicts of interests.



## 2. SELECT LEGAL ISSUES

Throughout the various stages of this long-running investment treaty arbitration, a number of significant legal issues arose. Several dealt with issues of jurisdiction. In particular, the Tribunal and Annulment Committee in the original arbitration proceeding made it clear that a host state can be responsible under a BIT for acts of its provincial authorities in breach of the BIT, even if the host state itself had no previous direct dealings with the investor. The *Vivendi I* Tribunal and first Annulment Committee also determined that a contractual forum selection clause in an agreement between an investor and a government entity that requires disputes relating to the investment to be pursued before local courts will not prevent the investor from initiating an ICSID case based on claims under a BIT.

In the resubmitted arbitration proceeding (*Vivendi II*), the Tribunal considered the significance of the host state's intent to a potentially expropriatory measure, taking the view that intention was a peripheral consideration and that the effect of the measure was the critical issue. The *Vivendi II* Tribunal also considered the content of the FET standard, stating that the words "fair and equitable" should be interpreted autonomously and in accordance with their ordinary meanings and that the standard includes an apparently broad obligation to "do no harm." Further, the *Vivendi II* Tribunal considered the circumstances in which compensation for lost profits may be appropriate, finding that, in this case, the Claimants could not recover such damages because they had not established with sufficient certainty that the investment would be profitable.

Most recently, the *Vivendi II* Annulment Committee's rejection of Argentina's application for annulment evidenced a very deferential stance toward the Tribunal's decisions, illustrating that annulment of awards can be a challenging undertaking.

At various stages in the proceedings, issues were raised regarding arbitrator independence and impartiality, including conflicts that may arise from arbitrators performing other roles such as serving as counsel in other



investor–state disputes or serving on the board of directors of an international bank. In each circumstance, however, the party’s concerns regarding conflicts of interests were effectively rejected.

These issues are discussed in more detail below.

## **2.1 | Original arbitration proceeding**

### **2.1.1 | Argentina’s responsibility for the acts of its provincial government**

In its preliminary objections to jurisdiction, Argentina argued, *inter alia*, that the BIT provided for consent to jurisdiction only for disputes between the Claimants and the Argentine Republic, whereas in this case, the dispute related exclusively to a Concession Contract, to which the Argentine Republic was not a party.

The Tribunal disagreed and held that it was well established that actions of a political subdivision of a federal state, such as the Province of Tucumán in the federal state of the Argentine Republic, were attributable to the central government under international law. It held that it was equally clear that the internal constitutional structure of a country could not alter these obligations. The Tribunal accordingly rejected this jurisdictional argument (paras. 49–50, *Vivendi I Award*).

### **2.1.2 | Jurisdiction over the investment dispute, notwithstanding the contractual forum selection clause**

Argentina had objected that the Tribunal did not have jurisdiction over the dispute because the dispute arose from the Concession Contract and the parties to that agreement had contractually committed to resolve all disputes before the administrative tribunals of Tucumán. The Tribunal rejected that argument. In doing so, it relied on Article 8 of the BIT, which grants investors the right to submit “dispute[s] relating to investments” to ICSID. According to the Tribunal, the contractual forum selection clause “did not and could not constitute a waiver by [the Claimants] of [their] rights under Article 8 of the BIT to file the pending claims against the Argentine Republic” (para. 53, *Vivendi I Award*).





## 2.2 | First annulment proceeding

### 2.2.1 | Contractual forum selection clause

The Annulment Committee agreed with the Tribunal that the exclusive forum selection clause in the Concession Contract did not prevent the Tribunal from having jurisdiction over the claims brought pursuant to the BIT. It stated that where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal should give effect to any valid forum selection clause in that contract. On the other hand, where (as in the case before it) “the fundamental basis of the claim” is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state (or one of its subdivisions) cannot operate as a bar to the application of the treaty standard (para. 101, *Vivendi I*, Decision on Annulment).

Nevertheless, the Annulment Committee disagreed with the Tribunal’s decision that it could not decide key aspects of the Claimants’ BIT claims because those claims involved issues of contractual performance or non-performance. The Annulment Committee stated that the forum selection clause did not and could not prevent the Tribunal from fulfilling its duty of determining whether there had been a breach of the BIT, even if that task required the Tribunal to interpret and apply the Concession Contract (paras. 104–111, *Vivendi I*, Decision on Annulment), saying, “In the Committee’s view, it [was] not open to an ICSID tribunal having jurisdiction under a BIT in respect of a claim based upon a substantive provision of that BIT, to dismiss the claim on the ground that it could or should have been dealt with by a national court” (para. 102). The Annulment Committee stated that by failing to determine the Claimants’ claims alleging wrongful conduct of the Tucumán authorities, the Tribunal had manifestly exceeded its powers, an annulable error under ICSID Convention Article 52(1)(b). The Committee concluded by annulling the portion of the award relating to those particular claims.



### 2.2.2 | Conflicts of interests in arbitral proceedings

During the annulment proceedings, Argentina sought to challenge the appointment of L. Yves Fortier as president of the first Annulment Committee, after he disclosed that a partner at his law firm had advised Vivendi on a tax matter in the years immediately preceding his appointment to the Annulment Committee. The partner continued to be paid by Vivendi on a retainer. According to Argentina, the relationship between Mr. Fortier and Vivendi raised doubts regarding whether the Committee member could be relied upon to exercise independent judgment as required under the ICSID Convention.

Applying the ICSID Arbitration Rules governing challenges to arbitrators, the other two members of the Annulment Committee decided, and rejected, Argentina's proposal to disqualify Mr. Fortier. The two Committee members reasoned that the test they should apply was whether "a real risk of lack of impartiality based upon [the] facts (and not on any more speculation or inference) could reasonably be apprehended by either party" (para. 25, *Vivendi I*, Decision on Challenge to Committee Member). They further stated that "[i]f the facts would lead to the raising of some reasonable doubt as to the impartiality of the arbitrator or member, the appearance of security for the parties would disappear and a challenge by either party would have to be upheld" (para. 25).

The Committee members then concluded that those considerations did not support disqualification based on the facts before them. They noted that although an arbitrator's professional relationship with a party could warrant his or her disqualification, in this case it did not. Factors influencing that determination were that Mr. Fortier was not personally involved in representing Vivendi, that the matters on which his partner represented the Claimant were not related to the investor–state dispute and would soon come to an end, and that Mr. Fortier "immediately and fully" disclosed information regarding his relationship with the Claimant (para. 26).



## 2.3 | Resubmitted arbitration proceeding

In the resubmitted arbitration (*Vivendi II*), the Tribunal determined that the provincial authorities of Tucumán (for which Argentina was responsible) violated the FET standard in Article 3 of the BIT and the protection and full security standard in Article 5(1) of the BIT, and also expropriated the Claimants' investment in breach of Article 5 of that treaty. With respect to the FET claim, the *Vivendi II* Tribunal rejected Argentina's arguments that CAA had frustrated and breached the Concession Contract and that the governmental actions about which Claimants complained were responsible, proportionate and appropriate responses to CAA's inadequate performance of a fundamental public service. The Tribunal held that on the facts before it, it was only possible to conclude that the provincial government, improperly and without justification, mounted an illegitimate "campaign" against the concession, the Concession Contract and the "foreign" concessionaire, aimed either at reversing the privatization or forcing the concessionaire to renegotiate (and lower) CAA's tariffs (paras. 7.4.18–7.4.19, *Vivendi II* Award).

With respect to the expropriation claim, the *Vivendi II* Tribunal held that the government's actions were not legitimate regulatory responses to CAA's failings, but were sovereign acts designed illegitimately to end the concession or to force its renegotiation. According to the Tribunal, the Claimants were radically deprived of the economic use and enjoyment of their investment, the benefits of which (i.e., the right to be paid for services provided) had been effectively neutralized and rendered useless. Under these circumstances, rescission of the Concession Contract represented the only rational alternative for Claimants. The Tribunal concluded that by leaving the Claimants with no other rational choice, the Province thus expropriated Claimants' right of use and enjoyment of their investment under the Concession Contract (paras. 7.5.20–7.5.34, *Vivendi II* Award).

### 2.3.1 | Expropriation and the "effects" test

In holding Argentina liable for violating the BIT's prohibition on unlawful expropriation, the *Vivendi II* Tribunal held that there was extensive authority for the proposition that the state's intent, or its subjective motives,



are at most a secondary consideration when determining whether a measure is expropriatory. Although improper motives could weigh in favour of showing a measure to be expropriatory, this was not a requirement to establish an expropriation, because the effect of the measure on the investor, not the state's intent, was the critical factor.

Turning to the present case, the Tribunal noted that the structure of Article 5(2) of the BIT directed it first to consider whether the challenged measures were expropriatory and only then to ask whether they complied with the conditions listed in the treaty as being necessary to render the expropriation lawful (i.e., that the expropriation be done for a public purpose, be non-discriminatory, not be contrary to specific commitments, and be accompanied by payment of compensation). The Tribunal held that if it concluded that the challenged measures were expropriatory, there would be a violation of Article 5(2) of the BIT, even if the measures might be for a public purpose and non-discriminatory, because no compensation had been paid. The Tribunal affirmed the finding of the tribunal in *Santa Elena v. Costa Rica* that the purpose for which the property was taken “does not alter the legal character of the taking for which adequate compensation must be paid”<sup>1</sup> (paras. 7.5.20–7.5.21, *Vivendi II* Award).

The Tribunal's interpretation of the expropriation standard is significant because it stands in apparent contrast to the view of some other tribunals that non-discriminatory regulations enacted for a public purpose are not compensable expropriations<sup>2</sup> (or are not compensable expropriations unless specific commitments to refrain from enacting the challenged regulations had been given).<sup>3</sup>

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<sup>1</sup> *Compañía del Desarrollo de Santa Elena S.A. v. The Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award (17 February 2000), 15 ICSID REV–FILJ 169 (2000).

<sup>2</sup> See, e.g., *Glamis Gold Ltd. v. United States of America*, Final Award (14 May 2009), para. 354.

<sup>3</sup> E.g., *Methanex Corp. v. United States of America*, Final Award on Jurisdiction and Merits (3 August 2005), Part IV, Chapter D, para. 7.



### 2.3.2 | Fair and equitable treatment purportedly includes a “do no harm” standard

In defending against the FET claim, Argentina argued that the requirement in Article 3 for host states to grant foreign investors “fair and equitable treatment according to the principles of international law” required states to accord with the minimum international law standard of treatment. Argentina further asserted that this standard, as “classic[ally]” formulated in the 1926 *Neer* decision,<sup>4</sup> is violated only when the government’s conduct “amount[s] to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency” (para. 6.6.3).

The Tribunal rejected Argentina’s argument that the FET standard was so limited, even going so far as to label the *Neer* standard as “obsolete” (paras. 7.4.5–7.4.9, 7.4.46, *Vivendi II* Award). The Tribunal additionally declared that there was “no doubt” that the fair and equitable standard includes a “government’s obligation not to disparage and undercut a properly granted concession (a ‘do no harm’ standard)...albeit one granted by a predecessor government,” in order to rescind the concession or to “force” a renegotiation (para. 7.4.39). Applying that “do no harm” standard, the Tribunal determined Argentina had directly undermined the Claimants’ legitimate expectations of their investment and violated Article 3 of the BIT (paras. 7.4.36–7.4.46).

The *Vivendi II* Tribunal’s interpretation of the FET standard is notable for its breadth. Its rejection of the narrower *Neer* formulation as “obsolete” is also notable given that, as recently as the 2009 *Glamis* decision under NAFTA, that exact formulation has been described as representing the FET standard under customary international law.<sup>5</sup> It should be recognized, however, that the *Vivendi II* Tribunal’s adoption of a strong interpretation of the FET standard did not appear to matter to the outcome of the case: the Tribunal stated that even if it had applied the narrower *Neer* standard

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<sup>4</sup> *Neer v. Mexico*, 4 R. Int’s Arb. Awards, 60–62 (1926).

<sup>5</sup> *Glamis Gold Ltd. v. United States of America*, Final Award (14 May 2009), paras. 21–22.



advanced by Argentina, it still would have found Argentina to have breached the FET obligation (para. 7.4.46).

### **2.3.3 | Damages for lost profits**

After determining that Argentina violated Articles 3 and 5 of the BIT, the *Vivendi II* Tribunal proceeded to determine the amount of damages owed. It stated that the appropriate amount due in cases of unlawful conduct by a state was that which would be “sufficient to compensate the affected party fully and to eliminate the consequences of the state’s action” (para. 8.2.8). This amount, the Tribunal continued, would be based on the “fair market value” of the concession (para. 8.2.11).

The vast majority of Claimants’ claims for damages (roughly US\$300 million of its US\$316.9 million claim) were based on lost profits the Claimants asserted the concession would have generated during the life of the 30-year concession, had the government not acted wrongfully and had the concession continued. Argentina challenged the Claimants’ attempt to derive the fair market value of the concession from their purported lost profits, noting that many international tribunals had determined that an award based on lost profits is generally only appropriate if the relevant enterprise was profitable and had operated for a sufficient period to establish its performance record, circumstances not present in the case of the Tucumán concession.

The Tribunal sided with Argentina on this point. It rejected the Claimants’ request for lost profits on the ground that the Claimants had failed to meet their obligation to establish with “convincing evidence” and “a sufficient degree of certainty that the Tucumán concession would have been profitable” (paras. 8.3.5 and 8.3.8). The Tribunal concluded that, instead, the amount of damages should be based on recovering the value of the investment the Claimants had actually already made (paras. 8.3.3–8.3.5 and 8.3.13). With the caveat that setting the amount of damages “is not an exact science,” the Tribunal determined that Argentina was obliged to pay the Claimants US\$51 million plus 6 per cent interest compounded annually from August 1997, and US\$54 million plus 6 per cent interest compounded annually from September 2002 (8.3.16 and 8.3.21).



### 2.3.4 | More on arbitrator conflicts of interests

During the resubmitted arbitration proceeding, Argentina sought to challenge the Claimants' counsel's use of legal arguments that were based on the award in another treaty-based investor–state dispute, *Eureko v. Poland*.<sup>6</sup> One of the Claimants' counsel, Stephen Schwebel, had been an arbitrator in *Eureko v. Poland* during the period when the Claimants' *Vivendi* case was ongoing. Argentina raised concerns about the ability of Mr. Schwebel to interpret the standard investment treaty obligations in *Eureko v. Poland* without consciously or subconsciously considering how that legal ruling might impact the *Vivendi* dispute, in which Mr. Schwebel was acting as counsel. Argentina accordingly made a formal request for any reference to the *Eureko v. Poland* award to be stricken from the Claimants' legal briefs.

The Tribunal refused to make such an order. It further determined that the question of whether Mr. Schwebel's role as arbitrator in the *Eureko* case should affect the weight to be given to the *Eureko* award was a question best reserved for a later stage of the proceedings.<sup>7</sup> However, given that the final award in the resubmitted proceedings does not expressly refer to Argentina's objection and cites the *Eureko* award as authority, it would seem that the *Vivendi II* Tribunal rejected Argentina's position.

## 2.4 | Second annulment proceeding

### 2.4.1 | Annulment under Article 52(1)(b), (d) and (e) of the ICSID Convention

Argentina applied to annul the *Vivendi II* award on various grounds including, briefly, that the Tribunal wrongly accepted jurisdiction and failed to apply applicable law, which consisted of provincial and national law and the terms of the Concession Contract. Argentina further argued that annulment was warranted because the Tribunal improperly relied on some evidence and information—including allegations relating to the

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<sup>6</sup> *Eureko B.V. v. Republic of Poland*, Ad Hoc (based on the Netherlands–Poland BIT).

<sup>7</sup> L. Peterson (2007), *Investment Treaty News*, 17 January.



government's purported "campaign to destroy" the Concession Contract— while ignoring other important evidence and information, including considerations relating to the right to water as a human right (paras. 244–45). These errors, Argentina argued, supported annulment under subsections (b), (d) and (e) of ICSID Convention Article 52(1), which, respectively, permit annulment if a tribunal manifestly exceeds its powers, seriously departs from a fundamental rule of procedure, or fails to state reasons upon which the award is based.

In its decision rejecting those arguments, the ad hoc Committee noted that "procedural incidents" and "erroneous findings of law and fact" "can be considered grounds for annulment," but "only if they rise to the exacting standards for annulment as expressed in Article 52(1)" of the ICSID Convention (para. 251). Without much elaboration and evidencing an apparently high degree of deference to the Tribunal's decisions, the ad hoc Committee then stated that no findings in or aspects of the *Vivendi II* award met the high standards warranting annulment.

#### **2.4.2 | Annulment under Article 52(1)(a) and (d)— and even more on conflicts of interests in arbitration proceedings**

Argentina also sought annulment based on the acts and omissions of one of the arbitrators, Professor Kaufmann-Kohler. More specifically, Argentina contended that those acts and omissions warranted annulment of the award under Article 52(1)(a) because they caused an improper constitution of the *Vivendi II* Tribunal, and under Article 52(1)(d) because they constituted a serious departure from a fundamental rule of procedure.

The facts supporting Argentina's application were that, while serving on the *Vivendi II* Tribunal, Professor Kaufmann-Kohler was also a member of the Board of Directors of UBS. UBS, in turn, was the single largest shareholder in Vivendi during the pendency of those arbitration proceedings. At no time during her service on the Tribunal, however, did Professor Kaufmann-Kohler disclose to the parties information about UBS's holdings that might raise questions about conflicts of interests.





Argentina argued that these relationships gave rise to justifiable doubts as to the arbitrator's independence and impartiality and that it had been unable to exercise its right to challenge Professor Kaufmann-Kohler's continued service on the Tribunal because Professor Kaufmann-Kohler did not fully investigate or disclose those circumstances.

The second Annulment Committee roughly criticized Professor Kaufmann-Kohler's failure to investigate and disclose these issues to the disputing parties. It also agreed with Argentina that, due to Professor Kaufmann-Kohler's contemporaneous service on the board of UBS and as an arbitrator, the Tribunal was not properly constituted and there had been a departure from a fundamental rule of procedure (para. 232). The Committee nevertheless stated that it had the discretion regarding whether to annul the award and would exercise that discretion to let the award stand.

Notably, one of the arbitrators, Professor J. H. Dalhuisen, filed a separate opinion in which he further raised issues relating to arbitrator independence and impartiality. His separate opinion, however, focused not on the conduct of Professor Kaufmann-Kohler, but aimed its criticism at the ICSID Secretariat which, according to Professor Dalhuisen, assumed roles that threatened the independence of the Annulment Committee members. Professor Dalhuisen concluded by suggesting that if the "self-cleaning forces in the international arbitration system are no longer sufficiently strong," "a treaty change probably involving the creation and operation of a specialised *international court*" would be necessary (para. 26, Separate Opinion).



# **World Duty Free Co. Ltd. v. Republic of Kenya, ICSID Case No. ARB/00/7 (*World Duty Free v. Kenya*)**

Lise Johnson

Award available at <http://ita.law.uvic.ca/documents/WDFv.KenyaAward.pdf>

**Keywords:** Corruption, interpretation, investor obligations, transparency

### **Key dates:**

Request for Arbitration: 7 July 2000

Constitution of Tribunal: 29 November 2000

Award: 4 October 2006

### **Arbitrators:**

Judge Gilbert Guillaume (president)

Hon. Andrew Rogers (claimant appointee)

Mr. V. V. Veeder (respondent appointee)

### **Forum and applicable procedural rules:**

International Centre for Settlement of Investment Disputes (ICSID)

ICSID Rules of Procedure for Arbitration Proceedings

### **Applicable treaty:**

None—the case concerns a contract-based investment arbitration<sup>1</sup>

### **Alleged violation:**

- Claimant alleged Kenya violated various contractual obligations and international law by illegally taking and destroying Claimant's property

### **Other legal issues raised:**

- Interpretation—reference to other bodies/principles of law
- Investor obligations—obligations to comply with domestic/international law
- Procedure—transparency

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<sup>1</sup> The present (April 2010) compilation of cases in this e-book covers primarily treaty-based arbitration. This case is an exception in that the dispute arose under a contract between the government and the investor, not a treaty between two states.



## 1. CASE SUMMARY

In June 2000, World Duty Free Company Limited, a company incorporated in the United Kingdom (“World Duty Free” or “the Claimant”<sup>2</sup>), initiated ICSID proceedings against the Republic of Kenya (“Kenya” or “the Respondent”). It alleged that Kenya had breached contractual obligations it owed the Claimant and had illegally taken the Claimant’s property when, in relevant part, Kenyan officials ordered in 1989 that a court-appointed official take over management and control of World Duty Free. As a remedy, the Claimant sought restitution and damages, including lost profits and exemplary damages.

At issue was a 1989 contract (the “1989 Agreement”) between the Claimant and Kenya, pursuant to which the Claimant would construct, maintain and operate duty-free complexes at two airports in Kenya. The 1989 Agreement also contained an arbitration clause providing that, if there were a dispute between the parties, the parties would submit it to ICSID for resolution by an arbitral tribunal pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention).

In December 2002, the Claimant filed a document in the arbitral proceedings that revealed the Claimant previously had made a covert payment to the former President of Kenya, Daniel arap Moi, in order to conclude the 1989 Agreement. Upon discovery of that information, Kenya sought to dismiss the Claimant’s case on the grounds that, because the relevant contract had been procured through payment of a bribe, the contract was void and unenforceable as a matter of public policy. Based on those developments, in December 2004 the Tribunal declared that the parties had to address, and it had to decide, certain fundamental issues—

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<sup>2</sup> The term “Claimant” also refers in this summary to World Duty Free Company Limited’s corporate predecessor, House of Perfume of Al-Ghurair Enterprises (of Dubai), as well as Mr. Nasir Ibrahim Ali, the “alter ego of both companies.”

namely, (1) whether a bribe was paid by the Claimant to the former president, (2) if so, whether the 1989 Agreement was procured as a result of the bribe and (3) if the Agreement had been obtained by the bribe, whether it was valid and enforceable under applicable domestic laws and public international law (para. 129).

Based on its assessment of the facts and relevant principles of domestic and international law, the Tribunal held the Claimant had in fact procured the 1989 Agreement through a bribe to the former Kenyan President and that, consequently, the Claimant had no right to pursue or recover under any of its pleaded claims, all of which arose from that 1989 Agreement (para. 179).

## 2. SELECT LEGAL ISSUES

This case is important in that it is an example of how a tribunal can refer to and rely upon general principles of international law, and private parties' obligations thereunder, in order to inform its evaluation of claims. It also supports the principle that investors have obligations to comply with domestic and international law in the host states in which they invest, and shows how investor misconduct in certain circumstances can affect an investor's legal rights vis-à-vis host states. The fact that *World Duty Free* was based on a contract between the Claimant and Kenya—as opposed to a bilateral investment treaty or other international investment agreement (IIA)—may, however, limit these principles' applicability in other investor–state disputes. The discussion below addresses each of these issues in more detail. It then also briefly relays some of the Tribunal's statements regarding transparency in investor–state dispute settlement and notes problems with its approach to this topic.



## 2.1 | Applying general principles of international law and public policy on corruption

The 1989 Agreement on which the Claimant based its claims (and ICSID jurisdiction) stated that disputes arising out of the contract should be resolved in accordance with English and/or Kenyan law<sup>3</sup> (paras. 158–59). Nevertheless, the Tribunal held that principles of international law also applied, noting that other arbitral tribunals had likewise “based their decisions on universal values” (paras. 137, 141). The Tribunal explained that before applying such “universal values” to the case before it, however, it must ensure there was “objective existence of a particular transnational public policy rule” on the subject (para. 141). To determine whether there was a relevant “transnational public policy” rule or “accepted norms of conduct that must be applied in all fora” (para. 139), the Tribunal looked to international conventions, declarations, national court decisions and arbitral awards condemning bribery and corruption (paras. 141–157). Based on those sources, it declared it was “convinced that bribery is contrary to...transnational public policy” and, as a result, it had to reject “claims based on contracts of corruption or contracts obtained by corruption” (para. 157).

Significantly, the Tribunal also noted that investors’ duties to comply with these international law principles remain in force even when corruption is a “widespread” and “common practice” in the relevant host state (para. 156). This suggests investors must comply with what can be characterized as an “objective minimum standard of conduct”—i.e., a standard from which investors cannot deviate even if there is evidence that the particular host state in which they are investing does not adhere to or enforce the standard (paras. 156, 172).<sup>4</sup>

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<sup>3</sup> There was ambiguity in the 1989 Agreement regarding which country’s law should apply, but the Tribunal found that the situation presented “no practical difficulty” because application of “the two legal systems [had] the same material effect” in resolving this case (para. 159).

<sup>4</sup> After interpreting and applying principles of international law, the Tribunal examined the relevant domestic laws of Kenya and England. It concluded that each country’s legal framework likewise prevented the Claimant from claiming any rights under its illegally procured contract. It also found that when Kenya learned of the bribe during the arbitration proceedings it could and legitimately did avoid the contract. There was no evidence or reason that supported attributing to Kenya the illegal acts of its former president (paras. 182–185).



The Tribunal acknowledged it had concerns that its decision would unfairly leave the Claimant without a remedy for wrongful acts by Kenya; yet it reasoned that the “answer” to those concerns was that public policy principles, such as the ones guiding its case, protect “not the litigating parties but the public” (para. 181).

## 2.2 | Investors’ legal obligations

*World Duty Free* is further notable in that it signals that foreign investors not only have *rights* in the countries where they invest, but also *obligations*; it similarly illustrates that foreign investors’ enjoyment of their rights may be contingent on the investors’ compliance with their obligations. There is, however, an arguable limit to *World Duty Free*’s implications for the scope and significance of investor obligations: because the Tribunal explicitly stated that the decision involved analysis of whether the Claimant could enforce illegally obtained *contractual rights*, the Tribunal left unclear whether and how its holding would have differed if the Claimant had grounded its claims on *rights under a governing IIA* (paras. 129, 137, 157).

The decision in a more recent case, *Inceysa v. El Salvador*,<sup>5</sup> however, helps address that issue. There, a tribunal held that because the investor obtained its investment through fraud, the investor could not seek relief for alleged harm to that investment under *either the governing IIA or the contract*.<sup>6</sup> Together, *World Duty Free* and *Inceysa* may therefore support a growing recognition and significance of foreign investors’ duties to comply with national and/or international law relating to their investments. One caveat to that conclusion is that each case relates to improper conduct by the investor in connection with securing the investment. The decisions do not deal with the important issue of wrongful conduct by investors in connection with maintaining or operating their investments.

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<sup>5</sup> *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26 (2 August 2006).

<sup>6</sup> The tribunal in *Inceysa* analyzed the issue of whether the investor’s wrongful conduct precluded the investor’s claims as a jurisdictional issue. The tribunal held that it did not have authority to hear the investor’s claims because El Salvador had only consented to ICSID jurisdiction over claims arising out of *investments made in accordance with El Salvador’s laws*; the investor’s illegally made investment did not meet that requirement.



### 2.3 | Confidentiality

In recounting the procedural aspects of the case, the Tribunal described its response to Kenya's request for an order regarding the confidentiality of the proceedings (paras. 12, 16). The Tribunal began by stating that, "[e]specially in an arbitration to which a Government is a Party, it cannot be assumed that the [ICSID] Convention and the [Arbitration] Rules incorporate a general obligation of confidentiality which would require the Parties to refrain from discussing the case in public" (para. 17). Nevertheless, with respect to confidentiality of hearings, the Tribunal decided to apply the following rule, which it derived from its reading of the ICSID Arbitration Rules and other ICSID regulations: "[W]hen no decision has been taken [by the Tribunal with the Parties' consent] to open the hearings to the public, the records of such hearings should not be disseminated unilaterally by one of the Parties" (para. 17). Pursuant to this approach, one disputing party can prevent the other from disclosing minutes, audio recordings and other records of hearings (para. 17). There does not appear to be any showing a party must meet before it can successfully compel or maintain confidentiality of the proceedings, nor any mechanism for public policy concerns to override a party's decision on the hearings' confidentiality (cf. para. 181). Following this approach, legitimate public interests in obtaining information relevant to government or investor misconduct or liability can apparently be thwarted by either disputing party's desire to conceal its own wrongful actions (para. 17).



## APPENDIX 1: LIST OF CASES AND THEIR SELECT ISSUES (Cases are organized alphabetically by their short titles.)

	Cases Decisions and Awards Addressed	Short Title	Select Issues
1.	Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22  Award, 24 July 2008	<i>Biwater v. Tanzania</i>	<ul style="list-style-type: none"> <li>• Causation</li> <li>• Damages</li> <li>• Interpretation—reference to other bodies/principles of law</li> <li>• Jurisdiction—definition of “investment”—definition under the ICSID Convention</li> <li>• Margin of appreciation</li> <li>• Necessity defence</li> <li>• Procedure—amicus curiae participation</li> <li>• Procedure—transparency</li> <li>• States’ substantive obligations—expropriation</li> </ul>
2.	CME Czech Republic B.V. v. Czech Republic, UNCITRAL  Partial Award, 13 Sept. 2001	<i>CME v. Czech Republic</i>	<ul style="list-style-type: none"> <li>• Causation</li> <li>• Degree of scrutiny</li> <li>• Jurisdiction—broad dispute resolution provision</li> <li>• Jurisdiction—multiple/parallel proceedings</li> <li>• States’ substantive obligations—expropriation</li> </ul>
3.	CMS Gas Transmission Co. v. Republic of Argentina, ICSID Case No. ARB/01/8  Decision on Jurisdiction, 17 July 2003  Award, 12 May 2005  Decision on Annulment, 25 Sept. 2007	<i>CMS v. Argentina</i>	<ul style="list-style-type: none"> <li>• Challenges to awards—ICSID annulment proceedings—standard for annulment</li> <li>• Jurisdiction—definition of “investment”—minority shareholders</li> <li>• Necessity defence</li> <li>• States’ substantive obligations—fair and equitable treatment</li> <li>• States’ substantive obligations—umbrella clause</li> </ul>





	Cases Decisions and Awards Addressed	Short Title	Select Issues
4.	Continental Casualty Co. v. Republic of Argentina, ICSID Case No. ARB/03/9  Decision on Jurisdiction, 22 Feb. 2006 Award, 5 Sept. 2008  (Decision on annulment pending as of 31 Dec. 2010)	<i>Continental Casualty v. Argentina</i>	<ul style="list-style-type: none"> <li>• Interpretation—reference to other bodies/principles of law</li> <li>• Margin of appreciation</li> <li>• Necessity defence</li> <li>• States' substantive obligations—fair and equitable treatment</li> <li>• States' substantive obligations—umbrella clause</li> </ul>
5.	Glamis Gold Ltd. v. United States of America  Award, 8 June 2009	<i>Glamis v. United States</i>	<ul style="list-style-type: none"> <li>• Cultural measures</li> <li>• Environmental measures</li> <li>• Procedure—amicus curiae participation</li> <li>• Procedure—transparency</li> <li>• States' substantive obligations—expropriation</li> <li>• States' substantive obligations—fair and equitable treatment/minimum international standards of treatment</li> </ul>
6.	Ronald S. Lauder v. Czech Republic, UNCITRAL  Award, 3 Sept. 2001	<i>Lauder v. Czech Republic</i>	<ul style="list-style-type: none"> <li>• Causation</li> <li>• Degree of scrutiny</li> <li>• Jurisdiction—broad dispute resolution provision</li> <li>• Jurisdiction—multiple/parallel proceedings</li> <li>• States' substantive obligations—expropriation</li> </ul>
7.	Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7  Decision on Jurisdiction, 25 Jan. 2000	<i>Maffezini v. Spain</i>	<ul style="list-style-type: none"> <li>• Jurisdiction—exhaustion of remedies</li> <li>• Jurisdiction—most favoured nation treatment</li> </ul>



	Cases Decisions and Awards Addressed	Short Title	Select Issues
8.	<p>Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1</p> <p>Award, 30 Aug. 2000</p>	<i>Metalclad v. Mexico</i>	<ul style="list-style-type: none"> <li>• Challenges to awards—judicial review</li> <li>• Environmental measures</li> <li>• States' substantive obligations—expropriation</li> <li>• States' substantive obligations—fair and equitable treatment /minimum international standards of treatment</li> </ul>
9.	<p>Methanex Corp. v. United States of America</p> <p>Decision on Acceptance of Amicus Curiae, 15 Jan. 2001</p> <p>Final Award, 3 Aug. 2005</p>	<i>Methanex v. United States</i>	<ul style="list-style-type: none"> <li>• Environmental measures</li> <li>• Interpretation—reference to other bodies/principles of law</li> <li>• Procedure—amicus curiae participation</li> <li>• Procedure—transparency</li> <li>• States' substantive obligations—expropriation</li> <li>• States' substantive obligations—fair and equitable treatment/ minimum international standards of treatment</li> <li>• States' substantive obligations—national treatment</li> </ul>
10.	<p>Occidental Petroleum Corp. and Occidental Exploration and Production Co. v. Republic of Ecuador, ICSID Case No. ARB/06/11</p> <p>Decision on Jurisdiction, 9 Sept. 2008</p>	<i>Occidental v. Ecuador</i>	<ul style="list-style-type: none"> <li>• Jurisdiction—contractual waiver of treaty rights</li> <li>• Jurisdiction—waiting periods</li> </ul>



	Cases Decisions and Awards Addressed	Short Title	Select Issues
11.	Parkerings–Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8 Award, 11 Sept. 2007	<i>Parkerings v. Lithuania</i>	<ul style="list-style-type: none"> <li>• Cultural measures</li> <li>• Environmental measures</li> <li>• Interpretation—reference to other bodies/principles of law</li> <li>• Investor obligations—due diligence</li> <li>• Investor obligations—exhaustion of remedies</li> <li>• Jurisdiction—broad dispute resolution provision</li> <li>• States’ substantive obligations—fair and equitable treatment</li> <li>• States’ substantive obligations—most favoured nation treatment</li> </ul>
12.	Phoenix Action Ltd. v. Czech Republic, ICSID Case No. ARB/06/5 Award on Jurisdiction, 9 Apr. 2009	<i>Phoenix v. Czech Republic</i>	<ul style="list-style-type: none"> <li>• Interpretation—reference to other bodies/principles of law</li> <li>• Investor obligations—obligations to act in good faith</li> <li>• Investor obligations—obligations to comply with domestic/international law</li> <li>• Jurisdiction—definition of “investment”—investments bona fide and made in good faith</li> <li>• Jurisdiction—definition of “investment”—compliance with host state law</li> <li>• Jurisdiction—definition of “investment”—definition under the ICSID Convention</li> </ul>



	Cases Decisions and Awards Addressed	Short Title	Select Issues
13.	SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13  Decision on Jurisdiction, 6 Aug. 2003	<i>SGS v. Pakistan</i>	<ul style="list-style-type: none"> <li>• Jurisdiction—broad dispute resolution provision</li> <li>• Jurisdiction—definition of “investment”—criteria of investments in the host state</li> <li>• Jurisdiction—effect of a contractual forum selection clause</li> <li>• Jurisdiction—multiple/parallel proceedings</li> <li>• Jurisdiction—umbrella clause</li> <li>• Jurisdiction—waiting periods</li> </ul>
14.	SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6  Decision on Jurisdiction, 24 Jan. 2004	<i>SGS v. Philippines</i>	<ul style="list-style-type: none"> <li>• Jurisdiction—broad dispute resolution provision</li> <li>• Jurisdiction—definition of “investment”—criteria of investments in the host state</li> <li>• Jurisdiction—effect of a contractual forum selection clause</li> <li>• Jurisdiction—multiple/parallel proceedings</li> <li>• Jurisdiction—umbrella clause</li> </ul>
15.	Siemens A.G. v. Republic of Argentina, ICSID Case No. ARB/02/8  Decision on Jurisdiction, 3 Aug. 2004  Award, 6 Feb. 2007	<i>Siemens v. Argentina</i>	<ul style="list-style-type: none"> <li>• Damages</li> <li>• Interpretation—reference to other bodies/principles of law</li> <li>• Investor obligations—obligations to comply with domestic/international law</li> <li>• Jurisdiction—most favoured nation treatment</li> <li>• Margin of appreciation</li> <li>• States’ substantive obligations—umbrella clause</li> </ul>



	Cases Decisions and Awards Addressed	Short Title	Select Issues
16.	Tecnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2 Award, 29 May 2003	<i>Tecmed v. Mexico</i>	<ul style="list-style-type: none"> <li>• Environmental measures</li> <li>• Interpretation—reference to other bodies/principles of law</li> <li>• States' substantive obligations—expropriation</li> <li>• States' substantive obligations—fair and equitable treatment</li> </ul>
17.	Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Republic of Argentina, ICSID Case No. ARB/97/3 First Final Award, 21 Nov. 2000 Decision on Annulment, 3 July 2002 Award in Resubmitted Proceeding, 20 Aug. 2007 Decision on Annulment, 10 Aug. 2010	<i>Vivendi v. Argentina</i>	<ul style="list-style-type: none"> <li>• Challenges to awards—ICSID annulment proceedings—standard for annulment</li> <li>• Conflicts of interests</li> <li>• Damages</li> <li>• Jurisdiction—attribution—authority to resolve claims involving conduct of federal states' political subdivisions</li> <li>• Jurisdiction—broad dispute resolution provision</li> <li>• Jurisdiction—effect of a contractual forum selection clause</li> <li>• States' substantive obligations—expropriation</li> <li>• States' substantive obligations—fair and equitable treatment</li> </ul>
18.	World Duty Free Co. Ltd. v. Republic of Kenya, ICSID Case No. ARB/00/7 (This case is a contract-based, not a treaty-based, action). Award, 4 Oct. 2006	<i>World Duty Free v. Kenya</i>	<ul style="list-style-type: none"> <li>• Interpretation—reference to other bodies/principles of law</li> <li>• Investor obligations—obligations to comply with domestic/international law</li> <li>• Procedure—transparency</li> </ul>



## APPENDIX 2: LIST OF SELECT ISSUES

(Relevant decisions and awards are organized chronologically.)

### Procedural Issues

#### Amicus Curiae

- *Methanex v. United States* (Decision on Acceptance of Amicus Curiae, Jan. 2001)
- *Glamis v. United States* (Procedural Order No. 6, Oct. 2005)
- *Biwater v. Tanzania* (Procedural Order No. 5, Feb. 2007; see also Award, July 2008)

#### Conflicts of Interests

- *Vivendi v. Argentina* (Decision on Challenge, Oct. 2001, and Decision on Annulment, Aug. 2010)

#### Transparency

- *World Duty Free v. Kenya* (Decision on Respondent's Request for Provisional Measures, Apr. 2001)
- *Methanex v. United States* (Decision on Acceptance of Amicus Curiae, Jan. 2001; see also Final Award, Aug. 2005)
- *Glamis v. United States* (Procedural Order No. 1, Mar. 2005)
- *Biwater v. Tanzania* (Procedural Order No. 3, Sept. 2006)

### Jurisdictional Issues

#### Attribution—Authority to Resolve Claims Involving Conduct of Federal States' Political Subdivisions

- *Vivendi v. Argentina* (Award [original proceeding], Nov. 2000)

#### Broad Dispute Resolution Provision

- *Lauder v. Czech Republic* (Final Award, Sept. 2001)
- *CME v. Czech Republic* (Partial Award, Sept. 2001)
- *Vivendi v. Argentina* (Decision on Annulment, July 2002)
- *SGS v. Pakistan* (Decision on Jurisdiction, Aug. 2003)
- *SGS v. Philippines* (Decision on Jurisdiction, Jan. 2004)
- *Parkerings v. Lithuania* (Award, Sept. 2007)

#### Contractual Waiver of Treaty Rights

- *Occidental v. Ecuador* (Decision on Jurisdiction, Sept. 2008)



## Jurisdictional Issues (cont.)

### Definition of “Investment”

#### **Compliance with Host State Law:**

- *Phoenix v. Czech Republic* (Award, Apr. 2009)

#### **Criteria of Investments in the Host State:**

- *SGS v. Pakistan* (Decision on Jurisdiction, Aug. 2003)
- *SGS v. Philippines* (Decision on Jurisdiction, Jan. 2004)

#### **Definition under the ICSID Convention:**

- *Biwater v. Tanzania* (Award, July 2008)
- *Phoenix v. Czech Republic* (Award, Apr. 2009)

#### **Investments Bona Fide and Made in Good Faith:**

- *Phoenix v. Czech Republic* (Award, Apr. 2009)

#### **Minority Shareholders:**

- *CMS v. Argentina* (Decision on Jurisdiction, July 2003; see also Decision on Annulment, Sept. 2007)

### Effect of a Contractual Forum Selection Clause

- *Vivendi v. Argentina* (Award [original proceeding], Nov. 2000; see also Decision on Annulment, July 2002, Award in Resubmitted Proceeding, Aug. 2007, and Decision on Annulment, Aug. 2010)
- *SGS v. Pakistan* (Decision on Jurisdiction, Aug. 2003)
- *SGS v. Philippines* (Decision on Jurisdiction, Jan. 2004)

### Exhaustion of Remedies

- *Maffezini v. Spain* (Decision on Jurisdiction, Jan. 2000)

### Most Favoured Nation Treatment

- *Maffezini v. Spain* (Decision on Jurisdiction, Jan. 2000)
- *Siemens v. Argentina* (Decision on Jurisdiction, Aug. 2004)

### Multiple/Parallel Proceedings

- *Lauder v. Czech Republic* (Final Award, Sept. 2001)
- *CME v. Czech Republic* (Partial Award, Sept. 2001)
- *SGS v. Pakistan* (Decision on Jurisdiction, Aug. 2003)
- *SGS v. Philippines* (Decision on Jurisdiction, Jan. 2004)

### Umbrella Clause

- *SGS v. Pakistan* (Decision on Jurisdiction, Aug. 2003)
- *SGS v. Philippines* (Decision on Jurisdiction, Jan. 2004)

### Waiting Periods

- *SGS v. Pakistan* (Decision on Jurisdiction, Aug. 2003)
- *Occidental v. Ecuador* (Decision on Jurisdiction, Sept. 2008)



## Issues on the Merits

### ***States' Substantive Obligations***

#### **Expropriation**

- *Metalclad v. Mexico* (Award, Aug. 2000)
- *Lauder v. Czech Republic* (Award, Sept. 2001)
- *CME v. Czech Republic* (Partial Award, Sept. 2001)
- *Tecmed v. Mexico* (Award, May 2003)
- *Methanex v. United States* (Award, Aug. 2005)
- *Vivendi v. Argentina* (Award in Resubmitted Proceeding, Aug. 2007)
- *Biwater v. Tanzania* (Award, July 2008)
- *Glamis v. United States* (Award, June 2009)

#### **Fair and Equitable Treatment/Minimum International Standards of Treatment**

- *Metalclad v. Mexico* (Award, Aug. 2000)
- *Vivendi v. Argentina* (Decision on Annulment, July 2002)
- *Tecmed v. Mexico* (Award, May 2003)
- *Methanex v. United States* (Award, Aug. 2005)
- *CMS v. Argentina* (Award, May 2005; see also Decision on Annulment, Sept. 2007)
- *Parkerings v. Lithuania* (Award, Sept. 2007)
- *Continental Casualty v. Argentina* (Award, Sept. 2008)
- *Glamis v. United States* (Award, June 2009)

#### **Most Favoured Nation Treatment**

- *Siemens v. Argentina* (Decision on Jurisdiction, Aug. 2004)
- *Parkerings v. Lithuania* (Award, Sept. 2007)

#### **National Treatment**

- *Methanex v. United States* (Award, Aug. 2005)

#### **Umbrella Clause**

- *SGS v. Pakistan* (Decision on Jurisdiction, Aug. 2003)
- *SGS v. Philippines* (Decision on Jurisdiction, Jan. 2004)
- *Siemens v. Argentina* (Award, Feb. 2007)
- *CMS v. Argentina* (Decision on Annulment, Sept. 2007)
- *Continental Casualty v. Argentina* (Award, Sept. 2008)





## Issues on the Merits (cont.)

### ***Other Issues of Liability***

#### **Causation**

- *Lauder v. Czech Republic* (Award, Sept. 2001)
- *CME v. Czech Republic* (Award, Sept. 2001)
- *Biwater v. Tanzania* (Award, July 2008)

#### **Damages**

- *Siemens v. Argentina* (Award, Feb. 2007)
- *Vivendi v. Argentina* (Award in Resubmitted Proceeding, Aug. 2007)
- *Biwater v. Tanzania* (Award, July 2008)

### ***States' Defences/Justifications***

#### **Margin of Appreciation/Degree of Scrutiny**

- *Lauder v. Czech Republic* (Award, Sept. 2001)
- *CME v. Czech Republic* (Award, Sept. 2001)
- *Siemens v. Argentina* (Award, Feb. 2007)
- *Biwater v. Tanzania* (Award, July 2008)
- *Continental Casualty v. Argentina* (Award, Sept. 2008)

#### **Necessity Defence**

- *CMS v. Argentina* (Decision on Annulment, Sept. 2007)
- *Biwater v. Tanzania* (Award, July 2008)
- *Continental Casualty v. Argentina* (Award, Sept. 2008)

### ***Interpretation – Reference to Other Bodies/ Principles of Law***

- *Tecmed v. Mexico* (Award, May 2003)
- *Methanex v. United States* (Award, Aug. 2005)
- *World Duty Free v. Kenya* (Award, Oct. 2006)
- *Siemens v. Argentina* (Award, Feb. 2007)
- *Parkerings v. Lithuania* (Award, Sept. 2007)
- *Biwater v. Tanzania* (Award, July 2008)
- *Continental Casualty v. Argentina* (Award, Sept. 2008)
- *Phoenix v. Czech Republic* (Award, Apr. 2009)



## Investor Obligations/Accountability

### Obligations of Due Diligence

- *Parkerings v. Lithuania* (Award, Sept. 2007)

### Obligations to Act in Good Faith

- *Phoenix v. Czech Republic* (Award, Apr. 2009)

### Obligations to Comply with Domestic/International Law

- *World Duty Free v. Kenya* (Award, Oct. 2006)
- *Phoenix v. Czech Republic* (Award, Apr. 2009)
- *Siemens v. Argentina* (Order Reflecting Discontinuance, Sept. 2009)

### Obligations to Exhaust Remedies

- *Parkerings v. Lithuania* (Award, Sept. 2007)

## Challenges to Awards

### ICSID Annulment Proceedings—Standard for Annulment

- *CMS v. Argentina* (Decision on Annulment, Sept. 2007)
- *Vivendi v. Argentina* (Decision on Annulment, July 2002, and Decision on Annulment, Aug. 2010)

### Judicial Review

- *Metalclad v. Mexico* (Judgment, Supreme Court of British Columbia, May 2001)

## Cultural Measures

- *Parkerings v. Lithuania* (Award, Sept. 2007)
- *Glamis v. United States* (Award, June 2009)

## Environmental Measures

- *Metalclad v. Mexico* (Award, Aug. 2000)
- *Tecmed v. Mexico* (Award, May 2003)
- *Methanex v. United States* (Award, Aug. 2005)
- *Parkerings v. Lithuania* (Award, Sept. 2007)
- *Glamis v. United States* (Award, June 2009)

