# *<Reference>*
# RECENT INVESTMENT TREATY ARBITRATION CASES

Although not binding as a precedent, arbitral awards under investment treaties have a significant influence on subsequent arbitral awards. Arbitration cases in which arbitration awards were granted in 2014 and on which information is available will be briefly summarized below. In general, claims over jurisdiction are raised quite often before arbitral tribunals. Where it is determined that the arbitral tribunal has jurisdiction, a decision on the merits of the case is made thereafter. The decisions on jurisdiction and the substance of the case are given either separately or together as one decision. Regarding decisions on the merits of the case, decisions on breach of obligation and on compensation are given either separately or together. As shown by the fact that many cases reach an amicable settlement after the jurisdiction of the arbitral tribunal is held in the affirmative, the determination of jurisdiction has a great influence on the negotiation between investor and state.

Note that the individual awards presented below are based on the specific facts and the provisions of the individual investment treaties referred to in accordance thereto, and therefore may not directly apply to other cases.

## *1. Decisions Regarding Jurisdiction*

### (1) Nationality of Investor

**○National Gas S.A.E. v. Arab Republic of Egypt, ICSID Case No. ARB/11/7, Egypt-United Arab Emirates BIT, Award, April 3, 2014. ((1) of the Table below)**

The claimant (Egyptian company) submitted a request for ICSID arbitration of the dispute about the concession contract concluded with a state-owned Egyptian petroleum corporation, claiming that non-compliance with the arbitral award of the international commercial arbitration body in Egypt was a violation of the expropriation clause of the BIT.

90% of the shares of the claimant were owned by a UAE company “C”, and its parent company “R” (also a UAE company) owned 100% of the shares of “C”. “R” was wholly owned by the business manager of the claimant “G” (who held dual citizenship in Egypt and Canada). According to Article 25(2)(b) of the ICSID Convention, “any juridical person which had the nationality of the Contracting State party [Note: Egypt in this case] to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State [Note: UAE in this case] for the purposes of this Convention” should be treated as a “National of another Contracting State” under the Convention. Egypt interpreted this clause as imposing two requirements: (1) the company was under foreign control (objective requirement); and (2) the parties agreed to treat the company as a national of another contracting state (subjective requirement). Egypt then claimed that the subjective requirement was met because Article 10(4) of the BIT clearly provided that Article 25(2)(b) of the ICSID Convention should apply, but the objective requirement was not met because the claimant was actually an Egyptian company owned by an Egyptian national, and therefore the jurisdiction *ratione personae* was not established. The Arbitral Tribunal accepted Egypt's claim and denied the jurisdiction.

On this point, there was a case where the Arbitral Tribunal denied the jurisdiction *ratione personae* by pointing out that for a company whose director held dual citizenship (including the citizenship of the host country), and owned a majority of the shares, the director could not be a claimant under Article 25(2)(a) of the ICSID Convention; thus, treating the company controlled by that director as a foreign company under Article 25(2)(b) would be inconsistent (Burimi SRL and Eagle Games SH. A v. Republic of Albania, ICSID Case No. ARB/11/18, Decision on Jurisdiction, May 29, 2013).

## (2) Existence of Investments

**○Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary, ICSID Case No. ARB/12/2, Hungary-Netherlands BIT and Hungary-Switzerland BIT, Award, April 16, 2014. ((2) of the Table below)**

The claimants (the former two are Dutch companies and the latter is a Hungarian company controlled by a Swiss national) wholly owned a Hungarian company Sláger. It won a bid for a license to use a frequency for FM radio broadcasting, and concluded a broadcasting licensing contract with the Hungarian Radio/TV Broadcasting Board. The licensing period under the contract, which was originally seven years and then was renewed for an additional five years, had been completed. Afterwards, bidding for issuance of a new license was conducted, but Sláger did not win. The claimants submitted a request for ICSID arbitration, claiming that unlawfulness and distortion through political pressure had occurred in the process of the tender, and thereby the investments were illegally expropriated. (The subject of the requests for arbitration based on both BITs was limited to the dispute over the expropriation clause.)

The Arbitral Tribunal first confirmed that (1) a property right subject to expropriation must exist in order to apply the expropriation clause, and (2) a mandatory requirement for establishing the property rights under the law of the host country (Hungarian law) was that it be an asset capable of ownership, valuation and alienation. The Tribunal then determined that Sláger did not own a property right subject to expropriation because the expired broadcasting contract did not provide for the issuance of a new license, and the right to participate in the tender for a new license did not constitute a property right. The Tribunal then denied jurisdiction.

## (3) Attribution to the State of the Conduct of an Agency Whose Shares Were Owned by a Governmental Agency to the State

**○Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey, ICSID Case No. ARB/11/28, Netherlands-Turkey BIT, Award, March 10, 2014. ((3) of the Table below)**

The claimant (Dutch company) indirectly owned the shares of Tulip JV (Turkish company). Tulip JV concluded a construction contract on part of a mixed-use residential and commercial real estate development project in Istanbul with a real estate investment trust Emlak, whose shares were owned by a governmental agency TOKI. Construction work by Tulip JV was delayed and not completed by the contract date. Emlak therefore declared the termination of the contract and conducted re-bidding. The claimant submitted a request for ICSID arbitration, claiming that the respective Turkish agencies (Emlak, TOKI, etc.) committed various obstructive acts and ultimately deprived the claimant of its investment by terminating the contract in breach of the fair and equitable treatment clause, the expropriation clause, the obligation observance clause, and the full protection and security clause of the Netherlands-Turkey BIT.

With respect to whether or not the Emlak's conducts were attributable to Turkey, the Arbitral Tribunal determined that Emlak was not a "governmental agency" under Article 4 of the Draft Articles on Responsibility of States for International Wrongful Acts; nor did it meet the criteria of Article 5, because it did not exercise governmental authority. As for Article 8, the Tribunal confirmed that, for the purposes of attribution to establish, merely the fact that Emlak was majority-owned by TOKI is insufficient and it is necessary that Emlak was exercising elements of governmental authority or TOKI was using its ownership interest in or control of Emlak in order to achieve a particular result. The Tribunal then determined that the Emlak's conducts were not attributable to Turkey because it made decisions independently based on commercial interests, and the requirements were therefore not met.

## (4) Denial of Benefits Clause

**○Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia, UNCITRAL, PCA Case No. 2011-17, Bolivia-UK BIT and Bolivia-US BIT, Award, January 31, 2014. ((4) of the Table below)**

On the occasion of the privatization of the Bolivian electricity sector, a US company won the bid for the shares of the power generation company EGSA and owned a majority of EGSA's shares through its holding company GAI (a claimant, US company). GAI later became a wholly-owned subsidiary of Birdsong (UK company), which was a subsidiary of another UK company Rurelec (a claimant). In July 1995, the Bolivian government granted a license to EGSA for power generation business, which was effective until 2038. After going through a number of changes in regulatory frameworks, the government declared the full nationalization of EGSA in 2010 and refused to pay compensations. The claimants submitted a request for arbitration under the UNCITRAL Arbitration Rules, claiming violations of the expropriation clause and the fair and equitable treatment clause, etc.

Bolivia alleged the denial of benefits against GAI under Article 12 of the US-Bolivia BIT (denial of benefits clause) on the grounds that GAI was owned by a national of a third country (the UK), and it did not carry out any substantial business activities in the United States. The Arbitral Tribunal accepted Bolivia's allegation and denied jurisdiction over GAI.

With respect to the denial of benefits clause, in the cases of Plama v. Bulgaria (ICSID Case No. ARB/03/24, Decision on Jurisdiction, February 8, 2005), Veteran Petroleum v. Russia (UNCITRAL PCA Case No. AA228, Interim Award on Jurisdiction and Admissibility, November 30, 2009), and Stati v. Kazakhstan (SCC Arbitration V (116/2010), Award, December 19, 2013), it was determined that, in order for Article 17 of the Energy Charter Treaty to be applicable, that Article needed to have been invoked against investors before the dispute arose; if it had been invoked after the dispute had already arisen, the Article would be inapplicable. However, under the Dominican Republic-Central America Free Trade Agreement, invocation of the denial of benefit clause after the dispute had arisen was accepted (Pac Rim Cayman v. El Salvador (ICSID Case No. ARB/09/12, Decision on Jurisdiction, June 1, 2012).

## (5) "*Prima Facie* Case" Regarding Violation of Obligation of the Treaty

**○ Achmea B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2013-12, Netherlands-Slovakia BIT, Award on Jurisdiction and Admissibility, May 20, 2014. ((5) of the Table below)**

Privatization of the public health insurance sector took place in the Slovak Republic, and the claimant (Dutch company) established a subsidiary (Slovak company) and commenced operation after obtaining an operation license from the regulatory authority. With the change of government, various changes were made to the legal framework, including a law requiring profits from health insurance to be used for healthcare purposes only (Ban on Profits) and a law prohibiting on the transfer of a portfolio of insurance contracts against payment and requiring voluntary transfer upon bankruptcy to state-owned insurance companies (Ban on Transfers), and forced the claimant to suspend its business expansion. The claimant submitted a request for international arbitration, and violations of the fair and equitable treatment clause and the free transfer of payments clause were found (Achmea I, PCA Case No. 2008-13, Final Award, December 7, 2012). (The Slovak Republic filed an application to set aside the award, and the Slovak Republic had not paid the amounts mentioned in the award as of May 2014).

In parallel with the above-mentioned arbitration proceedings, a petition was filed in the Slovak Republic challenging the constitutionality of the Ban on Profits and its conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Constitutional Court accepted this claim, and accordingly the government announced a reversal of both laws. After another change of government, however, discussions aiming at the introduction of a unitary system of public health insurance commenced. Then the government issued the Regulation approving the Project Plan, which provided for the sales of the shares of private companies to the new state-owned company and the implementation of expropriation measures when failing to agree on the sales of the shares. At the time of this government decision, the claimant requested the Slovak Republic not to implement expropriation measures, and submitted a request for arbitration under the UNCITRAL Arbitration Rules, claiming a violation of the fair and equitable treatment obligation.

The Slovak Republic alleged that the claimant has the burden to make a "*prima facie*" showing of a violation of the treaty by the respondent country, and that failing to do so should result in the dismissal of the claimant's claim for the lack of jurisdiction. The Slovak Republic further claimed that the jurisdiction requirements were not met because, in this particular case, a request for arbitration was submitted when the expropriation measures had not actually been materialized, and so the facts for determining the violation of the treaty were not presented. The Arbitral Tribunal accepted these claims and denied jurisdiction.

### (6) *Res Judicata* of the Precedent Award on Jurisdiction

**○Apotex Holdings Inc. and Apotex Inc. v. United States of America, ICSID Case No. ARB (AF)/12/1, NAFTA, Award, August 25, 2014. ((6) of the Table below)**

A generic pharmaceutical manufacturing company, Apotex Inc. (Canadian company), had been subject to on-site inspections at its facilities as a requirement for obtaining an approval for Abbreviated New Drug Applications (ANDAs) from the United States regulatory authority (FDA). A number of violations were observed during the inspections, and so the FDA amended Import Alert to prohibit the import of drugs produced in the facilities of Apotex Inc. As a result, Apotex-US (US company), which was indirectly owned by Apotex Holdings (Canadian company), was unable to import drugs of Apotex Inc., which constituted the majority of its sales items. In addition, the FDA suspended consideration of any new ANDEs for drugs of Apotex Inc., Apotex Holdings and Apotex Inc. submitted a request for arbitration under the ICSID Additional Facility Rules, claiming violations of the national treatment obligation, the most-favoured-nation treatment obligation, and the minimum standard of treatment obligation (including fair and equitable treatment obligation).

Apotex Inc. previously had submitted a request for arbitration in the same case, but the jurisdiction of the Arbitral Tribunal had been denied (Apotex Inc. v. United States of America, UNCITRAL, Award on Jurisdiction and Admissibility, June 14, 2013). In this second case, the parent company, Apotex Holdings, also became a claimant. The Arbitral Tribunal stated that NAFTA Article 1136(1) denied the principle of *stare decisis* but not the principle of *res judicata.* Accordingly, the Tribunal concluded that the award in the previous case denying the investment nature of ANDAs and the position of Apotex Inc. as an investor operated in this arbitration as *res judicata* as regards both named parties to the former arbitration, and determined that it did not have jurisdiction over all claims made by Apotex Inc. and those by Apotex Holdings as regards ANDAs.

## *2. Decision on Merits*

### (1) Expropriation

#### (a) Nationalization of a Business Company (Upheld)

**○ Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia, UNCITRAL, PCA Case No. 2011-17, Bolivia-UK BIT and Bolivia-US BIT, Award, January 31, 2014. ((4) of the Table below)**

Based on the facts as described in 1.(4) above, the Tribunal examined the claims made by Rurelec. There was no dispute that EGSA had been expropriated, but the necessity of compensation was at issue. Bolivia claimed that EGSA was insolvent, and since it only had a negative value, no compensation was necessary for its nationalization. However, the Arbitral Tribunal found that EGSA was not insolvent but had a positive value and Bolivia should have indemnified Rurelec. Therefore, the Tribunal determined that the expropriation of EGSA was illegal and Bolivia breached the expropriation clause.

**(b) Arbitrary Taxation Measures and Climinal Prosecution against Business Managers (Upheld)**

* The following three cases are presented here together, because the same facts were addressed, the structure of the Arbitral Tribunal was the same, and the awards were almost exactly the same.

**○ Hulley Enterprises Ltd. v. The Russian Federation, UNCITRAL, PCA Case No. AA226, Energy Charter Treaty, Final Award, July 18, 2014. ((7) of the Table below)**

**○Yukos Universal Ltd. v. The Russian Federation, UNCITRAL, PCA Case No. AA227, Energy Charter Treaty, Final Award, July 18, 2014. ((8) of the Table below)**

**○Veteran Petroleum Ltd. v. The Russian Federation, UNCITRAL, PCA Case No. AA228, Energy Charter Treaty, Final Award, July 18, 2014. ((9) of the Table below),**

The claimants (Cypriot companies Hulley and VPL, and a Manx company YUL), which were controlling shareholders of a Russian company OAO Yukos Oil Company (Yukos), submitted requests for arbitration under the UNCITRAL Arbitration Rules, claiming that the measures taken by the Russian government, including criminal prosecution of business managers and imposition of a large amount of additional taxes, etc. (which eventually led Yukos to bankruptcy), constituted a breach of the expropriation clause of the Energy Charter Treaty (ECT).

The Arbitral Tribunal determined that a series of measures taken against Yukos by Russia -- including tax payment investigations, criminal prosecution of business managers, additional taxes, auctions/bankruptcy proceedings of core sectors, etc. -- caused “drastic” conseqnences for Yukos. The Tribunal further determined that the measures were not consistent with the objective of collecting taxes as claimed by Russia, but that they were unreasonably taken based on arbitrary intent, etc. Accordingly, the Tribunal determined that the measures taken by Russia had an effect equivalent to expropriation and constituted a breach of the expropriation clause of the ECT. (These cases attracted considerable attention because the total amount of the compensations for three companies exceeded 50 billion USD, the highest total amount of compensations ever decided in investment treaty arbitrations).

Applicability of the ECT to Russia was at issue in the award on jurisdiction. First, the Arbitral Tribunal found that, even though Russia had made no declaration under Article 45(2) for non-acceptance of provisional application, Russia could benefit from the Limitation Clause in Article 45(1) providing that “…to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.” Second, the Tribunal determined that the Limitation Clause negated provisional application only where the principle of provisional application was itself inconsistent with the constitutions, laws or regulations of Russia, and that it did not require the analysis of the consistency of each provision of the ECT with the constitutions, laws and regulations. The Tribunal then found that there was no inconsistency between the provisional application of treaties and the constitutions, laws or regulation of Russia. Accordingly, the Tribunal concluded that it had jurisdiction over this claim. (See "(1)-4. The Energy Charter Treaty (ECT)" in this Chapter for the protection of investments by the investors of the Energy Charter member countries during the period of provisional application.)

**(c) Taxation on Profits Due to Steep Rise in Oil Price and Termination of Contract (Upheld)**

**○Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador), ICSID Case No. ARB/08/6, Ecuador-France BIT, Decision on Remaining Issues of Jurisdiction and on Liability, September 12, 2014. ((10) of the Table below)**

The claimant (a Bahamian company controlled by a French national through shareholding) took part in contracts with the government for participation in exploration/exploitation of hydrocarbons in the Amazon region (Blocks 7 and 21) in Ecuador. (The contractors would conduct exploration/exploitation and receive a specified amount of products.) Later, due to a steep rise in oil price, the Ecuadorian government revised the framework of its laws/regulations to increase the amount to be received (Law 42 provided that when the monthly average oil price exceeded the price at the time of the contract, Ecuador should receive 50% of that "extraordinary revenues", and later Decree 662 increased the participation rate of Ecuador to 99%). These revisions imposed additional obligations on the claimant, but the claimant did not make the additional payment, and negotiations with the Ecuadorian government broke down. The government delivered notification of the compulsory collection of the additional payment, and after the issuance of the order of seizure by the Court, the government physically took over the operations and declared the contract terminated. Based on Article 9 of the BIT providing that a company of a Contracting Party whose majority shares were held by nationals/companies of the other Contracting Party should be considered to be a company of the other Contracting Party for the purpose of Article 25(2)(b) of the ICSID Convention, the claimant submitted a request for ICSID arbitration claiming violations of the fair and equitable treatment clause or the expropriation clause. (The claimant also submitted a claim based on breach of the contracts).

The Arbitral Tribunal first made determinations with respect to the breach of contracts claim. As for the Law 42, the Tribunal determined there was no breach of the contract because of the existence in the contracts of the taxation modification clauses (granting the contractor the right to request negotiations to change the content of the contract at the time of tax system modification). As for the Decree 662, however, breach of the contracts was determined because the increase of the percentage to 99% could not be deemed an equitable distribution of the increased revenue. The Arbitral Tribunal then determined that Decree 662 and the subsequent measures leading to the declaration of the termination of the contract were in violation of the fair and equitable treatment obligation. With regard to the expropriation clause, the Tribunal determined that the Law 42 and Decree 662 did not amount to indirect expropriation on the grounds that (1) the payment of 50% of the "extraordinary revenues" was not deemed a "substantial deprivation" of investments, and (2) the claimant continued operation after the payment of 90% of the "extraordinary revenues" and neither the ownership nor right of control of investments was harmed. However, the Tribunal found that it constituted indirect expropriation to declare termination of the contracts during the midst of this arbitration and deprive the rights of the claimant under the contracts.

The same laws/regulations as the above case were at issue in Burlington v. Ecuador case (ICSID Case No. ARB/08/5, US-Ecuador BIT, Decision on Liability, December 14, 2012). There, it was determined that the introduction of the tax requiring the payment of 50% and 99% of the increased revenue decreased revenue of the investor, but not to the extent to make the investments valueless; therefore, it did not constitute a breach of the expropriation clause. (The treaty to be applied to that arbitration, US-Ecuador BIT, provided that only the obligation observance clause and the expropriation clause should apply to taxation measures, and therefore no determination was made on the existence of a violation of the fair and equitable treatment obligation clause).

**(d) Measures of Financial Supervisory Authority against Bank with Deteriorated Asset Condition (Dismissed)**

**○Renee Rose Levy de Levi v. Peru, ICSID Case No. ARB/10/17, France-Peru BIT, Award, February 26, 2014. ((11) of the Table below)**

A Peruvian financial supervisory authority (SBS) took a series of measures against a Peruvian company, BNM bank, which was indirectly owned by the claimant (French national). The measures included: (1) directing BNM to take measures to improve its asset condition (condition of bad loans, etc.) to the level stipulated by laws and regulations, and pointing out in an official document that BNM's execution of these measures was unreliable; (2) pointing out in a report that BNM had high liquidity risk, the bank's loan portfolio classification was incorrect and the actual condition was worse, its internal auditing was not functioning, and then warning that an immediate response was needed; (3) rejecting the capital expansion plan from BNM; (4) bringing BNM under the control of SBS based on an emergency decree; and (5) ordering dissolution and liquidation of BNM. (In Peru, the controlling shareholder of BNM bank filed an action for revocation of the resolution that ordered dissolution and liquidation of BNM, but it was rejected by the Supreme Court). The claimant submitted a request for ICSID arbitration, claiming that the series of measures violated the fair and equitable treatment clause, the national treatment clause, the full protection and security clause, and the expropriation clause.

The majority of Arbitral Tribunal decided as follows. With respect to the fair and equitable treatment obligation, it was determined that all the measures claimed by the claimant were both substantively and procedurally appropriate and were in compliance with Peruvian laws. With respect to the national treatment obligation, the Tribunal determined that domestic banks to which the claimant referred to for comparison were not "in like circumstances" with BNM bank in consideration of their scale and customer segments. (There was a dissenting opinion that they were "in like circumstances" because both were commercial banks). With respect to the full protection and security obligation, the Tribunal stated that the obligation includes not only physical security but also protection and security of the rights of investors; it then determined that the Peruvian judicial system provided sufficient remedies for such protection. With respect to the expropriation, the Tribunal determined that all the measures were within legitimate regulatory authority, and thus there was no violation of the obligation.

**(e) Termination of Contract by Reason of Not Meeting Requirement Stipulated in the Contract (Dismissed)**

**○Vigotop Limited v. Hungary, ICSID Case No. ARB/11/22, Cyprus-Hungary BIT, Award, October 1, 2014. ((12) of the Table below)**

The claimant (a Cypriot company) started a resort development project in Hungary consisting of casinos and hotels, etc., and concluded a land swap contract with the Hungarian authority in order to obtain state-owned land in exchange for land owned by the shareholders of the claimant. (Part of the state-owned land, however, was subject to a Hungarian law providing that the government should maintain ownership of such land, and this procedure was not completed. Accordingly, the registration of the ownership transfer was not made.) Subsequently, after obtaining a promise of preferential treatment (provision of subsidies and tax reduction, etc.) from the government, the claimant concluded a concession contract for the construction and operation of a casino with the government through its subsidiary (a Hungarian company). In Hungary, the legality of the above-mentioned land swap contract became a political issue, and the authority expressed the view that the contract was null on the basis of incorrect assessed value. The concession contract provided that the government had the right to terminate the contract if the concession receiver failed to certify that it has legitimate possession of the land by the time limit, and so the Hungarian government terminated the concession contract because this requirement had not been met. The claimant submitted a request for ICSID arbitration, claiming that the series of measures leading to the termination of the concession contract violated the expropriation clause. (Under the Cyprus-Hungary BIT, matters subject to arbitration were limited to disputes over expropriation). The government filed a complaint in a Hungarian court requesting for the nullification of the land swap contract; the decision of nullification became final in the Supreme Court after the measure to terminate the contract was taken.

The Arbitral Tribunal stated that the following three steps should be taken in determining whether or not the measure to terminate the concession contract was indirect expropriation: (1) determining if the government terminated the contract in its sovereign capacity, (2) determining if contractual grounds for terminating the contract existed, and (3) when the previous two conditions were affirmed, determining if the contractual termination was legitimate. With respect to (1), the Tribunal determined that the government decided to terminate the contract in its sovereign capacity on the grounds that the government concerned corruption in concluding the land swap contract and it took negative attitude toward the casino project based on its new environmental and touristic policies. With respect to (2), the Tribunal supported the Hungarian Supreme Court's decision regarding the nullification of the land swap contract, and determined that since that contact was not in force, the claimant would not be able to prove ownership of the land, and that this could be a rationale for terminating the contract. With respect to (3), in consideration of the fact that the effectiveness of the land swap contract was already in doubt at the time of concluding the concession contract, the Tribunal rejected the claimant's claim that the measure to terminate the contract was abuse of rights under the contract, and determined that there was no violation of the expropriation clause.

**○Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey, ICSID Case No. ARB/11/28, Netherlands-Turkey BIT, Award, March 10, 2014. ((3) of the Table below)**

Based on the facts as described in 1.(3) above, determinations were made regarding the conducts of agencies other than Emlak (attribution of Emlak's conducts to the state was denied). The Arbitral Tribunal determined that there was no violation of the treaty on the grounds that: (1) considering Emlak had considerable discretion under the contract, the other agencies had no ability to act arbitrarily and so the termination of the contract did not constitute a violation of the fair and equitable treatment obligation, and (2) no violation of the expropriation obligation was found because of the legality of the termination of the contract.

## (2) Fair and Equitable Treatment

### (a) Termination of Mining Concessions (Upheld)

**○ Gold Reserve Inc. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB (AF)/09/1, Canada-Venezuela BIT, Award, September 22, 2014. ((13) of the Table below)**

Through its US subsidiary, the claimant (a Canadian company) indirectly owned Brisas (a Venezuelan company), which was granted mining concessions for gold, copper and molybdenum by the Venezuelan government (for a period of 20 years; extendable twice for a period of 10 years with 6-month notification before expiration). The claimant obtained various approvals from the Ministry of Mines and the Ministry of Environment required for operating a mining business. However, the permit for the construction of infrastructure related to mining businesses acquired after the inauguration of President Chávez required the signature of the Ministry of Environment on the document in order to confirm officially that the claimant met certain requirements. The Ministry of Environment initially refused to sign the document even though the claimant met the requirements and imposed additional requirements. The Ministry of Environment later signed the document after the claimants complied with the additional requirements, but soon after declared the nullity of the construction permit and revoked it. The claimant submitted a request for arbitration under the ICSID Additional Facility Rules, claiming that these measures violated the fair and equitable treatment clause, the most-favoured-nation treatment clause, and the expropriation clause of the BIT.

The Arbitral Tribunal pointed out that the revocation of the construction permit was not for the purpose of protecting the environment as claimed by Venezuela during the arbitration proceedings, but was based on the change of political priorities by the highest levels of authority including President Chávez to the "recovery" of mineral resources. The Tribunal then determined that the fair and equitable treatment obligation was breached on two reasons. First, the government had raised the claimant's legitimate expectation that its mining titles and rights were continuingly valid and it would obtain the required authorization to start the exploitation of the concessions by having supported the business activities for nearly 20 years through the approvals of business reports, etc.. Second, the imposition of additional requirements without disclosing the reason and revocation of the construction permit without hearing the claimant's opinions amounted to a lack of transparency.

**(b) Restrictions on Production and Export Volume of Crude Oil (Upheld)**

**○Venezuela Holdings, Mobil Cerro Negro Holding, Mobil Venezolana de Petróleos Holdings, Mobil Cerro Negro, and Mobil Venezolana de Petróleos v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Netherlands-Venezuela BIT, Award, October 9, 2014. ((14) of the Table below)**

* See the figure below for the shareholding relationship of the original claimants (six companies) of this case.

This arbitration relates to two oil development projects in Venezuela. An extra-heavy crude oil mining business in the Cerro Negro region (Cerro Negro project) was based on a contract concluded between a Venezuelan state-owned company and Mobil Cerro Negro, etc. in October 1997. A light and medium crude oil mining business in La Ceiba region (La Ceiba project) was based on a contract concluded between a Venezuelan state-owned company and Mobil Venezolana, etc. in July 1996. The promises of preferential treatment, such as reduction in mining rent, etc., had been made for both projects. After the inauguration of President Chávez, however, the Venezuelan government took measures against both projects, including increasing the amount of mining rent, introducing new taxes, raising the income tax rates, and restricting the production/export volumes, etc. The government then declared the nationalization of both projects, but did not pay any compensations. The claimants submitted a request for ICSID arbitration, claiming that these measures violated the fair and equitable treatment clause and the expropriation clause of the BIT.

With regard to the introduction of new taxes and restrictions on production/export volume, which were the main subjects of the fair and equitable treatment claim, the Arbitral Tribunal determined that the new taxes were not subject to the fair and equitable treatment clause because of the existence of a special clause on taxation measures (Article 4). However, with regard to the new restrictions, the daily production volume and procedures for changing it were provided for in the contract, which the claimants could reasonably and legitimately expect, and therefore unilateral volume reduction measures that did not follow the procedures in the contract constituted a violation of the obligation. As for the expropriation, the existence of the acts of expropriation was not in dispute. The Arbitral Tribunal determined that there was no violation of the expropriation clause because the procedures were appropriate, the contracts confirmed that Venezuela's sovereign rights over the oil industry was not diminished, and the mere fact that an investor had not received compensation did not in itself render an expropriation unlawful. The Tribunal then found that existence of inappropriate acts in negotiations of the compensation amount was required to render an expropriation unlawful, but the claimants failed to prove that. Although the obligation of compensations remained, the Tribunal decided not to order the payment of compensations to avoid duplicate payments because a sufficient amount already had been paid in the ICC arbitration submitted by the claimants addressing the contractual disputes that arose from the same facts.

In the decision on jurisdiction made in June 2010, the jurisdiction *ratione temporis* of the Arbitral Tribunal was affirmed because there was no abuse of right with respect to the disputes that arose after the organizational reform even though the objective of that reform was for the protection of investments.

Mobil Corporation (US)

| 100% owned

Venezuela Holdings (Dutch)

| | |
|---|---|
| 100% | 100% |
| Mobil Cerro Negro Holding (US) | Mobil Venezolana de Petróleos Holdings (US) |
| 100% | 100% |
| Mobil Cerro Negro (Bahamian) | Mobil Venezolana de Petróleos (Bahamian) |
| 41 2/3% | 50% |
| Cerro Negro project | La Ceiba project |

**(c) Government Request to a Financial Institution for the Suspension of Loans (Dismissed)**

**○David Minnotte & Robert Lewis v. Republic of Poland, ICSID Case No. ARB (AF)/10/1, US-Poland BIT, Award, May 16, 2014. ((15) of the Table below)**

The claimants (US nationals) made investments and owned the shares of LFO, a subsidiary established by Nedepol (a Polish company) designated by the Polish government as a business operator for the construction and operation of blood plasma fractionation facilities. In 1997, a contract for the fractionation of blood plasma was concluded between the Ministry of Health of Poland and LFO. After obtaining a guarantee from the Ministry of Finance, LFO concluded loan agreements with financial institutions and obtained loans. When LFO became subject of an inspection by the tax authority in late 1998, the Ministry of Finance pointed out issues relating to the financial condition of LFO and the delay in the construction. It then presented a letter to the financial institution requesting the suspension of loans, which caused the financial institution to suspend the loans. In addition, the Ministry of Health concluded another contract regarding the fractionation of blood plasma with LFO in 2000, and requested the submission of proof that LFO had obtained sufficient financial support from external investors. The documentary proof was not submitted by the time limit, and the contract automatically lost all legal effects. Subsequently, LFO went bankrupt through the stages of (1) being requested the repayment of the outstanding loans by the financial institutions, (2) filing a request with the court to commence a insolvency procedures, (3) termination of the loan agreements between the financial institutions and LFO, and (4) being notified by the Ministry of Finance of the termination of the contract concluded in 2000 by reason of failure to complete the facilities. In response to this, the claimants (shareholders of LFO) submitted a request for ICSID arbitration, claiming violations of the expropriation clause, the fair and equitable treatment clause, and the obligation observance clause.

The Arbitral Tribunal determined that there was no violation of the expropriation clause or the fair and equitable treatment clause because the conducts of the Polish authorities were a legitimate exercise of their rights, and there was no violation of the obligation observance clause because Poland did not assume the obligations under the contract as claimed by the claimants.

**(d) Negligence in Prior Notification on Issuance of Import Alert to Prohibit Import of Products, etc. (Dismissed)**

**○Apotex Holdings Inc. and Apotex Inc. v. United States of America, ICSID Case No. ARB (AF)/12/1, NAFTA, Award, August 25, 2014. ((6) of the Table below)**

Based on the facts as described in 1.(6) above, decisions were made on the claims other than those the Tribunal lacked jurisdiction because of the previous award operated as *res judicata*: the claim of damage caused to Apotex-US (an investment of Apotex Holding). With respect to the national treatment obligation and the most-favoured-nation treatment obligation, the Arbitral Tribunal determined that the US and third-country companies that the claimant referred to for comparison were not in like circumstances with the claimants. With respect to the minimum standard of treatment obligation (fair and equitable treatment obligation under NAFTA), the Tribunal determined that there was no violation of the obligation because the claimants had not presented any state practice or *opinion juris* supporting that the procedural deficiency by FDA (not making a prior notification at the amendment of import alert to prohibit the import of drugs, etc.) was inconsistent with customary international law.

| No. | Complainant | Respondent country | Arbitration body or arbitration rules | Decision on jurisdiction/ merits | Outline of the case |
|---|---|---|---|---|---|
| (1) | National Gas S.A.E. | Egypt | ICSID Case No. ARB/11/7 | Decision on jurisdiction | Failure to comply with an award already made by a domestic arbitration body regarding a contract dispute |
| (2) | Emmis International Holding, B.V., etc. | Hungary | ICSID Case No. ARB/12/2 | Decision on jurisdiction | Failing to win the tender again after the expiration of the radio broadcasting licensing period |
| (3) | Tulip Real Estate and Development Netherlands B.V. | Turkey | ICSID Case No. ARB/11/28 | Decision on jurisdiction and on merits | Termination of contract by reason of delay in construction project |
| (4) | Guaracachi America, Inc. and Rurelec PLC | Bolivia | UNCITRAL | Decision on jurisdiction and on merits | Nationalization of power generation company |
| (5) | Achmea B.V. | Slovakia | UNCITRAL | Decision on jurisdiction | Change in regulations on public health insurance |
| (6) | Apotex Holdings Inc. and Apotex Inc. | The United States | ICSID Case No. ARB(AF)/12/1 | Decision on jurisdiction and on merits | Import prohibition and suspension of activities for new drug applications by reason of violation of operating standards at pharmaceutical facilities |
| (7) | Hulley Enterprises Ltd. | Russia | UNCITRAL | Decision on merits | Bankruptcy of oil company due to a series of measures taken, including arbitrary taxation measures and criminal |

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| | | | | | prosecutions against business managers, etc. |
| (8) | Yukos Universal Ltd. | Russia | UNCITRAL | Decision on merits | Same as above |
| (9) | Veteran Petroleum Ltd. | Russia | UNCITRAL | Decision on merits | Same as above |
| (10) | Perenco Ecuador Ltd. | Ecuador | ICSID Case No. ARB/08/6 | Decision on merits | Taxation on profits and termination of contract on exploration/exploitation of hydrocarbon resources |
| (11) | Renée Rose Levy de Levi | Peru | ICSID Case No. ARB/10/17 | Decision on merits | Measures of financial supervisory authority against bank with deteriorated asset condition, including dissolution/liquidation order, etc. |
| (12) | Vigotop Limited | Hungary | ICSID Case No. ARB/11/22 | Decision on merits | Termination of resort development contract by reason of not meeting the contract requirements |
| (13) | Gold Reserve Inc. | Venezuela | ICSID Case No. ARB(AF)/09/1 | Decision on merits | Nullification of construction permit for infrastructure required for the operation of business for which the mining concessions were granted |
| (14) | Venezuela Holdings, etc. | Venezuela | ICSID Case No. ARB/07/27 | Decision on merits | Measures against crude oil mining business, including tax changes, restrictions on production/export volume, and nationalization, etc. |
| (15) | David Minnotte & Robert Lewis | Poland | ICSID Case No. ARB (AF)/10/1 | Decision on merits | Request to financial institutions for the suspension of loans by reason of non-fulfillment of contract on the construction of blood plasma fractionation facilities |