<*REFERENCE*>

MAJOR INVESTMENT TREATY ARBITRATION CASES

Although not binding as a precedent, arbitral awards under investment treaties have a significant influence on subsequent arbitral awards. Some of the leading cases are summarized below to highlight the issues that have been disputed so far in investment treaties. 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.

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1. ***DECISIONS ON PROCEDURAL MATTERS***

1) ATTRIBUTION OF CONDUCT TO A STATE

(i) 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.

[Summary of the decision]

The conduct of a private entity is not deemed to be attributable to a state merely because the state owns a majority stake in the private entity.

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.

2) JURISDICTION *RATIONE PERSONAE*

(i) Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Ukraine-Lithuania BIT, Decision on Jurisdiction, April 29, 2004.

[Summary of the decision]

<u>"Investors" as referred to under the Ukraine-Lithuania BIT include enterprises established in the investors' home country that are owned or controlled by nationals of the host country.</u>

Tokios Tokelés, a company established under Lithuanian law, owned a publishing company in Ukraine. When this Ukrainian subsidiary company published a book written in favor of opposition politicians, the Ukrainian authority conducted a tax investigation on the company with the aim of obstructing its business activities. In response, Tokios Tokelés submitted a request for arbitration, claiming that this investigation was being conducted in violation of the Ukraine-Lithuania BIT. The Ukrainian government alleged that Tokios Tokelés did not fall under the scope of "investors" protected under the BIT on the grounds that 99% of the company was owned and controlled by nationals of Ukraine.

The Arbitral Tribunal stated that the nationality of a company should be determined according to individual BITs, rather than according to Article 25(2)(b) of the ICSID Convention. In conclusion, the Tribunal determined that Tokios Tokelés fell under the scope of Lithuanian investors since the Ukraine-Lithuania BIT simply defines investors as "an entity established in the Republic of Lithuania in accordance with its laws and regulations."

*See (1)(c-1)(iii) below for the decision on investments.

(ii) The Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, Netherlands-Romania BIT, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, April 18, 2008.

[Summary of the decision]

a) The meaning of "investors" as referred to under the ICSID Convention is determined according to the definition as provided under the BIT.

b) "Investors" as referred to under the Netherlands-Romania BIT include enterprises established in the investors' home country that are owned or controlled by nationals of the host country.

The Rompetrol Group, a Dutch company, acquired from the Romanian privatization agency a majority stake in a Romanian oil refinery and renamed it Rompetrol Rafinare S.A. (RRC). Subsequently, the Romanian prosecutors investigated RRC in relation to this transaction. The claimant submitted a request for arbitration, claiming that the investigations were conducted in violation of the Netherlands-Romania BIT. The Romanian government submitted an objection to jurisdiction on the grounds that the claimant was solely or predominantly controlled by a Romanian national living in Romania and that the claimant's funds originated in Romania.

The Arbitral Tribunal construed that the definition of a country's citizens was to be defined by domestic laws and the meaning of the "nationals" of contracting parties as "investors" as prescribed in Article 25(2)(b) was to be defined according to the BIT concluded by the individual states. The Tribunal stated that this Article clearly stipulated to this effect, denying the abuse of the ICSID mechanism (dissenting opinion in the Tokios Tokelés case) claimed by the claimant. The Tribunal then stated that the Netherlands-Romania BIT clearly defined "investors" as "legal persons constituted under the law of the Contracting Party," and it did not provide any ground for limiting the interpretation of this definition. In conclusion, the Tribunal determined that the claimant fell under the scope of investors under the BIT as a legal person constituted in the Netherlands.

3) JURISDICTION *RATIONE MATERIAE*

(1) Existence of investment

(i) Fedax N.V. v. Venezuela, ICSID Case No. ARB/96/3, Netherlands-Venezuela BIT, Decision on Objections to Jurisdiction, July 11, 1997.

[Summary of the decision]

Debt instruments were deemed as "investment" to be protected under Article 25 of the ICSID Convention and under the Netherlands-Venezuela BIT as "titles to money".

Dutch company Fedax submitted a request for arbitration, seeking payment of promissory notes issued by the Venezuelan government. Venezuela, as the respondent state, submitted an objection to jurisdiction, alleging that promissory notes did not constitute "investment" as prescribed in Article 25 of the ICSID Convention or in the Netherlands-Venezuela BIT.

As a result of referring to the background, explanation, interpretation and execution concerning the term "investment," the Arbitral Tribunal found that the scope of Article 25 was wide and thereby stated that loans constituted "investment" under the ICSID Convention. The Tribunal then determined that "every kind of assets, including titles to money" were included in the scope of the definition of "investment" as provided in the BIT. Then it determined that "titles to money" included loans and credit transactions. Finding that promissory notes were by definition instruments of credit, the Tribunal concluded that promissory notes constituted "investment" as provided in the BIT.

[Reference] Article 25(1) of the ICSID Convention provides that "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally." Although the term "investment" is translated into Japanese under Japan's investment treaties as "投資財産" (literally meaning "investment property") and while it is translated as "投資" ("investment") under the ICSID Convention, these Japanese translations refer to the same thing.

(ii) Salini Construttori S.P.A. and Italstrade S.P.A. v. Morocco, ICSID Case No. ARB/00/4, Italy-Morocco BIT, Decision on Jurisdiction, July 23, 2001.

[Summary of the decision]

a) In order for the Arbitral Tribunal based on ICSID Convention to have jurisdiction, the rights in dispute must constitute an "investment" as provided in the BIT and in the ICSID Convention.

b) Whether rights in dispute constitute an "investment" under the ICSID Convention is determined by considering: [i] contribution; [ii] a certain duration of performance of the contract; [iii] participation in the risks of the transaction; and [iv] the contribution of the investment to the economic development of the host State.

Salini, an Italian company, asserted that it suffered damages due to the cancellation of a road construction contract with *Societe Nationale des Autoroutes du Maroc* (Moroccan expressway public corporation) and submitted this dispute to arbitration. In response, the government of Morocco filed an objection to the jurisdiction of the Arbitral Tribunal, alleging that the highway construction contract concluded with the claimant did not constitute an "investment" under the Italy-Morocco BIT or under the ICSID Convention.

The Tribunal made a statement as described in a) above, determining that the contract constituted an "investment" under the BIT. With respect to whether the contract constituted an "investment" under the ICSID Convention, the Tribunal made a statement as described in b) above, with reference to commentaries and the Convention's preamble. The Tribunal then referred to and affirmed the following points. Firstly, it affirmed that the requirement of contribution was fulfilled, referring to the fact that the claimant provided knowhow, necessary equipment and talented human resources. The Tribunal found that the requirement of the duration of contract also was fulfilled, as the duration of the contract was initially 32 months and then was extended to 36 months, while the minimum required length of time was stated to be 2 to 5 years. The Tribunal affirmed that the risk requirement was fulfilled, stating that construction that stretches out over many years, for which the total cost cannot be established with certainty in advance, creates an obvious risk for the contractor. Lastly, the Tribunal affirmed that the last requirement was also fulfilled, stating that the contribution of the contract to the economic development of the Morocco could not seriously be questioned, in light of the public benefit it would serve and the fact that the claimant provided knowhow in the course of the construction work.

*This case was settled amicably before the decision on the merits was given.

(iii) Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Ukraine-Lithuania BIT, Decision on Jurisdiction, April 29, 2004.

[Summary of the decision]

a) The definition of an "investment" under the BIT that provides the grounds for submitting a dispute to arbitration determines the interpretation of the word "investment" under Article 25 of the ICSID Convention.

b) The scope of "investments" under the BIT is vast and they do not necessarily involve capital movement across the border.

(See (1)(b)(i) above for the facts.) The Ukrainian government alleged that investments by the claimant did not fall under the scope of "investment" under Article 25 of the ICSID Convention or under the Ukraine-Lithuania BIT, as the claimant failed to demonstrate that it used non-Ukraine-origin funds in the course of capital raising.

The Arbitral Tribunal stated that "Parties [of the ICSID Convention] have a large measure of discretion to determine for themselves whether their transaction constitutes investment for the purposes of the Convention." The Tribunal further stated that such discretion was exercised under the BIT (in defining the meaning of "investment"). The Tribunal also pointed out that, although the Ukraine-Lithuania BIT defines "investment" as "every kind of asset invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter," this definition does not limit the scope of "investment" according to the source of procured funds. Accordingly, the Tribunal determined that investments were to be protected under the BIT as long as a company established under Lithuanian law made investments in Ukraine.

(iv) Joy Mining Machinery Limited v. Egypt, ICSID Case No. ARB/03/11, U.K.-Egypt BIT, Award on Jurisdiction, August 6, 2004.

[Summary of the decision]

a) In order for the Arbitral Tribunal based on ICSID Convention to have jurisdiction, the contracts in dispute must constitute an "investment" as provided in the BIT and as provided in the ICSID Convention.

b) Ordinary sales contracts do not constitute "investment" under Article 25 of the ICSID Convention and the ICSID tribunal thus lacks jurisdiction over any disputes arising from such contracts.

U.K.-based company Joy Mining concluded a contract with the Egyptian government concerning the delivery of necessary equipment for a phosphate-mining project and provided the Egyptian government with a letter of guarantee for contract performance and an advance payment. The Egyptian government paid the full amount of the costs for the installed equipment, but alleged that it would not return the letter of guarantee until it had confirmed the full operation of the equipment. The company submitted a request for arbitration, alleging that this act of the Egyptian government constituted a violation of the U.K.-Egypt BIT. In response, the Egyptian government submitted an objection to jurisdiction, asserting that there was no "investment" as stipulated under the BIT or under the ICSID Convention existed.

Firstly, the Arbitral Tribunal examined whether the bank guarantees constituted “investment” under the BIT. It determined that they could not be deemed “investment” since a bank guarantee is merely a contingent liability. Moreover, the Tribunal pointed out that, even if a claim to return of performance and related guarantees has a financial value, it cannot amount to recharacterizing a dispute which in essence concerns a contingent liability as an investment dispute.

The Tribunal then stated that, in order for the project in question to be an “investment” under Article 25 of the ICSID Convention, it should have a certain duration, a regularity of profit and return, an element of risk, a substantial commitment (contribution), and that it should constitute a significant contribution to the host State’s development. The Tribunal further stated that whether these requirements were met must be determined by examining a series of the activities involved in the project. The Tribunal found that the terms of the Contract, including those governing the bank guarantees, were entirely normal commercial terms. The Tribunal noted that no reference to investment was made anywhere in the contract and no steps were taken to qualify it as an investment under the Egyptian mechanisms for the authorization of foreign investments. Moreover, the Tribunal noted that the production and supply of the kind of equipment involved in this case was a normal activity of the Company, not having required a particular development of production that could be assimilated to an investment on behalf of the Egyptian governmental agency’s demands. Furthermore, the Tribunal denied the regularity of profit and return, as the price was paid in its totality at an early stage. The Tribunal found that there could be risk but it was not different from that involved in any commercial contract. The Tribunal further noted that the amount of the bank guarantees was relatively substantial, but the contribution to the economic development of Egypt was only a small fraction of the project; there was nothing there to be compared with contracts entailing the concession of public services. The Tribunal stated that for the sake of a stable legal order, except in exceptional circumstances, investment contracts must be distinguished from sales or procurement contracts involving a state agency.

For these reasons, the Tribunal concluded that it lacked jurisdiction to consider this dispute because the claim fell outside both the Treaty and the Convention.

(v) Mytilineos Holdings S.A. v. Serbia, UNCITRAL Arbitration Rules, Greece-Yugoslavia BIT, Partial Award on Jurisdiction, September 8, 2006.

[Summary of the decision]

<u>The four requirements for the existence of an “investment” in the sense of Article 25 of the ICSID Convention are specific to the ICSID Convention and do not apply in the context of ad hoc arbitration provided for in BITs as an alternative to ICSID.</u>

(vi-1) Malaysian Historical Salvors Sdc, BHD v. Malaysia, ICSID Case No. ARB/05/10, U.K.-Malaysia BIT, Award on Jurisdiction, May 17, 2007.

[Summary of the decision]

a) <u>In order for the Arbitral Tribunal based on ICSID Convention to have jurisdiction, the rights in dispute must constitute an “investment” as provided in the BIT and the ICSID Convention.</u>

b) <u>The four elements used in the Salini case (described in (ii) above) are important criteria in determining whether the rights constitute “investment” under the ICSID Convention; however, other elements must be also considered depending on the facts that are in dispute.</u>

Malaysian Historical Salvors, a U.K. company, entered into a contract with the Malaysian government to locate and salvage the cargo of a wreck. The contract stipulated that the company would bear all the costs of the search and salvage operation, and recover its expenditure and make a profit only if both the salvage operation and the subsequent sale of the recovered items were successful. The company submitted a request for arbitration, claiming that the Malaysian government failed to pay the amount prescribed under the contract. The Malaysian government filed an objection to the jurisdiction, asserting that the contract did not fall within the definition of "investment" under the ICSID Convention.

The Arbitral Tribunal referred to the past arbitral awards concerning the interpretation of "investment" under Article 25 of the ICSID Convention, and made statements described in a) and b) above. The Tribunal then considered the degree to which the hallmarks of "investment" were met in this case. As a result, the Tribunal decided that the dispute was not within its jurisdiction, due to the following grounds: [i] there was no regularity of profits and returns in the contract, though this criterion may not always be decisive; [ii] the claimant had made contributions, in the forms of equipment, know-how and personnel; [iii] although the claimant satisfied the criterion of the duration of contract in a quantitative sense, it failed to do so in a qualitative sense when other elements, including the element of economic development as explained below, also were considered; [iv] while the claimant may have satisfied the risk criterion in a quantitative sense, it had not proved that the risks assumed under the contract were anything other than normal commercial risks (the claimant only superficially satisfied the criterion in light of established ICSID practice); and [v] as for the criterion of contribution to the economic development of the host country, it is necessary that such contribution was "significant"; however, the benefit of this contract was not lasting in the sense envisaged in the public infrastructure or banking infrastructure projects, and thus the claimant was not found to have made a significant contribution to the public benefit or economic development of the host country.

(vi-2) Malaysian Historical Salvors Sdc, BHD v. Malaysia, ICSID Case No. ARB/05/10, U.K.-Malaysia BIT, Decision on the Application for Annulment, April 16, 2009.

[Summary of the decision]

<u>"Investment" under Article 25 of the ICSID Convention only refers to the necessity that the dispute in question is a legal dispute between a contracting state and a national of another contracting state.</u>

After the decision as described in (vi-1) was given, Malaysian Historical Salvors applied for an annulment of the award on jurisdiction, claiming that the Tribunal effectively narrowed the meaning of the term "investment" under Article 25(1) of the ICSID Convention in a manner inconsistent with the intention of the Convention drafters. The company further claimed that the four conditions do not originate in the text of the ICSID Convention itself, and are inconsistent with the ordinary meaning of the term "investment". In response, the Malaysian government alleged that the Arbitral Tribunal had no jurisdiction over the dispute because "investment" under Article 25(1) means an investment was made for the economic development of the host country and the company's expenditures did not have such an aim.

The Ad Hoc Committee stated that the contract between the parties fell within the meaning of "investment" under the BIT. Article 7 of the BIT defines ICSID arbitration as the sole resource in the event that a dispute between the parties should arise. Therefore, the Committee pointed out, it is difficult to find that both contracting parties construed that the referral of a dispute concerning an "investment" under the BIT was limited by the definition of "investment" under the ICSID Convention.

The Committee stated that, according to the ICSID Convention's *travaux préparatoires*, the term "investment" was intentionally left undefined in the text of the Convention, and it found that agreements between the parties were the decisive criteria for determining the jurisdiction. The Committee noted that the outer limits of jurisdiction as provided under Article 25(1) of the ICSID Convention were nothing more than that: [i] the dispute in question has to be a legal dispute; [ii] parties of the dispute are a contracting state and a national of another contracting state; and [iii] the term "investment" does not mean "sale." Based on these findings, the Committee concluded that the Arbitral Tribunal erred in examining the definition of "investment" and gave rise to a manifest failure to exercise jurisdiction.

Judge Shahabuddeen submitted a dissenting opinion, stating that "investment" under the ICSID Convention refers to an investment that contributes to the economic development of the host county and such contribution must be substantial or significant.

(vii) Fraport AG Frankfurt Airport Services Worldwide v. Philippines, ICSID Case No. ARB/03/25, Germany-Philippines BIT, Award, August 16, 2007.

[Summary of the decision]

<u>The scope of the protection under the BIT is clearly limited to investments complying with domestic laws. If the claimant made investments in violation of the domestic laws with full awareness, those investments would not fall within the scope of "investment" under the BIT.</u>

Fraport, a German company, invested in PIATCO, which had concluded an agreement for the construction of airport terminals in the Philippines. However, the contract was opposed by companies involved in the Philippines and was criticized for violating the Philippine's domestic laws. The Philippine government attempted to renegotiate the contract, but eventually determined that it was invalid in the first place on the grounds that the financial requirements were not satisfied. The Philippine government nationalized the almost fully-built terminal and stated its intention to pay compensation. While these proceedings were still ongoing, Fraport referred this case to arbitration based on the Germany-Philippine BIT. The Philippine government filed an objection to the Arbitral Tribunal's jurisdiction.

The Tribunal referred to three provisions in the BIT, including the definition of investment, and the Protocol to the BIT, and construed that compliance with domestic laws was an important condition for an investment to be within the scope of the protection under the BIT. The Tribunal also found that this condition must be met at the time the investment was made and stated that any violation of the laws conducted in the course of activities after the investment was made should be examined in the merits phase of the arbitration. The Tribunal then stated that the secret shareholder agreement regarding Fraport's indirect shareholdings, whose existence was revealed while the arbitral proceedings were ongoing, violated the domestic law that restricted foreigners from having control over the management of national projects. The Tribunal noted that Fraport, following advice from lawyers, chose to conclude a secret agreement with the intention of concealing the violation of the law, while being fully aware of the illegality of such conduct. On the basis of these findings, the Tribunal concluded that this case did not constitute an "investment" within the scope of protection under the BIT, denying its jurisdiction over the dispute.

(viii) Fraport AG Frankfurt Airport Services Worldwide v. Philippines, ICSID Case No. ARB/03/25 (Annulment Procedure), Germany-Philippines BIT, Decision on the Application for Annulment, December 23, 2010.

[Summary of the decision]

Based on Article 25(1) of the ICSID Convention, an application for annulment was filed with respect to the arbitral award that denied the Arbitral Tribunal's jurisdiction. The Ad Hoc Committee annulled that award, stating that there had been a serious departure from a fundamental rule of procedure because the Tribunal had not provided equal hearing opportunities.

The award (see (vii) above) dismissed the claimant's claims, holding that the claimant's investments did not constitute "investments" within the scope of protection under the BIT since the claimant's conduct violated the domestic law of the host country. In response, the claimant filed an application for the annulment of the award based on Article 52(1)(d) of the ICSID Convention, which permits either party to request annulment of the award on the grounds "that there has been a serious departure from a fundamental rule of procedure". An Ad Hoc Committee was established following that application.

The award determined that it could not accept as evidence the fact that the prosecutor decided not to pursue the claimant's violation in court after the closure of the arbitral proceeding, stating that there was the possibility that the prosecutor's decision was made on the basis of biased evidence. The Ad Hoc Committee noted that this fact should have been deemed as important evidence when determining the jurisdiction of the Tribunal, and that the Tribunal should have reopened the proceedings in order to provide the parties with opportunities to state their views and eliminate any possible doubts. The Committee annulled the award, stating that there had been a serious departure from a fundamental rule of procedure because the Tribunal had not provided parties with any opportunity to be heard.

(ix) Plama Consortium Limited v. Bulgaria, ICSID Case No. ARB/03/24, Energy Charter Treaty, Award, August 27, 2008.

[Summary of the decision]

Although the definition of "investment" under the Energy Charter Treaty (ECT) does not require compliance with any specific law, protection under the ECT may be denied in cases where the investment was made in violation of domestic laws or applicable international laws.

Plama, a Cyprus company, submitted a request for arbitration, claiming that the Bulgarian government violated the ECT in its action against Nova Plama, a Bulgarian company in which Plama acquired share capital at the time of its privatization. The Bulgarian government filed an objection to the jurisdiction of the Arbitral Tribunal, claiming that it believed that the share capital of Nova Plama was sold to the joint company of André & Cie (André) and Norwegian Oil Tradings (NOT). In reality, though, the claimant acquired this share capital, using fraudulent misrepresentation to disguise this. The claimant stated that the Memorandum of Understanding (MOU) on the sale stated that the share capital was to be transferred to "a company presented by NOT and André," which did not mean a joint company of both firms.

The Arbitral Tribunal referred to the documents agreed between the parties at the time of Nova Plama's privatization and noted that the Bulgarian government believed that the share capital was sold to a joint company of the two firms. The Tribunal also found that, since the financial and technical abilities of the purchaser are critical under the contract on stock transfer, the Bulgarian government would not have sold the share capital if it knew the individual attempting to purchase the shares did not have enough funds. The Tribunal found that the claimant bore the obligation to tell the government that the company purchasing the shares was not a joint company, but that it intentionally failed to do so. Accordingly, the Tribunal found that the claimant's investment constituted fraud. The Tribunal also found that the claimant's conduct was contrary to the principle of "good faith" under Bulgarian contract law, which stipulates that in concluding a contract parties must provide each other with all related facts. The Tribunal stated that although, contrary to other BITs, the ECT does not include any provision that requires compliance with a specific law, violation against "applicable rules and principles of international law" (Article 26(6)) provided a basis for finding a violation. Then, referring to past arbitral awards, the Tribunal concluded that the claimant's conduct violated the principle of good faith under international law and thus the claimant's investment was not qualified for protection under the ECT.

*See (2)(b-1)(ii) below for the decision on most favored nation treatment under the decision on jurisdiction.

(x) Romak S.A. v. Uzbekistan, UNCITRAL Arbitration Rules, PCA Case No. AA280, Switzerland-Uzbekistan BIT, Award, November 26, 2009.

[Summary of the decision]

a) The term "investments" under the BIT has an inherent meaning and the scope of "investments" does not change irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings.

b) "Investment" under the BIT means a contribution that extends over a certain period and involves some risk.

Romak, a Swiss company, entered into a contract with the Uzbek government for the supply of wheat. Since the company was not paid even though it fulfilled the contract, it submitted a request for arbitration based on breach of the contract and obtained an acceptable award. However, because the company experienced difficulty in the execution of the award, it filed a request for arbitration based on the Switzerland-Uzbekistan BIT. In response, the Uzbek government submitted an objection to the jurisdiction of the Arbitral Tribunal, asserting that it concerned a supply contract and violation thereof did not fall within the scope of "investment" under the BIT.

The Tribunal stated that the investments set out in Article 1(2) of the BIT were intended as illustrations and that the scope of investments should be determined based on the interpretation of the provisions according to the Vienna Convention on the Law of Treaties. Firstly, the Tribunal stated that, as Article 9(3) of the BIT provides for the possibility to resort to ICSID Arbitration, it is absurd and unreasonable to interpret that the definition of "investment" or even the scope of protection may vary by virtue of a choice between the various dispute resolution mechanisms; this also would run counter to the rule of construction requiring the interpreter to infer that the same term in the same context has the same meaning. The Tribunal then noted that, although contracting states are free to deem any kind of asset or economic transaction to constitute an "investment" by clearly stipulating to this effect in the BIT, the wording of the BIT did not permit the Tribunal to infer an intent to provide any specific meaning. The Tribunal found that the term "investments" under the BIT has an inherent meaning, irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings, entailing a "contribution" that extends over a "certain period of time" and involves some "risk".

The Tribunal determined that the award base on the breach of the contract could not be an investment, as the contract on which the award was given was not an investment. As for the "contracts and economic relations entered into with Uzbek public entities", the Tribunal stated that Romak's transportation of wheat was not intended to promote investments nor was there any contribution in relation to that transaction; furthermore, it was a one-off transaction. The Tribunal further noted that the risk assumed by Romak was not an investment risk, which poses the unpredictability of the results of transactions, but rather was the risk of the possible non-performance of the contract, which is the ordinary commercial risk assumed by all those who enter into a contractual relationship. Based on the above, the Tribunal concluded that the claimant did not own any "investment" as provided under Article 1 of the BIT and therefore denied jurisdiction.

(xi) ATA Construction, Industrial and Trading Company v. Jordan, ICSID Case No. ARB/08/2, Turkey-Jordan BIT, Award, May 18, 2010.

[Summary of the decision]

An "investment" is not a single right but is correctly conceived of as a bundle of rights, and the right to arbitration is a distinct "investment".

ATA, a Turkish company, submitted a request for ICSID arbitration concerning the validity of the annulment by the Jordanian courts of an arbitral award rendered in favor of the company following a dispute arising from the collapse of a dike constructed by the company in Jordan. The Jordanian government claimed that the ICSID lacked jurisdiction *ratione temporis*, as the dispute had arisen, and had been extensively litigated, in both arbitral and judicial proceedings, for a period of nearly six years before the BIT's entry into force.

Referring to the award of the Lucchetti case, the Tribunal found that the dispute that gave rise to the FIDIC arbitration proceedings was the same dispute that concluded in an annulment of the final award concerning the contract in question. Based on this finding, the Tribunal determined that the Tribunal lacked jurisdiction *ratione temporis*. As for the right to arbitration, however, the Tribunal cited *Saipem v. Bangladesh* for support of its position that considered that the "entire operation" (including the "contract, the construction itself, the retention money, the warranty and the related ICC Arbitration") was an investment under Article 25 of the ICSID Convention. Accordingly, the Tribunal stated that an international commercial arbitral award constitutes an investment. The Tribunal further stated that a right to arbitration constitutes a right to legitimate performance having financial value related to an investment and a distinct investment. Based on these findings, the Tribunal concluded that it had jurisdiction *ratione temporis*. The Tribunal determined that the extinguishment of the claimant's right to arbitration by the Jordanian courts violated the letter and the spirit of the BIT, which provides for fair and equitable treatment in its Preamble. Therefore, the Tribunal ordered the termination of the Jordanian court proceedings.

(xii) Alasdair Ross Anderson et al v. Republic of Costa Rica, ICSID Case No. ARB (AF) /07/3, Canada-Costa Rica BIT, Award, May 19, 2010.

[Summary of the decision]

The Arbitral Tribunal found that it lacked jurisdiction, as assets acquired through an illegal intermediary did not constitute assets "owned or controlled in accordance with the domestic law" as provided under the BIT.

The claimants, victims of a fraudulent Ponzi scheme operated by a private person, submitted a request for arbitration, alleging that, by failing to provide proper vigilance and governmental regulatory supervision over the national financial system, Costa Rica had injured their investments in violation of the BIT provisions regarding full protection and security, fair and equitable treatment, due process of law, and protection against expropriation. In response, the Costa Rican government submitted objections to the Tribunal's jurisdiction and admissibility.

Firstly, the Tribunal noted that the Canada-Costa Rica BIT states that "'investment' means any kind of asset owned or controlled either directly, or indirectly through an enterprise or natural person of a third State, by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the latter's laws." The Tribunal further noted that, since not all BITs contain a requirement that investments subject to treaty protection be made in accordance with the law of the host country, the fact that the Contracting Parties to this BIT specifically included such a provision is a clear indication of the importance that they attached to the legality of investments made by investors of the other Party and their intention that their laws with respect to investments be strictly followed. The Tribunal stated that the acquisition by each Claimant of the asset resulting from the transaction with the financial intermediary that conducted business without permission was not in accordance with the law of Costa Rica. The Tribunal further found that the fact that they gained ownership of the asset in violation of the law means that their ownership was not in accordance with the law either. Accordingly, the Tribunal concluded that each of the claimants' deposits did not constitute an "investment" under the BIT. Based on these findings, the Tribunal accepted the objection to jurisdiction raised by the Costa Rican government on the grounds that the claimants did not own or control investment in accordance with the law of Costa Rica. The Tribunal thereby concluded that it lacked jurisdiction to hear the dispute.

(xiii) Mobil Corporation, Venezuela Holdings, B.V. v. Venezuela, ICSID Case No. ARB/07/27, Netherlands-Venezuela BIT, Decision on Jurisdiction, June 10, 2010.

[Summary of the decision]

<u>The BIT does not limit the definition of "investment" to direct investments or indirect investments. Stocks and other kinds of interests in companies and joint ventures owned by an individual shareholder of the contracting parties of the BIT can constitute an "investment" to be protected under the BIT.</u>

The claimants submitted a request for arbitration, claiming that they suffered damages to their investments because the Venezuelan government nationalized an oil development project without providing any proper compensation. The Venezuelan government submitted an objection to the tribunal jurisdiction, alleging that [i] the country does not provide the requisite clear and unambiguous consent to arbitration of this dispute; [ii] the claimants are not "the owners" of the direct investments in Venezuela or "the one who actually controlled" them; and [iii] indirect investments are not protected under the BIT.

The Tribunal noted that the definition of "investment" under the Netherlands-Venezuela BIT is very broad and it includes "every kind of asset." The Tribunal further noted that the provision does not clearly refer to direct investments or indirect investments. The Tribunal found that stocks and other kinds of interests in companies and joint ventures owned by Dutch shareholders that make investments within the territory of Venezuela also are subject to protection under the BIT. The Tribunal noted that the BIT does not require that there be no interposed companies between the ultimate owner of the company or of the joint venture and the investment, nor does it exclude indirect investments from the definition of "investment." Accordingly, the Tribunal dismissed the allegation made by the Venezuelan government that indirect investments are excluded from the scope of protection under the BIT.

*See (d-1)(v) below for jurisdiction *ratione temporis*.

(xiv) Fakes v. Turkey, ICSID Case No. ARB/07/20, Netherlands-Turkey BIT, Award, July 14, 2010.

[Summary of the decision]

<u>The notion of "investment" cannot be defined simply through reference to the parties' consent; the objective definition of "investment" must be contemplated within the framework of the ICSID</u>

Convention. The requirements for the constitution of "investment" are: (i) a contribution, (ii) a certain duration, and (iii) an element of risk.

The claimant claimed that he owned 66.96% of the shares in Telsim, and the Turkey government froze these shares and forced him to sell the assets to a third party. The claimant submitted a request for arbitration, claiming that the government's actions constituted expropriation of an investment, which caused him to suffer damages. The Turkish government submitted an objection to the jurisdiction, alleging that there was no evidence of the claimant's ownership of shares in Telsim and that the claimant was simply acting as a "dummy" shareholder, bringing this claim on behalf of the Uzans, whose assets had been seized due to their involvement in a fraud case.

The Arbitral Tribunal stated as described above and then noted that the requirement of a contribution to the economic development of a host state relied mainly on the preamble to the ICSID Convention as its foundation. The Tribunal considered, however, that it would be excessive to interpret that this was intended as a requirement. The Tribunal determined that, while a contribution to economic development is one of the proclaimed objectives of the ICSID Convention, this objective is not in and of itself an independent criterion for the definition of an "investment." Likewise, the Tribunal did not agree that the principles of good faith and legality were incorporated into the definition of "investment" either. The Tribunal determined that the dispute fulfilled the requirements of Article 25(1) of the ICSID Convention. However, the Tribunal dismissed the claimant's allegation concerning the acquisition of shares, referring to the background of the sale of shares and the price thereof and noting that the claimant did not have any means to access the shares in question. In conclusion, the Tribunal denied its jurisdiction, holding that the claimant did not own any share as an "investment."

(xv) Metal-Tech Ltd. v. Uzbekistan, ICSID Case No. ARB/10/3, Israel-Uzbekistan BIT, Award, October 4, 2013.

[Summary of the decision]

The most favored nation provision cannot be applied to the definition of the term "investment".

Two molybdenum-related state-owned companies in Uzbekistan established a joint venture Uzmetal with the claimant (an Israeli company) pursuant to a cabinet decision. Several years later, the Public Prosecutor's Office of Uzbekistan initiated an investigation alleging that officials of Uzmetal had abused their authority. The Uzbekistan's Cabinet adopted a resolution cancelling Uzmetal's right to purchase resources. The Uzbek court declared the bankruptcy of Uzmetal based on the claim of one of the Uzbek state-owned companies that participated in the joint venture. The claimant submitted a request for arbitration based on the BIT, alleging that there were violations of the provisions prohibiting expropriation, on fair and equitable treatment, and prohibiting discriminatory measures.

The Uzbek government noted that Article 1(1) of the BIT only covers investments that are lawfully "implemented" and asserted that the investments in question could not be subject to protection under the BIT, because they were made through bribery, which is prohibited by Uzbek law. The claimant noted that in other treaties that Israel negotiated, the definition of "investment" was not limited to investments made in accordance with the law, and this definition should also be applied in this case through the most favored nation provision under the BIT. The Arbitral Tribunal dismissed this claim, stating that one must fall within the scope of the treaty, which is in particular circumscribed by the definition of investment and investors, to be entitled to invoke the treaty protections, of which MFN treatment forms a part. The Tribunal then determined that the claimant had engaged in bribery and denied the Tribunal's jurisdiction.

(2) Cases concerning non-compliance to contract

(i) SGS Société Générale de Surveillance S.A. v. Pakistan, ICSID Case No. ARB/01/13, Switzerland-Pakistan BIT, Decision on Objections to Jurisdiction, August 6, 2003.

[Summary of the decision]

a) Even if a contract contains a dispute settlement provision that restricts the forums for the settlement of a dispute arising from the contract, the Arbitral Tribunal based on a BIT has jurisdiction over a dispute arising from the contract as long as the request for arbitration is fundamentally based on a violation of the BIT.

b) The umbrella clause of the BIT does not transform a purely contractual claim into a treaty claim.

SGS, a Swiss company, entered into a contract with the government of Pakistan regarding pre-shipment inspection services. The company submitted a request for arbitration, claiming that the government violated the Switzerland-Pakistan BIT by terminating the contract after the services had been provided for a certain period of time. The Pakistani government submitted an objection to the Arbitral Tribunal's jurisdiction based on the allegation that the claim was based on a violation of the contract and that the contract provides in its forum selection provision that any dispute arising therefrom would be settled by other mechanisms.

The Tribunal examined whether the umbrella clause (a clause that guarantees the observance of obligations assumed by the contracting state vis-à-vis the foreign investor, including contracts concluded between them) can be construed to have an intention to transform a purely contractual claim into a treaty claim even when the contract contains a forum selection clause concerning a dispute arising from the contract. The Tribunal denied this approach, stating that it could not find any obvious evidence to support it. In conclusion, the Tribunal determined it had no jurisdiction over this dispute.

(ii) SGS Société Générale de Surveillance S.A. v. Philippines, ICSID Case No. ARB/02/6, Switzerland-Philippines BIT, Decision on Objections to Jurisdiction, January 29, 2004.

[Summary of the decision]

Based on the umbrella clause of the BIT, the Arbitral Tribunal could exercise jurisdiction over contractual disputes; however, since the contract selected a domestic court as the forum for the settlement of disputes arising from the contract, such a contractual claim is inadmissible.

A subsidiary company of SGS in the Philippines entered into a contract with the government of Philippines concerning inspection services for imported cargoes. The parent company in Switzerland, SGS, submitted a request for arbitration, claiming that the Philippine government failed to pay the fees provided in the contract and that this constituted a violation against the Philippines-Switzerland BIT. The Philippine government asserted that this dispute was outside the jurisdiction of BIT arbitration, because the dispute was purely contractual in nature and the contract stipulates a domestic court as the forum for the settlement of any dispute arising therefrom.

The Arbitral Tribunal determined that it had jurisdiction over a contractual dispute, based on the dispute settlement clause of the BIT. The Tribunal also construed that the umbrella clause of the BIT allows an issue concerning the implementation of contractual obligations to be included in the scope of protection under investment treaties. The Tribunal then stated that, since SGS agreed to use a domestic court as the forum of the settlement of contractual disputes, the Tribunal should find the claim to be inadmissible. The Tribunal therefore concluded that it did not have jurisdiction to make a decision in this dispute.

*A dispute also can be discussed from the viewpoint of jurisdiction *ratione materiae* when the claimant (investor) asserts that the more favorable treatment as stipulated in the BIT between a third country and the host country should be applied in the present case based on the MFN treatment clause in the BIT between the investor's country and the host country, and that such allegation is related to the Arbitral Tribunal's jurisdiction. (See (2)(b-1)(i) and (ii) below, for example.)

4) JURISDICTION RATIONE TEMPORIS

(1) Cases concerning the difference of views or legal disputes between the parties before the BIT's entry into force

(i) Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. Peru, ICSID Case No. ARB/03/4, Chile-Peru BIT, Award, February 7, 2005.

[Summary of the decision]

<u>The critical element in determining the existence of one or two separate disputes is whether they concern the same matter. In addition, the Arbitral Tribunal also needs to determine whether the facts or considerations that gave rise to the earlier dispute continued to be central to the later dispute.</u>

Lucchetti Peru, a subsidiary of a Chilean company, Lucchetti, was planning to build a pasta factory near a nature conservation area in the City of Lima. However, the Municipalidad Metropolitana de Lima (Municipality of Lima) issued an order to annul the construction permits in 1997, referring to environmental problems and a violation of law by the claimant. Lucchetti Peru referred this case to judicial proceedings in Peru and obtained the revocation of this order. The company completed the construction of the plant and commenced its operation. However, in 2001, the Municipalidad Metropolitana de Lima revoked the company's license and ordered the closure of the plant. The two companies submitted a request for arbitration, claiming that this act violated the BIT. The government of Peru alleged that the Arbitral Tribunal lacked jurisdiction *ratione temporis*, since this dispute was identical to the dispute that arose from the order issued in 1997, and the Chile-Peru BIT, which entered into force on August 3, 2001, provides in Article 2 as follows: "This Treaty shall [...] not, however, apply to differences or disputes that arose prior to its entry into force."

The Tribunal construed that the purpose of the order issued in 2001 was to establish a regulatory framework for the nature conservation area, noting that the order's preamble referred to the negative impact that the claimant's action had caused to the protected area since 1997. The Tribunal then found that the dispute in 1997/1998 and the dispute in 2001 had the same origin, that is, the City of Lima's efforts to ensure compliance with its environmental conservation measures and the Claimant's efforts to obtain an injunction against the application of these measures to its plant. The Tribunal determined that the present dispute had crystallized by 1998 and continued to 2001. The Tribunal therefore concluded that it lacked jurisdiction *ratione temporis*.

*The claimant submitted a request for the revocation of this award, which was dismissed by the Ad Hoc Committee on September 5, 2007.

(ii) Jan de Nul N.V. v. Egypt, ICSID Case No. ARB/04/13, Belgium–Luxembourg Economic Union-Egypt BIT, Decision on Jurisdiction, June 16, 2006.

[Summary of the decision]

The Arbitral Tribunal concluded that the dispute that arose before the BIT's entry into force and the dispute that arose after the BIT's entry into force were connected but are separate "legal disputes".

Jan de Nul, a Belgian company, entered into a contract with the Suez Canal Authority for the dredging of the Canal in 1992. The company alleged that the Egyptian government committed fraud concerning important information when it concluded the contract, and that the Egyptian administrative court's decision in 2003 that dismissed the company's claim regarding the fraud was a violation of the BIT. Based on these allegations, the company submitted a request for arbitration. The Egyptian government submitted objections to the Arbitral Tribunal's jurisdiction on the grounds that the BIT, which entered into force in 2002, provides in Article 12 that the treaty provides protection for investments made before its entry into force but it shall "not be applicable to disputes having arisen prior to its entry into force."

The Tribunal construed that the purpose of Article 12 of the BIT was to exclude disputes that have crystallized before the entry into force of the BIT and that could be deemed "treaty disputes". The Tribunal then concluded that it had jurisdiction over this dispute, noting that the Egyptian government's conduct up to the administrative court's refusal to take appropriate remedies had increased damages to the claimant and that the actions of the court system were separate and distinct from the contract.

(iii) Chevron Corporation and Texaco Petroleum Corporation v. Ecuador, UNCITRAL Arbitration Rules, PCA Case No. 34877, US–Ecuador BIT, Interim Award, December 11, 2008.

[Summary of the decision]

a) The temporal ambit of the BIT and the Arbitral Tribunal's jurisdiction *ratione temporis* are decided based on the intention of the contracting parties determined by the interpretation of the provisions of the BIT.

b) The definition of the term "investment" is intended to be broad under the BIT. Investments are protected under the BIT from its establishment to its ultimate disposal, including the period of lawsuits concerning the liquidation and settlement of claims relating to the investments.

In 1973, US company Texaco Petroleum, a wholly-owned subsidiary of US company Chevron, entered into a concession contract with the government of Ecuador for oil exploration; a supplemental agreement was entered into in 1977. The negotiation on the extension of the 1973 contract broke down, and so the contract was terminated on June 6, 1992. From the end of 1991 to the end of 1993, the claimants filed a series of actions against the government of Ecuador in the courts in Ecuador, alleging that the Ecuadorian government breached the contract by acquiring oil exceeding the volume prescribed in the contract at the domestic market price. However, the Ecuadorian courts did not render any decision. The claimants therefore submitted request for arbitration in December 2006 based on the US-Ecuador BIT that had entered into force on May 11, 1997, claiming that the significant delays in the trials and the Ecuadorian government's interference with justice constituted a denial of justice under the BIT and under customary international law. The Ecuadorian government submitted objections to the Arbitral Tribunal's jurisdiction, claiming that the acts or facts on which the claimant's claims are based took place prior to the entry into force of the BIT and thus that this dispute was beyond the temporal scope of the

BIT.

The Arbitral Tribunal examined the text of the BIT and stated that the term "investment" under the BIT covers a broad scope of investments, including lawsuits concerning the liquidation and settlement of claims relating to the investments. The Tribunal also noted that, once an investment is established, it would be protected under the BIT until it is finally wound up. The Tribunal then noted that, since the lawsuits that had arisen from the contract between the claimant and the Ecuadorian government was still ongoing, "investments" did exist at the time of the BIT's entry into force and at the time of the commencement of arbitration. The Tribunal further noted that the issue in this case related to the interpretation of the text of the BIT, rather than in the retrospective application of the treaty. While the BIT provides it is applicable to "investments existing at the time of entry into force," the Tribunal determined that the claimant's investments had already existed at the time of the BIT's entry into force.

The Tribunal then determined that it had jurisdiction over a customary international law claim and stated that an investment agreement concerning an "investment" that is protected under the BIT is also included in the scope of protection under the BIT. In conclusion, the Tribunal determined that it had jurisdiction over the dispute concerning the denial of justice, which commenced after the BIT's entry into force in relation to the concession contract concluded before the BIT's entry into force.

(iv) Société Générale v. The Dominican Republic, UNCITRAL Arbitration Rules, LCIA Case No. UN 7927, France–Dominican Republic BIT, Award on Preliminary Objections to Jurisdiction, September 19, 2008.

[Summary of the decision]

a) <u>The text of the BIT does not include any clear indication of the parties' intention that the treaty would be applied retrospectively. The Arbitral Tribunal only has jurisdiction over acts or events that occurred after the BIT's entry into force.</u>

b) <u>If an act that took place before the BIT's entry into force has continued and that act is proved during the merits phase to constitute a violation against the treaty, the Arbitral Tribunal has jurisdiction over that act.</u>

Société Générale, a French company, submitted a request for arbitration alleging that the government of the Dominican Republic breached the contract with respect to investments in a power company established in the Dominican Republic under a joint venture contract it entered into with the government of the Dominican Republic. In response, the government submitted objections to the Tribunal's jurisdiction, asserting that it lacked jurisdiction over the claims because the BIT cannot be applied retrospectively, and the acts and events upon which the claims were based took place before the acquisition of property by the claimant, a French national, and before the entry into force of the BIT.

Firstly, the Tribunal noted that in principle a treaty cannot be applied retrospectively, and that the BIT in question does not include any clear indication of the parties' intention regarding retrospective application of the treaty. The Tribunal determined that it only has jurisdiction over a breach of BIT arising from an act or event that occurred after the BIT's entry into force. The Tribunal stated, however, that if an act that took place before the BIT's entry into force has continued and that the act is proved during the merits phase to constitute a violation against the treaty, the Arbitral Tribunal has jurisdiction over this act.

Then, with respect to the objection concerning the nationality of the claimant, the Tribunal examined the text of the BIT and found that the treaty is solely intended for the protection of nationals and companies of the contracting parties, and the investment in question cannot fall within the scope of protection under the BIT until the claimant obtains the ownership thereof. Accordingly, the Tribunal concluded that it lacked jurisdiction over acts or events that took place before that time.

(v) Mobil Corporation, Venezuela Holdings, B.V., et al v. Venezuela, ICSID Case No. ARB/07/27, Netherlands-Venezuela BIT, Decision on Jurisdiction, June 10, 2010.

[Summary of the decision]

The Arbitral Tribunal found that, even if the purpose of the restructuring of the company was to protect investments from an infringement of rights, the dispute that arose after the restructuring does not constitute an abuse of rights, and thereby determined that it has jurisdiction over this dispute.

The claimants submitted a request for arbitration, claiming that they suffered damages to their investments because the Venezuelan government nationalized an oil development project without providing any proper compensation. The Venezuelan government submitted an objection to the tribunal jurisdiction, alleging that [i] the country does not provide the requisite clear and unambiguous consent to arbitration of this dispute; [ii] the claimants are not “the owners” of the direct investments in Venezuela or “the one who actually controlled” them; and [iii] indirect investments are not protected under the BIT.

The Venezuelan government alleged that the restructuring of the company under the Dutch law, which was conducted by the claimant some times after the commencement of the investment, constituted an abuse of rights under the system of international investment protection based on the ICSID Convention and the BIT. The Arbitral Tribunal found that the main purpose of the restructuring was to protect Mobil’s investments through the ICSID Convention and the BIT from the measures taken by the Venezuelan government and stated that whether the restructuring was a legitimate corporate plan or not and whether it constituted an abuse of rights should be determined based on the circumstances. Firstly, the Tribunal noted that Mobil and its subsidiary did not bear a contractual obligation to obtain an approval for restructuring from the Venezuelan authority. The Tribunal also noted that Mobil did not conceal the fact of restructuring and that the Venezuelan government had not submitted any objection against it at that time. The Tribunal found that the investments in the project that was being operated after the restructuring were financed through funds generated by the project itself rather than brought into Venezuela from or through the Netherlands. The Tribunal also found that this fact was consistent with the claimant’s allegation that the project stood as it was at the time of the restructuring. The Tribunal also found that the treaty does not contain any requirement that the origin of the capital must be foreign. The Tribunal found that the purpose of the restructuring was to protect Mobil’s rights relating to the investments from infringement by the Venezuelan government; it did so by incorporating the local company in Venezuela as a subsidiary of the parent company established in the Netherlands, which has entered into a bilateral treaty with Venezuela. The Tribunal determined that this purpose of restructuring was perfectly legitimate in relation to the dispute concerning the nationalization measures after the restructuring. On the other hand, the Tribunal found that the situation of pre-existing disputes was different from this and determined that it lacked jurisdiction over the disputes, because the restructuring of the company only in order to gain jurisdiction under a BIT for such disputes would constitute an abuse of rights.

(2) Provisional Application of the Energy Charter Treaty

(i) Ioannis Kardassopoulos v. Georgia, ICSID Case No. ARB/05/18, Energy Charter Treaty (ECT) and Greece-Georgia BIT, Decision on Jurisdiction, July 6, 2007.

[Summary of the decision]

a) Based on Article 45(1) of the ECT, the Treaty is to be provisionally applied as a whole and in its entirety.

b) Even if a signatory State did not make a declaration excluding the provisional application of the ECT in accordance with Article 45(2)(a) of the ECT, the State does not bear any obligation of provisional application based on Article 45(1) to the extent that such provisional application is inconsistent with its constitution, laws or regulations.

The claimant, a Greek national, submitted a request for arbitration based on the Greece-Georgia BIT, claiming that the company in which the claimant has shares entered into a concession contract regarding pipelines with the Georgian government, but that the Georgian government had expropriated the investment. Greece and Georgia signed the ECT on December 17, 1994, and the ECT entered into force on April 16, 1998. Since the event in dispute took place around these times, the interpretation of the provisional application under Article 45 of the ECT was an issue.

The Arbitral Tribunal examined the wording of Article 45(1) of the ECT, which provides that "this Treaty" is to be provisionally applied, and the wording of Article 31(3)(c) of the Vienna Convention on the Law of Treaties. As a result, the Tribunal construed that under Article 45 of the ECT the ECT is to be provisionally applied as a whole and in its entirety on the same basis as would in due course result from the ECT's definitive entry into force. The Tribunal then stated that, even if a signatory State did not make a declaration excluding the provisional application of the ECT in accordance with Article 45(2)(a) of the ECT, the State does not bear any obligation of provisional application to the extent that such provisional application is inconsistent with its constitution, laws or regulations (noting that the party raising this assertion would bear the burden of proof for such inconsistency with its laws). The Tribunal then examined the domestic laws of Georgia and Greece, respectively, and found that neither of them conflict with the ECT. In conclusion, the Tribunal determined that the ECT should be provisionally applied to both countries for the period from December 17, 1994, to April 16, 1998.

[Provisional application of the Energy Charter Treaty]

Article 45(1) of the Energy Charter Treaty provides that: "Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations." Article 45(2)(a) provides that: "Notwithstanding paragraph (1) any signatory may, when signing, deliver to the Depository a declaration that it is not able to accept provisional application. The obligation contained in paragraph (1) shall not apply to a signatory making such a declaration [...]" Belarus is deemed to be subject to the provisional application of the ECT because it signed the treaty but has not ratified it yet, nor has it made a declaration to deny the provisional application.

(ii) Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL Arbitration Rules, PCA Case No. AA227, Energy Charter Treaty (ECT), Interim Award on Jurisdiction and Admissibility, November 30, 2009.

[Summary of the decision]

a) <u>The provision for the provisional application of the ECT (Article 45(1)) does not require determination of the existence of inconsistency with the provisions of the Russian constitution, laws and regulations corresponding to the provisions of the ECT.</u>

b) <u>The existence or non-existence of a declaration excluding the provisional application in accordance with Article 45(2) is not related to whether the provisional application can be denied.</u>

The claimant, a legal person established in the Isle of Man, is a shareholder of Yukos Oil Corporation OJSC. Together with two other companies, the claimant submitted a request for arbitration on February 3, 2005, alleging that measures that the Russian government took against Yukos, including criminal proceedings against the managers and assessment of high back taxes, which culminated in the company's bankruptcy, violated the ECT. (See (2)(d)(v) below for the background to the bankruptcy of Yukos.)

Since Russia signed the ECT on December 17, 1994, but had not ratified it yet, the existence of the Arbitral Tribunal's jurisdiction based on the ECT was an issue. On August 20, 2009, Russia notified its intention not to become a party to the Treaty. As the ECT provides for its provisional application to countries that have not ratified the treaty yet as explained in (i) above, the main issue regarding jurisdiction was whether the provisional application of the treaty could be established.

The claimant alleged that Russia was bound by Article 45(1) unconditionally because it did not make a declaration in accordance with Article 45(2). In response, Russia asserted that whether provisional application can be denied in accordance with Article 45(1) is not related to whether a declaration in accordance with Article 45(2) was made, on the grounds that these two provisions are independent from each other and that a declaration under Article 45(2) is not obligatory. The Arbitral Tribunal accepted Russia's claim on the grounds that the declaration under Article 45(2) is not obligatory. The Tribunal also stated that, even though Russia made no prior declaration nor notification that it intended to rely on Article 45(1) to exclude provisional application, exception from the application of Article 45(1) can be sought.

The Tribunal then examined the interpretation of Article 45(1). Russia asserted that whether exception from the application of Article 45(1) can be granted should be determined by examining the provisions of the ECT and the corresponding provisions of the Russian constitution and domestic laws to see if there is any inconsistency between them. On the other hand, the claimant alleged that whether there is any inconsistency with the principles of the provision for the provisional application should be examined, instead of examining each provision of the treaty. The Tribunal stated that both interpretations included some errors. The Tribunal found that, since the phrase "such provisional application" calls for a decision according to the context, what needs to be examined in light of the purpose of Article 45(1) is whether if there is any inconsistency between a specific implementation of the provisional application and the Russian constitution or domestic laws. The Tribunal concluded that no such inconsistency could be found and thus it had jurisdiction over the present case.

Russia also raised questions in relation to the position of the claimant as an "investor" and the existence of "investments," but the Tribunal dismissed them. The Tribunal deferred its decision on the interpretation of taxation measures curve-out under Article 21 to the merits phase on the grounds that this was a core issue of the dispute.

5) Denial of Benefits Clause

(i) Guaracachi America, Inc. and Rurelec PLC v. Bolivia, UNCITRAL Arbitration Rules, PCA Case No. 2011-17, Bolivia-UK BIT and Bolivia-US BIT, Award, January 31, 2014.

[Summary of the decision]

<u>Invocation of the denial of benefit clause can be accepted even after the dispute had arisen.</u>

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).

6) Abuse of Process

(i) Renée Rose Levy and Gremcitel S.A. v. Peru, ICSID Case No. ARB/11/17, France-Peru BIT, Award, January 9, 2015.

[Summary of the decision]

<u>If a corporate realignment or restructuring were carried out with the intention to invoke the treaty's protections at a time when the relevant party could foresee a specific future dispute as a very high probability, it would constitute an abuse of process.</u>

The claimant, Gremcitel (a Peruvian company), owned land adjacent to a historical site near Lima, Peru. The company had a dispute with the Peruvian authority concerning the boundaries of the development prohibition area. The Peruvian authority adopted a resolution on October 18, 2007, which concluded that the land owned by the company was included in the development prohibition area (the "2007 Resolution"). Ms. Levy (a French national), who is one of the claimants, was registered as the controlling shareholder on October 9, 2007. The two claimants submitted a request for arbitration to the ICSID in May 2011, claiming that the Peruvian authority had breached its obligation to accord fair and equitable treatment.

The first issue in this case was the Arbitral Tribunal's jurisdiction. The Tribunal found that the issuance of the 2007 Resolution gave rise to the present dispute and that Ms. Levy had already been an "investor" who owned and controlled Gremcitel at that point. Based on these findings, the Tribunal determined that it had jurisdiction over the present case. The Tribunal determined that it also had jurisdiction over Gremcitel, which was controlled by Ms. Levy, in accordance with Article 25(2)(b) of the ICSID Convention and Article 8(3) of the BIT. The focus of the Tribunal then moved on to whether investments in Gremcitel made by Ms. Levy right before the issuance of the 2007 Resolution constituted an "abuse of process". The Peruvian authority asserted that the claims of the present case constituted an "abuse of process" on the grounds that the investments made by Ms. Levy had been carried out for the sole purpose of securing the ability to submit a request for international arbitration under the BIT when the dispute was foreseeable. The Tribunal upheld the criteria for "abuse of process" set out in past ICSID cases, including the award on the *Pac Rim* case (ICSID Case No. ARB/09/12) (a corporate realignment or restructuring carried out with the intention to invoke the treaty's protections at a time when the relevant party could foresee a very highly probable specific future dispute). As the present dispute fulfilled these criteria, the Tribunal determined that it was precluded from exercising jurisdiction over this dispute.

7) Application of the Principle of the Remedies for Procedural Errors

(i) Philip Morris Brands Sàrl et al. v. Uruguay, ICSID Case No. ARB/10/7, Switzerland-Uruguay BIT, Decision on Jurisdiction, July 2, 2013.

[Summary of the decision]

<u>The Tribunal has jurisdiction over the dispute if the jurisdictional requirements are met when it renders a decision, even if the requirements were not met at the time a request for arbitration was submitted.</u>

In accordance with the Ordinance issued by the Uruguayan Ministry of Public Health and the Decree issued by the President of Uruguay, Uruguay stipulated that [i] cigarette packages must indicate graphic images that illustrate the adverse health effects of smoking; [ii] at least 80% of the surface of the front and back of the package must be used for health warning; and [iii] each cigarette brand is allowed to use only one kind of package presentation (for example, "Marlboro Red" and "Marlboro Gold" must be sold using the same packaging). The claimant (a Swiss company) submitted a request for arbitration, claiming that these measures were inconsistent with the BIT. Article 10(2) of the BIT provides that an investor may submit a dispute that could not be settled within the 6-month amicable negotiation period to the competent domestic courts; if no judgment has been passed within 18 months, the investor may appeal to an arbitral tribunal. In this case, the parties had negotiated for six months and then the dispute was submitted to domestic proceedings, but 18 months had not yet elapsed when the request for arbitration was submitted. The 18-month period did elapse after the filing of the request for arbitration and before the decision on jurisdiction. Uruguay alleged that the request for arbitration must be dismissed on the grounds that 18 months had not elapsed at the time the request for arbitration was submitted.

The Arbitral Tribunal cited a decision of the International Court of Justice in which it determined that, if the jurisdictional requirements were not met at the time when the lawsuit was instituted, but then these requirements were met before the decision was made, from the viewpoint of the sound administration of justice the court should have jurisdiction over the dispute. This was because even if jurisdiction was once denied, the court will have jurisdiction over the dispute if the plaintiff re-files the lawsuit (*Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, *ICJ Reports 2008*, pp. 441-442, para. 87). The Tribunal also referred to the tribunal in *Teinver v. Argentina* (ICSID Case No. ARB/09/1, Decision on Jurisdiction, December 21, 2012) as precedent to the same effect. In conclusion, the Tribunal determined that it had jurisdiction over the present case.

8) EXCLUSION OF MATTERS OF TAXATION

(i) Occidental Exploration and Production Company v. Ecuador, UNCITRAL Arbitration Rules, LCIA Case No. UN3467, US-Ecuador BIT, Final Award, July 1, 2004.

[Summary of the decision]

The Arbitral Tribunal has jurisdiction under the BIT over a dispute concerning matters of taxation as long as it is a dispute concerning the observance and enforcement of the investment contract.

Occidental, a US company, entered into a service contract with Petroecuador, a state-owned company in Ecuador, for the exploration and production of oil in Ecuador. Occidental regularly had filed applications at Ecuador's Internal Revenue Service (SRI) and obtained refunds of VAT that it paid for the purchase of necessary equipment for the exploration of oil and for the export of oil, which were carried out based on the contract. However, after the form of the contract was changed to a participation contract in accordance with amendment of the Ecuadorian law, the SRI decided to discontinue refunding to oil companies and to order them to return the refunds they previously had received. Occidental submitted a request for arbitration, claiming that this measure by SRI was against the US-Ecuador BIT. The Ecuadorian government submitted objections to the Arbitral Tribunal's jurisdiction, alleging that VAT and the refund thereof fall under the exclusion of matters of taxation under Article 10 of the BIT, and thus they are exempt from the application of the BIT. Article 10(2) of the BIT provides that the provisions of the BIT apply to matters of taxation only with respect to the following: [a] expropriation, pursuant to Article 3; [b] transfers, pursuant to Article 4; or [c] the observance and enforcement of terms of an investment agreement as referred to in Article 6.

Firstly, the Tribunal dismissed the claimant's allegation that the exclusion of matters of taxation only applies to direct taxes, finding that such a claim was not persuasive. The Tribunal then stated that, since there was no transfer or expropriation, the issue would be whether the present dispute is a dispute concerning the observance and enforcement of terms of an investment agreement as provided in Article 10(2)(c) of the BIT. The Tribunal found that the present case contests whether the refunds of VAT were included as an element of the participation contract, and thus this dispute concerns the observance and enforcement of terms of the investment agreement. Accordingly, the Tribunal concluded that it had jurisdiction over this case.

*See (2)(a)(iii) below for the decision on national treatment.

(ii) EnCana Corporation v. Ecuador, UNCITRAL Arbitration Rules, LCIA Case No. UN3481, Canada-Ecuador BIT, Award, February 3, 2006

[Summary of the decision]

The Arbitral Tribunal lacks jurisdiction over measures concerning the refunds of VAT carried out by a competent authority in accordance with the relevant law, because they fall within the scope of the exemption for taxation measures set out in Article 12(1) of the BIT, unless they satisfy a condition provided under the BIT.

EnCana, a Canadian company, entered into a participation contract through its subsidiary in Ecuador with Petroecuador, a state-owned company in Ecuador, for the exploration and production of oil in Ecuador. Ecuador's Internal Revenue Service (SRI) had refunded VAT on the goods and services used in connection with the production of exported oil. However, the SRI decided to discontinue refunding to oil companies and to order them to return the refunds they already had received. EnCana submitted a request for arbitration, claiming that this measure taken by the Ecuadorian government constituted a breach of the Canada-Ecuador BIT. In response, the Ecuadorian government submitted objections to the Arbitral Tribunal's jurisdiction, asserting that the right to receive the refunds of VAT fell within the scope of the exemption for taxation measures in Article 12(1) of the BIT. Article 12(1) of the BIT provides that: "Except as set out in this Article, nothing in this Agreement shall apply to taxation measures." The treaty subsequently provides for an exception to this Article, stating that "a claim by an investor that a tax measure of a Contracting Party is in breach of an agreement between the central government authorities of a Contracting Party and the investor concerning an investment" (Article 12(3)) shall be subject to the application of the BIT. The treaty also provides that Article 8 concerning expropriation may be applied to a taxation measure (Article 12(4)). The Tribunal examined the issue of jurisdiction together with the merits of this case.

Firstly, the Tribunal stated that the term "taxation measures" should be given its normal meaning in the context of the BIT. The Tribunal made the following findings in connection with the meaning of the term: [1] it is imposed by law; [2] the term "taxation" includes not only direct taxes but also indirect taxes, such as VAT; [3] the term "measures" includes the decision on the amount of tax payable or refundable; and [4] the question whether something is a tax measure is primarily a question of its legal operation, not its economic effect. The Tribunal then determined that, even if the application of the regulations concerning VAT was inconsistent as the claimant asserted, the measures in question constituted "taxation measures" because they were conducted by tax officials in accordance with the relevant laws and they also had been submitted to the hearing at the court. The Tribunal concluded that it lacked jurisdiction over this dispute, because this case did not fall within the scope of Article 12(3), since it was not a claim concerning a breach of contract concluded by a central government and the BIT (except Article 8 concerning expropriation) was not applicable to this case.

(iii) Duke Energy Electroquil Partners and Electroquil S.A. v. Ecuador, ICSID Case No. ARB/04/19, US-Ecuador BIT and Arbitration Agreement, Award, August 18, 2008.

[Summary of the decision]

The BIT provides for the exclusion of application of the BIT concerning "matters of taxation" other than enumerated specific matters. However, since the claims regarding customs duties fall within the scope of "matters of taxation," the Arbitral Tribunal lacks jurisdiction over such claims.

Duke Energy, a US company, acquired shares in Electroquil, a private power company in Ecuador. Electroquil supplied electricity based on a power purchase agreement (PPA) it entered into with INECEL, a state-owned power company. Based on the PPA concluded in 1996, which provided that "goods required to generate electricity" were eligible for tax-free importation, Electroquil imported a turbine free of tax; however, this turbine broke down in 1998. Electroquil submitted a request for exemption from customs duties for the turbine it was reimporting, but the Ecuadorian authority rejected this request, since the customs law had been amended after the previous import. The claimant alleged that this constituted a breach of the BIT. The Arbitral Tribunal's jurisdiction was an issue in this case. The Tribunal determined that the claims regarding customs duties fell within the scope of "matters of taxation," for which Article 10(2) of the BIT provides that the treaty shall not be applicable. The claimant asserted that the Tribunal had jurisdiction over the dispute based on Article 10(2)(c) of the BIT, which provides that the treaty applies, as exceptional cases, to matters concerning the observance and enforcement of terms of an "investment agreement." The Tribunal noted that the PPA was not concluded between Duke Energy and the Ecuadorian government and thus it was not an "investment agreement" as provided under Article 10(2)(c). Accordingly, the Tribunal denied its jurisdiction over the claims regarding customs duties.

*The Tribunal decided that the Ecuadorian government violated its other obligations. See (2)(c)(v) and (2)(e)(iv) below.

2. DECISIONS ON SUBSTANTIVE MATTERS

1) NATIONAL TREATMENT

(i) S.D. Myers, Inc. v. Canada, UNCITRAL Arbitration Rules, NAFTA, Partial Award, November 13, 2000.

[Summary of the decision]

a) Domestic investors and foreign investors are deemed as being "in like circumstances" if they belong to the same economic or business sector.

b) Whether a governmental measure constituted a violation against national treatment should be determined based on the measure's "impact" on the invested project, rather than the government's "intention" regarding the introduction of the measure.

S.D. Myers, a US company, established a subsidiary company in Canada. The company was planning a business project to process PCB wastes from Canada in the US. S.D. Myers' plant in the US was located in an area that is comparatively near the location of PCB wastes, which gave the company a cost advantage over its competitors in Canada. The company obtained approval from the US Environmental Protection Agency to import wastes. However, the company was forced to discontinue the project, when the Canadian government adopted a measure to prohibit the export of PCB wastes. The company submitted a request for arbitration, claiming that this measure violated the national treatment clause of NAFTA, which provides that "Each Party shall accord to investors of another Party treatment no less favorable than it accords, in like circumstances, to its own investors."

The Arbitral Tribunal supported the allegation concerning the violation of the national treatment clause. The Tribunal stated that it should determine whether the foreign investor in this case conducted activities in the same economic or business sector as the domestic investors by interpreting the phrase "in like circumstances" with reference to the Declaration and Decision on International Investment and Multinational Enterprises issued by the OECD (in which both the US and Canada participate). Furthermore, the Tribunal stated that, in determining whether a governmental measure was violating the principle of national treatment, whether the government had a "protectionist intent" was not a decisive element; rather, the focus should be on the practical effect of the measure, including whether the measure disproportionately benefits nationals over non-nationals. The Canadian government alleged that the measure was adopted for a valid public purpose, that is, to maintain its ability to conduct domestic PCB processing. Although the Tribunal acknowledged the validity of the alleged purpose, it dismissed the Canadian government's claims, stating that there should have been other legitimate means to achieve the same purpose.

(ii) Pope & Talbot, Inc. v. Canada, UNCITRAL Arbitration Rules, NAFTA, Award on the Merits, April 10, 2001.

[Summary of the decision]

a) Domestic investors and foreign investors are deemed as being "in like circumstances" if they belong to the same economic or business sector.

b) If the difference in the treatment of domestic investors and that of foreign investors bears a reasonable relationship to rational policies not motivated by preference of domestic over foreign owned investments, these two types of investors are deemed as not being "in like circumstances" and such differentiated treatment would be justified.

Pope & Talbot, a US company, established a subsidiary company in the US, which engages in the production of softwood lumber. Exports to the US accounted for a great part of the company's sales. However, the company's exports became regulated under the Canada-US Softwood Lumber Agreement. This measure applied a complex export quota to duty-free exports from specific provinces in Canada, including the province in which the company's subsidiary was located, while it did not apply any regulation on exports from other provinces. Pope & Talbot alleged that these export regulations constituted discriminatory treatment and a violation of national treatment obligation. As stated above, NAFTA provides that each party must accord to investors of another party treatment no less favorable than it accords, "in like circumstances," to its own investors.

The Arbitral Tribunal stated that, in order to determine whether the foreign investors and domestic investors in this case were in the like circumstance, it needed to compare the foreign investors with the domestic investors that belong to the same economic or business sector. The Tribunal then stated that even if there were a difference in the treatment of domestic investors and that of the foreign investors, such difference would be justified "by showing that it bears a reasonable relationship to rational policies not motivated by preference of domestic over foreign owned investments." In conclusion, the Tribunal determined that the export regulation imposed on certain provinces for the purpose of avoiding countervailing duty actions by the U.S. government was a rational policy. Thus, this measure did not constitute a violation of national treatment obligation, because the foreign investors were not "in like circumstances" to the domestic investors in the provinces to which the export regulation was not applied.

(iii) Occidental Exploration and Production Company v. Ecuador, London Court of International Arbitration Case No. UN3467, US-Ecuador BIT, Final Award, July 1, 2004.

[Summary of the decision]

In light of the purpose of national treatment obligation, domestic investors and foreign investors may be deemed as being "in like situations" even if they do not belong to the same business sector.

Occidental, a US company, submitted a request for arbitration, claiming that the company could not receive VAT refunds under Ecuador's tax laws even though exporters of other kinds of goods were entitled to do so, and that this constituted a violation of the national treatment obligation under the US-Ecuador BIT. The Ecuadorian government alleged that this was not discriminatory treatment against foreign investors, as it did not grant VAT refunds to Petroecuador, a domestic oil company, either. The BIT provided that each party must treat the companies of the other party on a basis no less favorable than that accorded "in like situations" to investment of its own companies.

The Arbitral Tribunal stated that the purpose of national treatment obligation is to protect foreign investors as compared to local producers, and whether investors were "in like situations" cannot be determined by referring exclusively to the sector in which that particular activity was undertaken. Furthermore, the Tribunal stated that the reference in the BIT to "in like situations" is different from that to "like products" in the GATT, because "like products" relates to competitive and substitutable products, while "in like situations" can relate to all exporters that share such condition. Accordingly, the Tribunal concluded that there was a violation of the national treatment obligation.

*See (1)(h)(i) above for the exclusion of matters of taxation.

(iv) Champion Trading Company Ameritrade International, Inc. v. Egypt, ICSID Case No. ARB/02/9, US-Egypt BIT, Award, October 27, 2006.

[Summary of the decision]

A "like situation" has been defined as a similar situation that should be assessed within the same business or economic sector.

Champion Trading (a US company), et al. submitted a request for arbitration, claiming that the Egyptian government's decision to implement a compensation program (granting an amount equivalent to the gap between the market price and the government-designated price), which only benefited the state-owned cotton companies to the exclusion of foreign companies, including Champion Trading, constituted a violation of the national treatment obligation under the US-Egypt BIT. The BIT provides that each party shall accord companies of the other party treatment no less favorable than that accorded in like situations to its own companies.

The Arbitral Tribunal noted that in order for companies to be eligible for the compensation program, they had to purchase cotton from the government's Collection Center at a price designated by the government, not from the market. The Tribunal determined that there was a significant difference between a company opting to buy cotton from the Collection Centres at fixed prices and a company opting to trade on the free market. The Tribunal then determined that the claimant, which bought cotton solely from the market, and other companies were not in comparable situations in terms of the payment of compensation. Since the Tribunal reached the conclusion that the claimant and other companies were not in "like situations," as stated above, it determined, without examining whether there was a discriminatory treatment based on nationality, that Egypt did not violate the national treatment obligation.

(v) United Parcel Service of America Inc. v. Canada, UNCITRAL Arbitration Rules (referred to ICSID), NAFTA, Award on the Merits, May 24, 2007.

[Summary of the decision]

a) A foreign investor that alleges a violation of Article 1102 of NAFTA (national treatment) must establish the following elements: [1] that the Respondent State accorded treatment with respect to the establishment, acquisition, expansion, management, etc. of investments; [2] that the foreign investor or investment was "in like circumstances" with local investors or investments; and [3] that the Respondent State has treated the foreign investor or investment less favorably than it treated the local investors or investments.

b) In determining whether investors were "in like circumstances," all the relevant circumstances in which the treatment was accorded must be considered.

UPS, a US company, submitted a request for arbitration, claiming that Canada had enforced its customs laws in a way that is preferential to Canada Post (a state-owned company; it has a monopoly on postal services, but not on delivery services), violating the national treatment obligation under NAFTA.

The Arbitral Tribunal determined that the measures in dispute constituted "treatment." The Tribunal then stated that to determine whether UPS and Canada Post were "in like circumstances" it needed to consider all the relevant circumstances in which the treatment was accorded. The Tribunal noted that the issue arose from inherent distinctions between postal traffic and courier shipments that require the Canadian customs to implement different programs for the processing of goods imported as mail and for goods imported by courier, including UPS. The Tribunal determined that with respect to the customs measure in question postal traffic and courier shipments are not "in like circumstances". As grounds for this conclusion, the Tribunal set out the following differences between postal traffic and courier shipments: [1] couriers provide detailed advance information on shipments, thus permitting the customs authority to carry out risk assessments and other checks; [2] self-assessment in the courier stream as contrasted to officer determinations in the postal process; and [3] greater security of courier shipments through secure shipping routes and trade chain controls. The Tribunal concluded that UPS and Canada Post were not "in like circumstances" and denied the claim that Canada's measures violated the national treatment obligation.

(vi) Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. Mexico, ICSID Case No. ARB (AF)/04/5, NAFTA, Award, November 21, 2007.

[Summary of the decision]

a) <u>The object of Article 1102 of NAFTA is to ensure that a national measure does not upset the competitive relationship between domestic and foreign investors.</u>

b) <u>A violation of the national treatment obligation is established by showing that a foreign investor has unreasonably been treated less favorably than domestic investors in like circumstances.</u>

The claimants, two US companies, established a joint venture ALMEX in Mexico. It had been producing high fructose corn syrup (HFCS). However, the Mexican government decided to impose a 20% tax on the trading of soft drinks and syrups using sweeteners other than sugar, such as HFCS. The claimants submitted a request for arbitration, claiming that the tax was intended to discriminate against the HFCS industry and to protect the domestic sugar industry, and that the Mexican government violated the national treatment obligation.

The Arbitral Tribunal first examined whether the HFCS producers and the Mexican sugar industry were "in like circumstances." With reference to the precedents under NAFTA, the Tribunal determined that they were "in like circumstances," because they both were part of the same sector, competing face to face in supplying sweeteners to the soft drink and processed food markets. With respect to whether the tax constituted discriminatory treatment, the Tribunal noted that [1] the tax on HFCS was higher than that on domestic products; and [2] the tax had an intent and effect to protect the Mexican sugar industry. Based on these findings, the Tribunal determined that the measure taken by the Mexican government was discriminatory in its nature and concluded that Mexico violated the national treatment obligation.

2) MOST-FAVOURED-NATION TTREATMENT

(1) Cases concerning arbitration procedures

(i) Emilio August Maffezini v. Spain, ICSID Case No. ARB/97/7, Argentina-Spain BIT, Decision on Objections to Jurisdiction, January 25, 2000.

[Summary of the decision]

If the scope of the most favored nation clause is defined in broad terms and if a BIT with a third country contains provisions for arbitration procedures that are more favorable to investors than those in the basic treaty, such provisions may be extended to the beneficiary of that clause, even if there is no clear reference to this effect in the text of the treaty. However, this operation of the most favored nation clause has limits arising from public policy considerations.

Mr. Maffezini, an Argentine national, submitted a request for arbitration, claiming that the acts of a financial institution in Spain, which was his partner in a joint venture, caused the failure of the venture and his investments in Spain. He asserted these acts constituted a violation of the Argentina-Spain BIT. The Spanish government submitted objections to the Arbitral Tribunal's jurisdiction on the grounds that the claimant did not satisfy the procedural requirement under the BIT, which provides that a dispute of this sort needs to be submitted to domestic proceedings in Spain before it is submitted to arbitration. The claimant alleged that the provision under the Spain-Chile BIT stipulates that a party can submit a dispute directly to arbitration, without undergoing domestic proceedings, and the same right should be granted to the claimant based on the most favored nation clause under the Argentina-Spain BIT.

The Tribunal noted that the Argentina-Spain BIT provides that its most favored nation clause applies to "all matters subject to this Agreement." It also included consideration of the role that arbitration under an investment treaty plays in the protection of investments. As a result, the Tribunal determined that the most favored nation clause applied to the provision for the settlement of disputes. While the Tribunal also noted that the operation of the most favored nation clause might be limited by "public policy considerations," it concluded that such limitation did not apply in this case.

(ii) Plama Consortium Limited v. Bulgaria, ICSID Case No. ARB/03/24, Energy Charter Treaty and Bulgaria-Cyprus BIT, Decision on Jurisdiction, February 8, 2005.

[Summary of the decision]

To determine whether the most favored nation clause can be construed as extending to the arbitration mechanism contained in a BIT with a third country, the parties' intention to this effect must be clearly apparent in the treaty that contains the most favored nation clause.

Plama, a Cyprus company, submitted a request for arbitration, claiming that the Bulgarian government's action against the company's subsidiary in Bulgaria constituted a violation of the Bulgaria-Cyprus BIT and of the Energy Charter Treaty. The Bulgarian government submitted objections to the Arbitral Tribunal's jurisdiction, asserting that jurisdiction would require the parties to provide separate consents to submit a dispute under the BIT to arbitration. Plama alleged that the arbitration procedures provided under the Bulgaria-Finland BIT (ICSID arbitration) should be applied to the present dispute through the most favored nation clause of the Bulgaria-Cyprus BIT.

The Arbitral Tribunal found that there is no conclusive evidence either in the text of the most favored nation clause, in the context thereof, or in the BIT's object and purpose, to demonstrate that the parties agreed to include arbitration procedures in the scope of the most favored nation clause. With reference to the background of the negotiation on the amendment of the Bulgaria-Cyprus BIT, the Tribunal concluded that the parties had no intention to apply the most favored nation clause to arbitration procedures, stating that it was not possible to construe that each party consented to submit the dispute to arbitration.

*See (1)(c-1)(ix) above for the decision on "investments" at the merits phase.

(iii) Wintershall Aktiengesellschaft v. Argentina, ICSID Case No. ARB/04/14, Germany-Argentina BIT, Award, December 8, 2008.

[Summary of the decision]

a) Requirements set forth in the dispute settlement provisions under the BIT (obligation to seek amicable settlement, submission of dispute to domestic courts prior to arbitration, etc.), which a Claimant must satisfy before submitting a dispute to arbitration, are important elements that constitute the foundation for the consent of the Respondent State to arbitration.

b) The most favored nation clauses are not construed as extending to arbitration procedures, except when the clauses clearly provide to this effect.

Wintershall Aktiengesellschaft, a German company, submitted a request for arbitration, claiming that measures that the Argentine government took in the midst of the financial crisis in 2001 infringed the rights and profits of the company's subsidiary in Argentina and these acts constituted a violation of the Germany-Argentina BIT. Article 10 of the BIT provides for the requirements that must be met before the submission of a dispute to arbitration, namely that no substantive decision is reached by domestic courts during a period of 18 months, or that the dispute still continues regardless of a decision that already has been reached. The company's subsidiary in Argentina alleged that, even though it had not filed a lawsuit in domestic courts in Argentina, the provisions for dispute settlement procedures under the Argentina-US BIT, which does not require an 18-month period for domestic proceedings, should be applied to the present dispute based on the most favored nation clause under the Germany-Argentina BIT.

The Arbitral Tribunal did not support application of the most favored nation clause and denied its jurisdiction. In addition to a) and b) above, the Tribunal gave the following as the reasons for this decision: c) the phrase "investment related activities" used in the BIT refers to business activities in the host country; activities related to the settlement of disputes are not included in the scope of this phrase; and d) there are significant differences between the arbitration procedures as provided under the Germany-Argentina BIT and those as provided under the US-Argentina BIT, including that they offer different dispute settlement forums.

(iv) Impregilo S.p.A. v. Argentina, ICSID Case No. ARB/07/17, Argentina-Italy BIT, Award, May 17, 2011.

[Summary of the decision]

If the BIT contains provisions that both [a] disputes are to be submitted to domestic courts and [b] disputes may be submitted to arbitration after 18 months from the time the domestic lawsuit was instituted, it should be interpreted that, in light of the text of the treaty and the context thereof, the investors are obligated to submit a dispute to domestic courts first, and they are allowed to submit the dispute to international arbitration only after 18 months.

Impregilo S.p.A. (the claimant), an Italian company, entered into a concession contract with the state government for water services. Based on this contract, the company established a subsidiary in Argentina, AGBA, to provide these services. Following the economic crisis, the state government notified the company of the discontinuation of the collection of fees and the prohibition on rate increases. In response, AGBA demanded revision of the contract. The Argentine authority did not accept this proposal, while it approved rate hikes by companies in other areas and granted compensation to them. AGBA claimed that it was discriminatory against it and demanded equal treatment. However, this request was also dismissed. Furthermore, the state government imposed a financial penalty on AGBA on the grounds that it breached the contract, and notified AGBA of the termination of the contract and the transfer of its license to another firm.

The Argentine government submitted objections to the Arbitral Tribunal's jurisdiction, on the grounds of violations of Article 8(2) (submission to domestic courts) and 8(3) (a dispute can be submitted to arbitration only if it was previously submitted to domestic courts for at least 18 months). The Tribunal noted that there are two ways to interpret these provisions, namely, [a] submission of disputes to domestic courts is optional, and only when an investor choose this option does Article 8(3) become applicable; or [b] an investor is obligated to submit disputes to domestic courts and the disputes can be submitted to arbitration only after 18 months have passed. The Tribunal then stated that it should consider not only the text of the treaty but also the context thereof in order to solve the ambiguity of the provisions. The Tribunal noted that [1] if interpretation as described in [a] above was adopted, investors would be able to choose to submit a dispute to arbitration immediately or after the 18-month waiting period, which it believed to be contrary to the parties' intention and [2] Article 8(3) indicates that it contains a general condition for international arbitration, and there is no exception for the situation where there had been no domestic proceedings. Based on these findings, the Tribunal concluded that it should adopt the interpretation described in [b] above, accepting Argentina's allegations. Other tribunals where similar sentences of BITs were contested (the *Maffezini* case and *Wintershall* case) also adopted the same interpretation.

(2) Cases concerning substantive obligations

(i) Parkerings-Compagniet AS v. Lithuania, ICSID Case No. ARB/05/8, Norway-Lithuania BIT, Award, September 11, 2007.

[Summary of the decision]

a) <u>Investors of the contracting party of the BIT and investors of a third country are deemed as being "in like circumstances" if they belong to the same economic or business sector.</u>

b) <u>When differences in the treatment of investments in dispute can be justified by the nation's legitimate purpose, these two groups of investors are deemed as not being "in like circumstances" and, therefore, less favorable treatment accorded to one of these groups will be deemed not to violate the most favored nation obligation.</u>

Parkerings, a Norwegian company, entered into contract with the City of Vilnius, Lithuania, which contains a historical site inscribed on the World Heritage List, for the development and operation of public parking facilities. However, it was revealed later that this contract was not consistent with Lithuanian law. Furthermore, it also turned out that the existing contract was not in accordance with a new law that had just been enacted. Negotiations on the revision of the contract were difficult. Meanwhile, a governmental organization submitted its view that the construction of proposed parking facilities was undesirable in terms of harmony with the scenery and for environmental reasons. The government of Vilnius annulled the contract with the company on the grounds of the company's non-performance of obligations under the contract, including the provision of information. Parkerings submitted a request for arbitration, claiming that the government's treatment accorded to the company was discriminatory in comparison with that accorded to companies from other countries with which the government had entered into similar contracts, and thus Lithuania violated the most favored nation clause under the Norway-Lithuania BIT.

With respect to the interpretation of the phrase "in like circumstances" under the most favored nation clause, the Tribunal referred to the decision in the *Pope & Talbot* case, stating as described in a) and b) above. The Tribunal then compared the plans proposed by the claimant and those proposed by other companies and determined that they were not "in like circumstances" from the viewpoint of the size of the parking facilities and the distance from culturally important sites. In conclusion, the Tribunal dismissed the claim regarding the government's violation of the most favored nation clause.

*See (2)(c)(iv) below for the decision on fair and equitable treatment.

*If the BIT based on which a dispute is submitted to arbitration contains most favored nation clauses, favorable treatment provided under a BIT concluded between the host country and a third country may be extended, depending on the interpretation of the most favored nation clause. For example, in Rumeli and Telsim v. Kazakhstan (ICSID Case No. ARB/05/16), the BIT based on which the dispute was submitted to arbitration did not contain any provision for fair and equitable treatment. However, since the BIT concluded with the host country and a third country contained a provision for fair and equitable treatment, the Tribunal construed that the claimant had the right to receive the same treatment based on the most favored nation clause in the first-mentioned BIT.

(ii) MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Chile, ICSID Case No. ARB/01/7, Malaysia-Chile BIT, Award, May 25, 2004.

[Summary of the decision]

<u>The fact that the most favored nation clause excludes tax treatment and regional cooperation from its scope means that other matters, including fair and equitable treatment, are included in its scope.</u>

MTD Equity Sdn., a Malaysian company, was planning the development of a residential area in a part of the suburb of Santiago, Chile. Assuming that the zoning of that area would be changed, the company made investments in the local subsidiary after obtaining approval for the investment project from the Foreign Investment Committee. After the investments were made, however, the Ministry of Housing and Urban Development did not approve the change of zoning on the grounds that it was not compatible with its city development policies. The project was forced to discontinue. MTD submitted a request for arbitration, claiming that the government's rejection of zoning changes after the company's investments constituted [1] a violation of fair and equitable treatment and [2] an illegal expropriation under the Malaysia-Chile BIT.

The Claimant alleged that the provision for fair and equitable treatment under the Chile-Croatia BIT should be applied to this dispute based on the most favored nation clause under the Malaysia-Chile BIT. The Arbitral Tribunal accepted the claimant's allegations, noting that [a] the fact that the most favored nation clause under the Malaysia-Chile BIT excludes tax treatment and regional cooperation from its scope means that other matters, including fair and equitable treatment, are included in its scope; and that [b] the provision for fair and equitable treatment should be interpreted in a way that conforms to the purpose of the BIT, namely, the protection of investors and creation of a sound investment environment; and extending the effects of this provision to the beneficiary of the most favored nation clause would conform to this purpose.

3) FAIR AND EQUITABLE TREATMENT/MINIMUM STANDARD OF TREATMENT

(i) CMS Gas Transmission Company v. Argentina, ICSID Case No. ARB/01/8, US-Argentina BIT, Award, May 12, 2005.

[Summary of the decision]

A stable legal and business environment is an essential element of fair and equitable treatment.

CMS, a US company, acquired shares in TGN, a privatized gas company in Argentina. During the economic crisis, the government of Argentina failed to comply with the tariff regime stipulated under the law and license contract, straining the company's earning structure.

The Arbitral Tribunal stated that there were no grounds for exemption of liability under the law, including an emergency (see (2)(f)(i-1) below), and determined that the government violated the obligation of fair and equitable treatment. In determining that Argentina violated this obligation, the Tribunal referred to the preamble to the US-Argentina BIT and stated that a stable legal and business environment is an essential element of fair and equitable treatment. Furthermore, the Tribunal stated that this obligation is provided under many other BITs and is inseparable from providing stability and predictability. The Tribunal determined that the government violated this obligation, stating that non-compliance with the tariff regime meant that it failed to keep the guarantee that was extremely important in making the decision to invest.

*The Argentine government filed an application for annulment of decision. The Ad Hoc Committee annulled the decision on September 25, 2007, except for the above part. (See (2)(f)(i-2) below.)

(ii) Eureko B.V. v. Poland, Netherlands-Poland BIT, Partial Award, August 19, 2005.

[Summary of the decision]

Government acts that are arbitrarily and politically motivated constitute a violation of the obligation of fair and equitable treatment.

Eureko, a Dutch company, entered into a contract with Poland to purchase additional shares in a previously state-owned insurance company in Poland, PZU, at the initial public offering. Eureko was supposed to own a majority share in PZU after this additional purchase. However, the public offering of PZU had been pending, because the government unilaterally changed the plan. Eureko submitted a request for arbitration, claiming that the Polish government intentionally delayed the public offering of the stock of PZU by taking various actions, while "the privatization of PZU was becoming more and more a political issue." The company alleged these actions were a violation of the Netherlands-Poland BIT.

With reference to the statement of Minister of State Treasury of Poland, the documents of the Cabinet decision, and a report of Supreme Audit Chamber, the Arbitral Tribunal found that Poland changed its plan to privatize PZU because it determined it needed to maintain control over PZU. The Tribunal then determined that Poland acted "for purely arbitrary reasons linked to the interplay of Polish politics and nationalistic reasons of a discriminatory character," and concluded that Poland violated the obligation of fair and equitable treatment.

(iii) Saluka Investments BV (The Netherlands) v. Czech Republic, UNCITRAL Arbitration Rules, Netherlands-Czech Republic BIT, Partial Award,

March 17, 2006.

[Summary of the decision]

In order to comply with the obligation of fair and equitable treatment, the government must [1] ensure consistency, transparency, even-handedness and non-discrimination, and [2] not frustrate investors' legitimate and reasonable expectation.

Saluka, a Dutch company (subsidiary of a Japanese company), owned 46% of the shares of IPB, a previously state-owned bank in the Czech Republic. IPB and three state-owned banks played important roles in the financial market, although they all had an enormous amount of bad debts. The Czech government provided financial assistance, including injections of public funds, to the three state-owned banks, while it did not provide any such assistance to IPB, which was in the same situation as these banks; nor did it provide Saluka any opportunity for negotiation. As IPB's finances declined significantly, the central bank took over its management and the bank was later transferred to another state-owned bank.

With respect to the obligation of fair and equitable treatment as provided under the Netherlands-Czech BIT, the Arbitral Tribunal stated that the government is required not to frustrate foreign investors' legitimate and reasonable expectations. The Tribunal further noted that investors have the right to expect that the state will not act in a way that is manifestly inconsistent, non-transparent, unreasonable or discriminatory. The Tribunal then noted that the discriminatory response to IPB's bad debts, namely, that it excluded the bank from the scope of public fund injections without any reasonable grounds, and the government's unfaithful and non-transparent attitude toward negotiation frustrated the investor's legitimate and reasonable expectations. The Tribunal concluded that the Czech government violated the obligation of fair and equitable treatment.

(iv) Parkerings-Compagniet AS v. Lithuania, ICSID Case No. ARB/05/8, Norway-Lithuania BIT, Award, September 11, 2007.

[Summary of the decision]

a) A violation of the obligation of fair and equitable treatment is established when investors are deprived of their legitimate expectations that the environment as of the time of the conclusion of the agreement will not change.

b) Investors have the right to receive the protection of its legitimate expectation only when the expectations under the circumstances in dispute were reasonable and when they have paid proper attention to the circumstances. (See (2)(b-2)(i) above for the facts.)

Parkerings asserted that Lithuania violated the obligation of fair and equitable treatment in that the City of Vilnius [1] was aware that the charging method provided under the contract was incompatible with Lithuanian law but did not inform the company of this during the negotiation of the contract; and [2] frustrated the company's legitimate expectation that the legal environment would not change.

The Tribunal dismissed both of the claims on violation of the obligation of fair and equitable treatment for the following reasons. With respect to the claim described in [1], the Tribunal referred to the company's conduct of research on the contract's compatibility with Lithuanian law. The Tribunal noted that foreign investors making investments in Lithuania must have been aware that the country's legal infrastructure was not stable, as considerable changes in the political regime and economy were ongoing. The Tribunal also noted that the determination of the contract's compatibility with Lithuanian law did not require information that was exclusively accessible by the city government. With respect to the claim described in [2], the Tribunal did not recognize violation of the obligation of fair and equitable treatment, referring to its understanding of said obligation as described in a) and b) above. The Tribunal noted that the expectation that the legal environment would not change was not something based on an explicit or implicit promise from Lithuania. The Tribunal also noted that in 1998, at the time of the agreement on the contract, the political environment in Lithuania was in transition from being part of the Soviet Union to being a candidate for European Union membership; and under such circumstances, any businessperson should be aware of the risk that changes of laws would probably occur after the conclusion of the contract. The Tribunal also stated that the company failed to prove that the amendment of the law was conducted with an intention to cause damage to the company's investments.

(v) Duke Energy Electroquil Partners and Electroquil S.A. v. Ecuador, ICSID Case No. ARB/04/19, US-Ecuador BIT and Arbitration Agreement, Award, August 18, 2008.

[Summary of the decision]

<u>The stability of the legal and business environment is directly linked to the investor's justified expectations and such expectations are an important element of fair and equitable treatment. b) To be protected, the investor's expectations must be legitimate and reasonable when the investor makes the investment. Such expectations must arise from the conditions that the State offered the investor and the latter must have relied upon them when deciding to invest.</u>

Electroquil was the first private power generation company in Ecuador. The company had supplied electricity to INECEL, a state-owned power company, since 1995 based on power purchase agreements (PPAs). The PPAs were concluded in 1995 and 1996, both of which included a provision: [a] concerning the establishment of a payment trust to secure the purchase amount and payment; and [b] for INECEL's right to charge a penalty in the event the supply from Electroquil fell below the warranted amount. In 1998, Duke Energy, a US company, acquired a controlling share in Electroquil. In 1999, INECEL was dissolved in accordance with the law, and the government of Ecuador assumed the company's rights and obligations based on an administrative order. Because there was a dispute between the claimant and the Ecuadorian government concerning unpaid invoices and the legitimacy of charged penalties, Electroquil submitted the case to domestic arbitration based on the arbitration agreement. The Attorney General submitted objections to jurisdiction during the arbitration process, but they were dismissed. The final award given by the local arbitral tribunal declared that the arbitration clause was invalid pursuant to the Ecuadorian law. The claimant alleged that these acts by the Ecuadorian government violated the US-Ecuador BIT.

The Arbitral Tribunal examined whether Ecuador violated the obligation of fair and equitable treatment from the viewpoint of [i] the execution of the PPAs, [ii] the government's non-compliance with the payment guarantee, and [iii] the context of the arbitration agreement. With respect to the delayed payments and irregular imposition of penalties based on the PPAs as referred to in [i] above, the Tribunal stated that these acts constituted conduct that any contract party could adopt; thus they did amount to a breach of fair and equitable treatment. Duke Energy insisted that it had reasonable expectations that there would be no outstanding penalties under the PPAs. The Tribunal dismissed this claim, noting that, when it made its investments, Duke Energy was aware of the risk that Electroquil could be fined and concluded that there was no violation of the obligation in this regard. With respect to [ii] above, the Tribunal stated that the 1996 PPA contained a provision for the government's payment guarantee and thus Electroquil's expectations could not be deemed mere contractual expectations. The Tribunal further stated that, since Duke Energy received the government's payment guarantee prior to making its investments in 1997, its expectations also were reasonable. Accordingly, the Tribunal determined that Ecuador violated the obligation of fair and equitable treatment against both claimants. With respect to the arbitration agreement as referred to in [iii] above, the Tribunal found that it was concluded two years after Duke Energy's investments and thus this was not an expectation protected based on the obligation of fair and equitable treatment.

*See (1)(h)(iii) above for the decision on exclusion of matters of taxation

(vi) Glamis Gold, Ltd. v. US, UNCITRAL Arbitration Rules, NAFTA, Award, June 8, 2009.

[Summary of the decision]

a) Article 1105 of NAFTA prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

b) Since it was established in the 1920s, the standard has not changed. However, as a result of the course it took since then, a finding of bad faith is no longer a requirement for a breach of the minimum standard of treatment obligation.

Glamis, a Canadian company that engages in gold mining business in California, submitted a request for arbitration, claiming that a series of measures taken by the US Federal Government and State agencies, including an order for the reclamation of mined land, due to environmental and cultural concerns, were inconsistent with the customary international law minimum standard of treatment as warranted under Article 1105 of NAFTA.

The Arbitral Tribunal firstly confirmed that there is no dispute between the parties that the minimum standard of treatment under Article 1105 of NAFTA (which includes the obligation of fair and equitable treatment) prescribes the customary international law minimum standard of treatment of aliens. The Tribunal then referred to the *Neer v. Mexico* arbitration in 1926, which established the minimum standard, stating "the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful 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." The Tribunal examined how this minimum standard has evolved since then. It stated that, since many BITs include different protections than those provided for in customary international law, it would only examine BITs that appear to seek to provide the same base floor of conduct as the minimum standard of treatment under customary international law. The Tribunal then referred to the scope of the minimum standard of treatment under customary international law. It concluded that, although the meaning and content of the standard have been changing over time, the *Neer* standard still applies today, except for the requirement of "bad faith." The Tribunal then stated that the customary international law minimum standard of treatment is an absolute, non-contingent standard, as opposed to the standards embodied in national treatment, which may vary from country to country. Thus, a violation of the minimum standard obligation should be determined based on objective criteria. The Tribunal stated that a breach of Article 1105 of NAFTA may exist when there was "a gross denial of justice or manifest arbitrariness falling below accepted international standards" or the creation by the state of objective expectations in order to induce investment and the subsequent repudiation of those expectations.

With respect to the present case, the Tribunal determined that none of the decisions of the Department of the Interior to dismiss the claimant's project plan, the Federal Government's examination procedures for the project plan, or California's legislation and emergency regulations constituted an arbitrary act as stated above; nor did they repudiate the investor's legitimate expectations. The Tribunal held that it could not see that the Federal and State Government's measures as a whole would be a violation of the obligation linked to the minimum standard of treatment, in light of the facts and situations of the present case. Based on the above findings, the Tribunal dismissed Glamis' claim of violation of Article 1105 of NAFTA.

(vii) Walter Bau v. Thailand, UNCITRAL Arbitration Rules, Thailand-Germany BIT, Award, July 1, 2009.

[Summary of the decision]

<u>Disregard of reasonable requests for toll increases over a long period and the complete closure of the airport infringed part of the reasonable expectations of the investor and constituted a violation of the obligation of fair and equitable treatment.</u>

The claimant, Walter Bau (a German company), entered into a concession agreement with the Thai government for the renovation of a highway connecting the capital city and the airport. The company established a joint venture with a local company. However, the entire construction work was delayed, because Thailand later refused the initial plan for turning of flyovers. The company claimed that this caused a reduction in toll fees and that it suffered damages since the Thai government disregarded the company's requests for toll increases. Based on these claims, the company submitted a request for arbitration. The Thai government submitted objections to the Arbitral Tribunal's jurisdiction *ratione temporis*, alleging that the present dispute had arisen before the entry into force of the BIT.

The Tribunal determined that reasonable toll fees were part of the claimant's reasonable expectations due to the following four reasons: [1] the semi-public nature of the concession; [2] the inherent unlikeliness that any investor would contemplate entering into such a long-term arrangement without a legitimate expectation of reasonable return; [3] the tolls to be received constituted the only way in which the reasonable return on investment could be achieved; and [4] there had been extensive consideration of the economic viability of the concession, including a memorandum of agreement on the improvement of the management. The Tribunal found that the Thai government kept refusing over a long period the claimant's requests for toll increases, which were stated in the memorandum of agreement, and the Thai government thereby violated the obligation of fair and equitable treatment. The Tribunal also found that the complete closure of the airport for six months and the construction of a toll-free road and changes to the road network by another contractor did not fall within the scope of "change of use of airport" or "traffic management," which the memorandum of agreement defined as not constituting a violation of the concession agreement. Accordingly, the Tribunal determined that these acts infringed the investor's reasonable expectations and constituted a violation of the obligation of fair and equitable treatment.

(viii) Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentina, ICSID Case No. ARB/03/19; AWG Group v. Argentina, UNCITRAL Arbitration Rules, France-Argentina BIT/Spain-Argentina BIT/UK-Argentina BIT, Decision on Liability, July 30, 2010.

[Summary of the decision]

<u>The concept of full protection and security is included within the concept of fair and equitable treatment, but the scope of full protection and security is narrower. The provision of full protection and security imposes an obligation upon a host state to exercise due diligence to protect investors and investments from physical injuries; this provision does not include the stability of the business environment and legal security in its scope.</u>

The claimants (a French company, a Spanish company, and a British company) submitted a request for arbitration with respect to a dispute that arose from the concession contract they entered into with the Argentine government, claiming that the government's acts since the financial crisis in 1998 constituted direct and indirect expropriation of their investments and violated the obligation to provide full protection and security, as well as the obligation of fair and equitable treatment. Argentina alleged [1] that the defense of necessity under international law excuses any failure to satisfy its BIT commitments and [2] that the provisions in the Argentina-France BIT and the Argentina-UK on national emergencies pre-empt the application of other BIT provisions.

The Arbitral Tribunal stated that traditionally cases applying the obligation to provide full protection and security have dealt with injuries to physical assets of investors committed by third parties where host governments failed to exercise due diligence in preventing the damage or punishing the perpetrators. The Tribunal then noted that a few arbitral tribunals have sought to expand the scope and content of the "full protection and security" clause beyond protection from physical injury, and have interpreted it to apply to unjustified administrative and legal actions taken by a government. However, the Tribunal stated that in light of the text of the France-Argentina BIT, which requires that "investors are to be [...] fully and completely protected [...] in accordance with the principle of just and equitable treatment mentioned in Article 3," the concept of full protection and security is included within the concept of fair and equitable treatment, but the scope of full protection and security is narrower than the fair and equitable treatment. The Tribunal then noted that an overly extensive interpretation of the full protection and security standard might result in an overlap with the other standards of investment protection, which is neither necessary nor desirable. The Tribunal also stated that it was inclined to think that the absence of the word "full" or "fully" in the UK-Argentina and Spain-Argentine BITs supported this view that the obligation of protection and security was limited to providing physical protection and legal remedies for the British and Spanish investors and their investments. Accordingly, in opposition to the *CME* and *Azurix* awards, the Tribunal interpreted that the clause implied only an obligation to exercise due diligence to protect investments from physical threats, and determined that it would not extend to an obligation to maintain the stability of the business environment or legal security.

(ix) AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Hungary, ICSID Case No. ARB/07/22, Energy Charter Treaty, Award, September 23, 2010.

[Summary of the decision]

<u>If the government has made no commitment to ever introduce any new regulation, measures that have been taken indiscriminately and for a legitimate regulatory purpose do not constitute a violation of the obligation of fair and equitable treatment.</u>

UK company AES Summit (the claimant) entered into a power purchase agreement (PPA) with a Hungarian state-owned company in 1996. In 2001, the company made additional investments based on a new agreement. However, following a political debate that power companies earned unreasonably high profits, the Hungarian government recommended lowering the electricity price in 2005. In the following year, the Hungarian parliament amended the Electricity Act and introduced price regulation (Price Decree). The claimant submitted a request for ICSID arbitration, claiming that these measures constituted a violation of the Energy Charter Treaty.

The claimant made the following allegations. [1] The Hungarian government violated the obligation to provide a stable legal and business framework. [2] The Hungarian government violated the obligation to respect legitimate expectations. The introduction of the Price Decree was arbitrary, non-transparent and lacking in due process, and this constituted a violation of the obligation of fair and equitable treatment. [3] The introduction of the Price Decree was an unreasonable and discriminatory measure targeted at a limited number of companies.

With respect to [1] above, the Arbitral Tribunal noted that no specific commitments were made by Hungary that could limit its sovereign right to change its law and determined that the claimant was aware, at the time of the conclusion of the PPA in 2001, that a change in the law could occur. With respect to [2] above, the Tribunal stated that there was no procedural failing, noting that the Hungarian government provided the claimants with various adjustment measures prior to the introduction of the measure in dispute. With respect to [3] above, the Tribunal determined that the introduction of the Price Decrees was not a discriminatory measure on the grounds that [a] it was reasonable and legitimate that the Hungarian government took actions against the excessively high profits the claimants enjoyed in the absence of either competition or regulation; and [b] a common pricing schedule was applied to all power companies. Based on the above findings, the Tribunal dismissed the claim on a violation of obligations under the treaty.

(x) Chemtura Corporation v. Canada, UNCITRAL Arbitration Rules, NAFTA, Award, August 2, 2010.

[Summary of the decision]

<u>Since the measures taken by the Canadian authority for the cancellation of lindane registration were not discriminatory and were decided based on health risks, they do not constitute a violation of Article 1105 (minimum standard of treatment) or Article 1103 (most favored nation treatment) of NAFTA.</u>

US company Chemtura Corporation (the claimant) produced lindane, an agricultural chemical mainly used for the production of canola (a kind of rapeseed oil). It sold lindane in Canada through its subsidiary, but the use and distribution of lindane was not allowed in the US. Following the decision of the US Environmental Protection Agency (EPA) in January 1998, the company agreed in December of the same year to voluntarily remove the word “canola” from the product labels by the end of 1999. In October 1999, the claimant concluded a voluntary withdrawal agreement with the Canada Pest Management Regulatory Agency (PMRA). In December 1999, the company discontinued the production of lindane products for canola in Canada and deleted the word “canola” from the labels. In April 2001, the claimant began the first of a series of Federal Court applications for judicial review concerning the prohibition of the use of lindane in Canada. In May 2001, the claimant filed a request with the PMRA for reinstatement of canola use on its lindane labels. The PMRA dismissed this request. The claimant challenged this refusal before the Federal Court of Canada. The PMRA decided to phase-out of lindane registrations by means of suspension of registrations or voluntary discontinuation. Subsequently, the PMRA informed the claimant that the lindane registrations had to be terminated. Based on the request from the claimant, the Canadian government established the Lindane Board of Review in October 2003. The Board prepared a Re-evaluation Note (REN). Dissatisfied with insufficient opportunity to consult with the PMRA, the claimant filed an objection. Eventually, the claimant submitted a request for arbitration, claiming that a series of measures taken by the Canadian government constituted a violation of Article 1105 (minimum standard of treatment) or Article 1103 (most favored nation treatment) of NAFTA.

The Arbitral Tribunal noted that serious concerns about lindane had been raised increasingly at the international level since the 1970s, and that lindane was included in the list of chemicals designated for elimination under the Stockholm Convention on Persistent Organic Pollutants (POPs). In light of these facts, the Tribunal determined that bad faith or disingenuous conduct on the part of Canada could not be found with respect to the cancellation of lindane registrations by the

PMRA. The Tribunal also noted that the claimant was actually offered by the PMRA a phase-out or voluntary discontinuation option, like other lindane product registrants, but refused it. Based on this, the Tribunal determined that Canada, in the exercise of its discretion under regulation, afforded the claimant the same treatment as all the other lindane registrants. The Tribunal thereby dismissed the claim of Canada's violation of Article 1105 of NAFTA.

(xi) Spyridon Roussalis v. Romania, ICSID Case No. ARB/10/6, Greece-Argentina BIT, Award, December 7, 2011.

[Summary of the decision]

a) The sanction imposed by the government authority against the investor engaging in illegal acts did not constitute a violation of the investment treaty.

b) The scope of the arbitration procedures as provided under the BIT is limited to host country's violations of obligations. Therefore, the respondent may not bring a counterclaim against the claimant.

The claimant, a Greek national, is a board member of a Romanian company, Continent Marine Enterprise Import Export. The Authority for State Assets Recovery (AVAS), a Romanian agency, supervises the privatization of state-owned companies. Continent Marine Enterprise Import Export entered into a share purchase agreement with the AVAS to acquire Malimp, a partially-privatized state-owned company, and changed its name to Continent Marine Enterprise.

The claimant alleged that former Malimp newly issued stocks, with Continent as the subscriber, with an aim to increase capital to perform the obligation of an additional post-purchase investment of USD 1.4 million. Romania denied this allegation. The claimant also alleged that the following four measures taken by the Romanian authority amount to indirect expropriation, or at least substantial impairment, of the claimant's investments: [1] the accounting of former Malimp; [2] the order to prohibit the claimant from leaving Romania; [3] the order issued by the National Sanitary Veterinary and Food Safety Authority; and [4] measures taken against the tax-related problems concerning the consultancy fees paid by former Malimp. The claimant also alleged that these measures violated the obligation of fair and equitable treatment and the obligation to provide full protection and security of investments as provided under the Greece-Argentina BIT. Based on these allegations, the claimant submitted a request for arbitration. In response, Romania made an allegation, as a plea prior to the merits, to comprehensively deny the Arbitral Tribunal's jurisdiction. In addition, Romania submitted a counterclaim against the claimant, claiming that the Tribunal should order Continent to take measures concerning the share purchase agreement.

The Tribunal dismissed all of the claimant's claims. As grounds for this decision, the Tribunal noted that the additional investments from Continent to former Malimp as provided under the share purchase agreement were conducted through a fraudulent scheme and the claimant himself was subject to criminal proceedings by the Romanian police on charges of fraud, tax evasion, etc. The Tribunal stated that a sanction against the investor engaging in illegal acts did not constitute a violation of the investment treaty. As for the counterclaim brought by Romania, the Tribunal denied its jurisdiction, stating that it did not believe that counterclaims made by a respondent state are included in the scope of the arbitration procedures under the Greece-Argentina BIT, since the BIT does not impose any duty on investors. In short, the Tribunal determined that the scope of the arbitration procedures provided under the BIT was limited to a host country's violations of obligations.

(xii) Electrabel S.A. v. Hungary, ICSID Case No. ARB/07/19, Energy Charter Treaty, Award, November 25, 2015.

[Summary of the decision]

<u>The fair and equitable treatment clause does not impose on a host state an obligation to give first priority to investors' interests. A host state maintains the right to regulate to protect other public interests.</u>

In 2001 the claimant, Electrabel S.A. (a Belgium company), acquired a majority shareholding in Dunamenti, a Hungarian power generator that had entered into a power purchase agreement (PPA), due to expire at the end of 2010, with MVM, Hungary's only electricity supply company (a state-owned company). After Hungary joined the EU in May 2004, the European Commission determined that the PPA constituted illegal and incompatible state aid under EU law that interfered with a competitive market. The Commission decided that the PPA should be terminated and the power generator should reimburse the state aid it received. Following this decision, Hungary terminated the PPA in January 2009. The claimant submitted a request for ICSID arbitration in June 2007, claiming that the termination of the PPA before its expiration constituted a violation of the provision concerning expropriation and of the provision of fair and equitable treatment under the Energy Charter Treaty. Dunamenti had filed an action at the Court of Justice of the European Union, seeking annulment of the Commission's Decision. The Court dismissed the Dunamenti's claims, confirming the decision's compatibility with EU law.

The decision on the merits is divided into two parts. The decision concerning the termination of the PPA was rendered in 2012. Firstly, the Arbitral Tribunal examined whether an early termination of the PPA constituted an (indirect) expropriation. The Tribunal noted that there is an established standard for the establishment of an indirect expropriation, that is, a substantial deprivation of investment. The Tribunal found that the termination of the PPA, which was merely a part of the investments, was insufficient to meet this standard, determining that it did not constitute an indirect expropriation. The Tribunal then examined whether the termination of the PPA constituted a violation of the obligation of fair and equitable treatment. The claimant alleged that the European Commission's Decision did not require the termination of the PPA and the Hungarian government could have adopted a means that would have caused less damage. The Tribunal dismissed this claim, determining that no violation of the obligation of fair and equitable treatment could be found in the measures taken by Hungary that followed the Commission's Decision requiring the termination of the PPA.

The decision in 2015 concerned the issue of whether the non-payment of net stranded costs, which forms part of the claimant's PPA termination claim, constituted a violation of the obligation of fair and equitable treatment. Hungary calculated the state aid received by Dunamenti as 125 billion HUF and the company's stranded cost (gap between the amount of investments and the expected income in the event of termination of the PPA) as 147 billion HUF. As the latter amount exceeded the former amount, Hungary decided that reimbursement of the state aid was unnecessary. Based on these premises, Hungary decided on non-payment of the net stranded costs, which amounted to 22 billion HUF. The claimant alleged that the Hungarian government violated the obligation of fair and equitable treatment in that: [1] the Hungarian government made an arbitrary decision to refuse the maximum compensation permitted under EU law with the aim of reducing its spending; and [2] the Hungarian government thereby frustrated the claimant's legitimate expectations that its damage would be compensated to the maximum extent. The Tribunal denied the arbitrariness of the measure in dispute on the grounds that Hungary chose a compensation amount that was more favorable to the claimant within the scope permitted under EU law. With respect to the protection of the investor's legitimate expectations, the Tribunal found that [1] the

PPA does not guarantee interests, nor did it assure that the agreement would not be influenced by an amendment to law; and [2] the fair and equitable treatment clause does impose on a host state an obligation to give first priority to investors' interests; a host state is able to maintain a right to regulate to protect other public interests. Accordingly, the Tribunal determined that maximum compensation was not found to be a reasonable or legitimate expectation. Based on the above findings, the Tribunal concluded that there was no violation of the obligation of fair and equitable treatment with respect to the rest of the issues, and that the Hungarian government had not violated the treaty.

(xiii) William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Canada, UNCITRAL Arbitration Rules, PCA Case No. 2009-04, NAFTA, Award on Jurisdiction and Liability, March 17, 2015.

[Summary of the decision]

The mere breach of domestic law or any kind of unfairness does not constitute a violation of the international minimum standard.

The claimants, Bilcon of Delaware (a US company), and its shareholders (US nationals) established a Canadian subsidiary in 2002 for a project to develop and operate a quarry and a marine terminal in Nova Scotia, Canada. The claimants submitted a request for permission for the project to the Canadian Federal Government and the Nova Scotia provincial government. The two governments established a joint review panel (JRP) to conduct an environmental assessment, which was a requirement for the issuance of permission. The JRP submitted a report requesting the governments to refuse the project. Based on this report, the Federal and provincial governments rejected the project at the end of 2007. The claimants submitted a request for arbitration based on the UNCITRAL Arbitration Rules in June 2008, claiming that Canada breached the minimum standard of treatment through the series of procedures as stated above.

As a first step for determining whether Canada violated the minimum standard of treatment, the Arbitral Tribunal referred to the Notes of Interpretation prepared by the NAFTA Free Trade Commission and confirmed that the clause in question requires a contracting state to accord treatment required by the international minimum standard. With respect to that standard, the Tribunal interpreted that only "grossly unfair, manifest failure of natural justice and complete lack of transparency," or in short, acts and omissions of a serious nature, may constitute a breach of the standard; the mere breach of domestic law or any kind of unfairness does not violate the international minimum standard. Based on this understanding, the Tribunal determined that Canada's acts were a breach of the international minimum standard and of the obligations under the treaty. This decision was made on the grounds that Canada accorded arbitrary and unfair treatment to the claimants, including that Canada [1] rejected the project by arbitrarily introducing assessment criteria that were not provided under laws or regulations; [2] took measures contradicting the specific expressions of encouragement for investments the government showed to the claimants; and [3] committed some procedural failings, such as failing to notify the claimants of changes to the criteria when making a decision to reject the claimants' project.

4) EXPROPRIATION

(i) Pope & Talbot Inc. v. Canada, UNCITRAL Arbitration Rules, NAFTA, Interim Award, June 26, 2000.

[Summary of the decision]

“Expropriation” requires a substantial deprivation of investments.

(See (2)(a)(ii) above for the facts of this case.)

Pope & Talbot, a US company, asserted that export quotas based on the Softwood Lumber Agreement concluded between the US and Canada constituted expropriation.

The Arbitral Tribunal determined that access to the US market is an intangible right to be protected as an “investment” under NAFTA. The Tribunal then examined whether the export quotas constituted expropriation. The Tribunal determined that it did not believe that there had been a “substantial deprivation” in this case, because, while the quotas resulted in reduced profits for the investment, the claimant still retained control over its subsidiary in Canada and the subsidiary continued its export business, earning substantial profits. The tribunal concluded that the measure in dispute did not constitute expropriation.

(ii) Metalclad Corp. v. Mexico, ICSID Case No. ARB (AF)/97/1, NAFTA, Award, August 30, 2000.

[Summary of the decision]

Expropriation (or a measure tantamount to expropriation) also includes a measure which have the effect of depriving the owner, in whole or in significant part, of the reasonably-to-be-expected economic benefit.

Metalclad, a US company, acquired Coterin, which had obtained permission for the development of a hazardous waste landfill located in one of the Mexican states. Metalclad was told by the Federal Government officials that the company only needed the Federal Government’s permission for the development and operation of the landfill and that Local governments had no right to refuse the permitted project. After the completion of the construction, however, the local governments ordered the company to suspend its operation on the grounds that the company had not obtained their permission, preventing the company from continuing its project. Metalclad submitted a request for arbitration, claiming that Mexico violated the provisions of NAFTA.

The Arbitral Tribunal determined that the measures described above “constitute an act tantamount to expropriation.” The Tribunal also noted that expropriation under NAFTA includes not only acknowledged takings of property, 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.

(iii) Técnicas Medioambientales Tecmed, S.A. v. Mexico, ICSID Case No. ARB (AF)/00/2, Spain-Mexico BIT, Award, May 29, 2003.

[Summary of the decision]

In determining whether a government’s measure constitutes “expropriation,” the effects of the measure on the investments are an important element. At the same time, consideration also should be given to the question of whether the measure is proportional to the public interest protected thereby and to the protection legally granted to investments.

Tecmed, a Spanish company, won a tender held by a State government of Mexico and commenced a waste treatment project. Although the permit was due to expire in five years, the company was planning to continue the project over a long period. However, the government rejected renewing the permit due to breaches of regulations. The company submitted a request for arbitration, claiming that [1] the government's act constituted an expropriation; and [2] Mexico violated the obligation of fair and equitable treatment. With reference to the statement of the government and the minutes of government meetings, the Arbitral Tribunal found that the government recognized that the breaches of regulations were minor ones and that the true reason for the rejection of the renewal of permit was the movement of citizens against the project. In determining whether the government's act constituted "expropriation", the Tribunal stated that it needed to consider "whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality." Specifically, the Tribunal examined and determined that the refusal of permit renewal for the reason of minor breaches of regulations and of the residents' opposition was not proportionate to the public interest or to the protection legally granted to investments. In conclusion, the Tribunal determined that the government's measure constituted expropriation.

(iv) Rumeli Telekom and Telsim Mobil v. Kazakhstan, ICSID Case No. ARB/05/16, Turkey-Kazakhstan BIT, Award, July 29, 2008.

[Summary of the decision]

A court decision on a transfer of asset to a third party may amount to expropriation attributable to the State if the judicial process was instigated by the State.

Rumeli and Telsim, Turkish companies, established in Kazakhstan a joint stock company, KaR-Tel, in cooperation with a local partner company. It obtained the Global System for Mobile Communications (GSM) license from the Ministry of Transportation and Telecommunications of Kazakhstan. Subsequently, KaR-Tel entered into a contract with the Investment Committee of Kazakhstan for the creation of a digital cellular radiotelephone connection of the GSM (900) standard. Three years later, the Investment Committee terminated the contract with KaR-Tel due to the company's breach of the contract. Later, the claimants' local partner called for an extraordinary general meeting of shareholders, which decided in the absence of the claimant on the purchase of the claimants' shares in KaR-Tel. Subsequently, the local partner filed an action against the claimants in the local court, seeking the purchase of its shares. The claimants defended against the claim, but the Supreme Court rendered a decision permitting the forced buy-out of the claimants' shareholdings. The claimants submitted a request for arbitration, claiming that these Kazakh government's acts constituted a violation of the expropriation clause and fair and equitable treatment clause under the Turkey-Kazakhstan BIT.

With respect to whether the court's actions constituted expropriation, the Tribunal stated as described in a) above. As for the facts, the Tribunal determined, as a result of examining the relationship between the termination of the contract by the Committee and the extraordinary general meeting of shareholders held by the local partner, that there was collusion between the Investment Committee and the claimants' local partner. The Tribunal concluded that the Investment Committee's decision to terminate the contract with the claimants was improperly communicated to the claimants' local partner, which eventually led to the Supreme Court's decision permitting the forced buy-out of the claimants' shares. The Tribunal determined that the government's actions constituted “creeping expropriation.”

(v) RosInvestCo UK Ltd. v. The Russian Federation, SCC Case No. 079/2005, UK-Russia BIT, Final Award, September 12, 2010.

[Summary of the decision]

<u>The Arbitral Tribunal determined that an accumulation of a series of actions, including additional taxes and sale of shares, amounted to “expropriation”.</u>

UK company RosInvestCo (the claimant) acquired shares in Yukos, a Russian oil company, in November and December 2004. The Putin administration had taken measures against Yukos, including the arrest of the company’s manager who had taken a critical attitude toward the administration. Furthermore, the administration took various measures from December 2004 to 2007, including the imposition of a large amount of additional taxes and transfer of shares in the company’s subsidiary to a state-owned company through an auction. Because of these measures, Yukos was forced to default, be dissolved and was nationalized. The claimant submitted a request for arbitration to seek compensation for damages, claiming that the government’s measures were based on an arbitrary intention and constituted illegal expropriation.

The Russian government alleged that the Arbitral Tribunal lacked jurisdiction on the grounds that the Denmark-Russia BIT, which the claimant asserted should be applied in the present dispute through the most favored nation clause, excludes tax measures from the scope of investor-state dispute settlement (ISDS) provisions. However, the Tribunal determined that it had jurisdiction over this dispute, noting that the present case was not only about the tax measures, but rather that it was intended to contest whether an accumulation of a series of the government’s measures amounted to expropriation.

The Tribunal noted that the Russian government took individual measures with the arbitrary intention to take control over Yukos’ assets. The Tribunal stated that each of these measures must be seen as elements in a cumulative combination of measures taken for such an arbitrary intention. The Tribunal determined that an accumulation of a series of the government’s measures constituted measures having effect equivalent to nationalization or expropriation, because they caused the deprivation of all of Yukos’ assets.

(vi) Hulley Enterprises Ltd. v. The Russian Federation, UNCITRAL Arbitration Rules, PCA Case No. AA226, Energy Charter Treaty, Final Award, July 18, 2014.

Yukos Universal Ltd. v. The Russian Federation, UNCITRAL Arbitration Rules, PCA Case No. AA227, Energy Charter Treaty, Final Award, July 18, 2014.

Veteran Petroleum Ltd. v. The Russian Federation, UNCITRAL Arbitration Rules, PCA Case No. AA228, Energy Charter Treaty, Final Award, July 18, 2014.

*These 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.

[Summary of the decision]

Same as (v) above.

The claimants (Cypriot companies Hulley and VPL, and a Manx company YUL), which were controlling shareholders of a Russian 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" consequences 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. 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).

(vii) Chemtura Corporation v. Canada, UNCITRAL Arbitration Rules, NAFTA, Award, August 2, 2010.

[Summary of the decision]

The measures taken by the Canadian authority concerning the cancellation of registration of lindane, an agricultural chemical, were found to be a valid exercise of Canada's police power, and thus they did not constitute a violation of Article 1110 of NAFTA (expropriation).

(See 2.3)(x) above for the outline of the case.)

The Arbitral Tribunal found that [1] the sales of lindane products only accounted for a comparatively small part of the claimant's total sales and [2] the claimant had achieved sales of the same level as before the cancellation of lindane registrations. In light of these facts, the Tribunal determined that the infringement of the claimant's investments by Canada did not amount to a "substantial deprivation". The Tribunal also noted that the measures against lindane adopted by Canada Pest Management Regulatory Agency fell within the scope of its discretion and they were conducted in non-discriminatory manner. The Tribunal determined that the measures in dispute were a valid exercise of Canada's police power that was conducted based on the health risk concerning lindane. Based on the findings above, the Tribunal denied Canada's violation of obligations under the treaty.

(viii) Telenor Mobile Communications A.S. v. Hungary, ICSID Case No. ARB/04/15, Norway-Hungary BIT, Award, September 13, 2006.

[Summary of the decision]

The mere exercise by a government of regulatory powers that cause delays of or impediments to business or entail the payment of taxes or other levies or the unreasonable measures taken by the government do not of themselves constitute expropriation, unless there has been a "substantial deprivation" of investments.

Pannon (a Hungarian company), which is wholly owned by the claimant, Telenor (a Norwegian company), entered into a concession agreement with the Hungarian government in November 1993 for the provision of public mobile radiotelephone services. The agreement adopted a fixed price system. Following an EC Directive issued in 2002, which imposed on the member states the duty to provide universal telecommunication services at reasonable costs, the Hungarian government decided to reorganize its telecommunications system. Through this reform, the Hungarian government limited universal service provision to the fixed-line operators, while setting up a public fund to fund the unrecovered costs incurred by the universal service providers. As with other mobile service providers, Pannon was required to contribute a certain amount to the fund. The Hungarian government also introduced a regulated price regime for mobile service providers.

The claimant submitted a request for ICSID arbitration in December 2003, claiming that the measures taken by the Hungarian government constituted a violation of the expropriation clause and fair and equitable treatment clause on the grounds that: [1] Pannon was deprived of business opportunities since the government limited universal service provision to fixed-line operators; [2] the Hungarian government unreasonably deprived the claimant of its profits, because it forcibly collected contributions for the benefit of the fixed-line operators; and [3] the regulated price regime was introduced with the aim of supporting the fixed-line operators. Although the Norway-Hungary BIT excluded fair and equitable treatment from the scope of the dispute settlement clause, the claimant alleged that the provision under a treaty with a third state that provides for arbitration based on the fair and equitable treatment clause should be applied through the most favored nation treatment clause in the BIT. In response, the Hungarian government alleged that the measures in dispute did not constitute expropriation on the grounds that [1] there has been no “substantial deprivation” of investments, as Pannon had maintained a considerable market share, enjoying a consistent record of enviable profits; and [2] the regulated price regime was a nondiscriminatory measure that was imposed equally on other service providers. The Hungarian government also alleged that the fair and equitable treatment provision does not fall within the scope of dispute settlement procedures, as the most favored nation clause is limited to substantive rights and cannot be invoked to extend the jurisdiction *ratione materiae* of the Arbitral Tribunal. Based on these allegations, Hungary claimed that the Tribunal lacked jurisdiction over this case.

The Tribunal stated that the mere exercise by government of regulatory powers that cause delays of or impediments to business or entail the payment of taxes or other levies or the unreasonable measures taken by government do not of themselves constitute expropriation, unless there has been a “substantial deprivation” of investments. The Tribunal further stated that any investors entering into a concession agreement must be aware that investment involves risks of being exposed to some kinds of regulations or payments. The Tribunal then concluded that there had been no “substantial deprivation” that could be deemed as expropriation on the grounds that: [1] the contribution paid by Pannon was equivalent to merely 1% of the company’s assets; [2] the company’s profits and total assets had been steadily growing; and [3] the same measures were taken against other competing companies. The Tribunal dismissed the claim on extending jurisdiction *ratione materiae* through the most favored nation clause, stating that it was not acceptable to invalidate the limitation on procedural rights that had been deliberately adopted by the contracting parties of the BIT. Based on these findings, the Tribunal concluded that it lacked jurisdiction over this case. The Tribunal ordered the claimant to pay all the arbitration costs, including those incurred by the respondent state, since the claimant’s claims were based on a considerable misconception in procedures and interpretation of the treaty.

5) UMBRELLA CLAUSE

(i) Noble Ventures v. Romania, ICSID Case No. ARB/01/11, US-Romania BIT, Award, October 12, 2005.

[Summary of the decision]

A breach of contract under domestic law can be deemed as a breach of international law if the wording of the umbrella clause clearly provides to this effect.

A US company, Noble Ventures, entered into a privatization agreement with the Romanian government and acquired shares in a state-owned steel company, CSR. Noble Ventures submitted a request for arbitration, claiming that the Romanian government breached its contractual obligation to negotiate with state budgetary creditors on CSR's debt relief and thereby violated the umbrella clause under the US-Romania BIT.

The umbrella clause of the BIT provides: "Each Party shall observe any obligation it may have entered into with regard to investments." The Arbitral Tribunal focused on the use of the terms "shall observe", "any obligation", and "with regard to investments". The Tribunal found that, although under international law it is considered that a violation of domestic law and a violation of international law are completely different things, the wording of the umbrella clause provided in the BIT clearly falls into the category of the most general and direct formulations, which supports assimilation of contractual obligations to treaty ones. However, the Tribunal stated that it was unnecessary for it to express any definitive conclusion as to whether "any" breach under domestic law "perfectly" assimilates to breach of the BIT, when the breach of contract itself had not been proved.

(ii) Sempra Energy International v. Argentina, ICSID Case No. ARB/02/16, US-Argentina BIT, Award, September 28, 2007.

[Summary of the decision]

Ordinary commercial breaches of a contract are not the same as treaty breaches. They are distinguished based on whether the breach has arisen from the conduct of an ordinary contract party, or rather involves a kind of conduct that only a sovereign State function or power could effect.

Following the privatization of the gas industry in Argentina, a US company, Sempra, initiated a gas distribution business. In making the decision to make its investments, Sempra alleged that it was important to ensure the calculation of tariffs in U.S. dollars and their semiannual adjustment according to changes in the U.S. Consumer Price Index, while also ensuring compliance with Argentine law. The company submitted a request for arbitration, claiming that Argentina breached the umbrella clause, because the tariffs were reversed due to various measures it took following the economic crisis.

The Arbitral Tribunal stated that ordinary commercial breaches of a contract are not the same as treaty breaches. The Tribunal further stated that they are distinguished based on whether the breach had arisen from the conduct of an ordinary contract party, or rather involved a kind of conduct that only a sovereign State function or power could effect. The Tribunal then concluded that the Argentine government's measures constituted a violation of the umbrella clause, determining that these measures were the consequences of legal changes triggered by the government and these were actions that could be done only by the government.

*Interpretation of the umbrella clause is also discussed in the context of jurisdiction *ratione materiae*. See 1.3)(i) and (ii) above.

(iii) AMTO v. Ukraine, SCC Case No. 080/2005, Energy Charter Treaty (ECT), Final Award, March 26, 2008.

[Summary of the decision]

a) The umbrella clause of the ECT (the final sentence of Article 10(1)) applies to contracts between a state and an investor or investor's investments (including local corporations). However, the clause is not applicable to a contract where one of the parties thereto is a separate legal entity and not an organ of a state.

b) Article 22 of the ECT imposes on the state a general obligation to 'ensure' that state-owned entities observe the obligations specified under Part III of the ECT. It does not constitute an obligation of the state to assume liability for any failing of a state-owned legal entity to discharge a commercial debt in a given instance.

AMTO, a Latvian company, acquired shares in EYUM10, a Ukrainian company. EYUM10 was the largest creditor of Energoatom, a state-owned company. EYUM10 sought execution based on the court decision it received concerning the discharge of the debt. Execution was stayed because of bankruptcy proceedings against Energoatom. Later, EYUM10 and Energoatom concluded an agreement on the debt. AMTO submitted a request for arbitration, claiming that the Ukraine government's acts constituted a violation of the umbrella clause of the ECT.

The Arbitral Tribunal noted that the parties of the contract in dispute were [i] Energoatom, which was a separate legal entity and not a governmental organ and [ii] EYUM10, which was a legal entity separate from AMTO. With respect to [ii], the Tribunal determined that the contract concluded by EYUM10 fell within the scope of the umbrella clause, since Article 10(1) of the ECT provides that "Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party." However, the Tribunal determined that the umbrella clause was not applicable in this dispute due to the reason described in [i] above. As Energoatom was wholly-owned by the state, the Tribunal also considered Article 22 of the ECT, which provides that "Each Contracting Party shall ensure that any state enterprise which it maintains or establishes shall conduct its activities in relation to the sale or provision of goods and services in its Area in a manner consistent with the Contracting Party's obligations under Part III of this Treaty*." The Tribunal stated that Article 22 imposes on the state a general obligation to ensure that state-owned entities conduct activities that, in general terms of governance, management and organization, make them capable of observing the obligations specified under Part III of the ECT. It does not constitute an obligation of the state to assume liability for any failing of a state-owned legal entity to discharge a commercial debt in a given instance. The Tribunal concluded that there was no violation of the umbrella clause.

*Part III of the ECT provides for the substantive obligations to protect investments.

(iv) Duke Energy Electroquil Partners and Electroquil S.A. v. Ecuador, ICSID Case No. ARB/04/19, US-Ecuador BIT and Arbitration Agreement, Award, August 18, 2008.

[Summary of the decision]

The parties in this dispute consented under an arbitration agreement to application of the BIT to contractual disputes. If the scope of the umbrella clause of the BIT is widely defined as "any obligation", breach of contract constitutes breach of the umbrella clause.

(See 2.3)(v) above for the facts.)

In accordance with the agreement between the parties of this dispute and Article 25(2)(b) of the

ICSID Convention, Electroquil, which is an Ecuadorian subsidiary of Duke Energy (a US company), is also deemed to have US nationality. The Arbitral Tribunal determined that there was a violation under domestic law of the power purchase agreement (PPA) concluded between Electroquil and a state-owned power company, INECEL. The Tribunal determined that the breach of the PPA constituted a breach of the umbrella clause, on the grounds that [1] the scope of the umbrella clause is widely defined as "any obligation"; [2] the parties consented under an arbitration agreement to the application of the BIT to contractual disputes; and [3] the Ecuadorian government was planning to assume INECEL's rights and obligations in accordance with an administrative order. However, the Tribunal did not find any violation of obligations in relation to Duke Energy, and ordered Ecuador to pay compensation to Electroquil.

*See 1.8)(iii) above for the decision on the exclusion of matters of taxation.

(v) Malicorp Ltd. v. Egypt, ICSID Case No. ARB/08/18, UK-Egypt BIT, Award, February 7, 2011.

[Summary of the decision]

<u>If the contract includes a dispute resolution clause, in principle whether there was a breach of the contract needs to be determined in accordance with that clause. However, if the government doubts the validity of the dispute resolution procedures in the contract, it is possible to resort to the dispute settlement procedures provided under the BIT.</u>

A UK company, Malicorp (the claimant), entered into a concession contract with the Egyptian government for the construction of an international airport. However, as there were various differences of opinion between the parties, the government eventually notified the company of the termination of the contract and discontinuation of the project. The claimant submitted a request for arbitration based on the arbitration clause of the contract. Based on the claims of the Egyptian Government, the Cairo Court of Assizes rendered a decision on the invalidity of the arbitration clause under the contract, ordering the Cairo Regional Centre for International Commercial Arbitration (CRCICA) to stay the proceedings. However, the CRCICA continued the proceedings and rendered an award in the absence of the arbitrator designated by the Egyptian government. However, this award was not enforceable. Therefore, the claimant submitted a request for ICSID arbitration.

The Arbitral Tribunal stated that, since the contract includes a dispute resolution clause, a breach of the contract has to be determined in accordance with that clause (the CRCICA arbitration). The Tribunal continued, however, that the Egyptian government had questioned the validity of the CRCICA award. The Tribunal noted that the proceedings in dispute lacked certainty and thus the claimant could resort to the dispute settlement procedures under the BIT. The Tribunal thereby determined that it had jurisdiction over this case. The Tribunal examined whether the termination of the contract was compatible with Egyptian law, based on which the contract was concluded. The Tribunal found that the nature and content of the information supplied by the claimant to the Egyptian side was such as to give rise to an essential mistake. The Tribunal determined that this was sufficient as a ground for the revision and termination of the contract, thereby dismissed the claimant's claims.

6) GENERAL AND SECURITY EXCEPTIONS

(i-1) CMS Gas Transmission Company v. Argentina, ICSID Case No. ARB/01/8, US-Argentina BIT, Award, May 12, 2005.

[Summary of the decision]

a) Under customary international law and the BIT, the state of necessity under a economic crisis situation can only be invoked when it becomes "total economic collapse."

b) The Arbitral Tribunal determines whether or not a state of necessity may be invoked by a government based on whether the requirements of necessity under international law and the requirements for the preclusion of wrongfulness have or have not been met, rather than based on the government's self-judgment.

As a part of its economic reform measures, the Argentine government addressed the privatization of public utilities. Since 1991, the government has maintained a fixed exchange rate regime, fixing the Argentine peso at par with the US dollar. In order to attract foreign investments on privatized gas and other projects, the government provided various guarantees for investors, including [1] tariffs were to be calculated in dollars and converted to pesos at the time of billing; [2] tariffs would be adjusted every six months in accordance with the United States Producer Price Index (US PPI); [3] licenses would not be revised or abolished without the licensees' consent or violation of law or license; [4] the neutrality of subsidies would be ensured; and [5] gas tariffs would not be frozen.

Based on the above conditions, a US company, CMS, acquired shares in an Argentine gas utility, TGN, in 1995. However, due to the serious economic crisis that hit Argentina at the end of the 1990s, the government decided to freeze gas tariffs in 2000. Furthermore, the government adopted the Emergency Law in 2002 and abolished the fixed exchange rate regime. The gas company saw significant income losses after these measures. CMS submitted a request for arbitration against the Argentine government, claiming that a series of these measures constituted a violation of the US-Argentina BIT. The Arbitral Tribunal determined that the government's acts in dispute constituted a violation of the obligation of fair and equitable treatment and other obligations (see 2.3)(i) above). The Tribunal then examined the Argentine government's claims on a state of necessity under customary international law and on general and security exceptions based on Article 11 of the US-Argentina BIT. Article 11 of the BIT provides: "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, [...] or the protection of its own essential security interests."

Firstly, the Tribunal stated that Article 25 of the Articles on State Responsibility adequately reflects the state of customary international law on the question of necessity. The Tribunal examined the present dispute in light of the requirements provided under this Article: "*1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act [...] 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. [...] necessity may not be invoked [...] if: (a) the international obligation in question excludes the possibility of invoking necessity; or (b) the State has contributed to the situation of necessity.*" The Tribunal then noted that the economic crisis in question could not be deemed as "total economic collapse" and its relative effects were insufficient to say that an "essential interest" of the country was in a "grave and imminent peril." The Tribunal also noted that the measures in dispute were not the "only way" to respond to the crisis, because the government was able to choose other alternatives. In addition, the Tribunal stated that it did not appear that the essential interest of the international community as a whole had been affected in any relevant way. The Tribunal also noted that government policies and their shortcomings significantly contributed to the crisis and the emergency.

The Tribunal then referred to Article 11 of the BIT. The Tribunal stated that, while it is clear that an economic crisis is included in "essential security interests" as provided under this Article, the respondent cannot invoke state of necessity unless it finds that there has been a "total collapse," since the purpose of the treaty is to provide protection to investments in circumstances of economic difficulty. The Tribunal determined that, since the present case did not fall within the scope of "total collapse," the circumstances of Argentina were only to be taken into account in determining the amount of compensation. With respect to whether the rule of Article 11 of the treaty is self-judging, the Tribunal noted that, when states intend to create for themselves a right to determine unilaterally the legitimacy of extraordinary measures importing non-compliance with obligations assumed in a treaty, they do so expressly. Since the treaty did not contain any clause to such effect, the Tribunal stated that it would examine whether the situation meets the conditions for the state of necessity laid down by customary international law and whether it thus is or is not able to preclude wrongfulness.

In conclusion, the Tribunal dismissed the Argentine government's claims on state of necessity.

(i-2) CMS Gas Transmission Company v. Argentina, ICSID Case No. ARB/01/8, US-Argentina BIT, Decision on the Application for Annulment, September 25, 2007.

[Summary of the decision]

a) <u>The general and security exception clause under the BIT cannot be equated with the state of necessity under customary international law, as these two are different in their scope, requirements and legal nature.</u>

b) <u>Whether there was a state of necessity under customary international law should be examined only when wrongfulness of acts has not been precluded by the general and security exception clause under the BIT.</u>

Based on Article 52(1) of the ICSID Convention, Argentina submitted an application for the annulment of the award on the merits dated May 12, 2005 (see 2.3))(i) above), claiming that the Arbitral Tribunal had manifestly exceeded its powers and that the award had failed to state the reasons on which it had been based.

Firstly, the Ad Hoc Committee (the "Committee") examined the Argentina's claim that the Tribunal did not state any reason for its decision concerning Article 11 of the BIT. The Committee noted that the Tribunal erroneously equated Article 11 of the BIT and state of necessity under customary international law, and mistakenly understood that the defense based on Article 11 was to be dismissed if state of necessity under customary international law was not found. The Committee then stated that, although the Tribunal should have expressly stated this, a careful reader could follow the implicit reasoning of the Tribunal. Based on these grounds, the Committee dismissed the Argentina's claim.

Next, the Committee examined the Argentina's claim that the Tribunal manifestly exceeded its powers by equating the general and security exception under Article 11 of the BIT and state of necessity under customary international law, and by examining the latter prior to the former. The Committee stated that Article 11 is a threshold requirement, and if it applies, the substantive obligations under the treaty do not apply. By contrast, the Committee continued, state of necessity under customary international law is an excuse that is only relevant once it has been decided that there has otherwise been a breach of the substantive obligations. Moreover, the Committee also noted that these two provisions are different in their scope and requirements. The Committee concluded that the Tribunal had made a manifest error of law. The Committee then noted that the Tribunal should have considered first whether the breach of the treaty was excluded by Article 11 of the BIT, and only if it concluded that there was conduct not in conformity with the treaty would it have had to consider whether Argentina's responsibility could be precluded under customary international law as a secondary rule. However, the Committee concluded that although there had been an error in the interpretation of Article 11 of the BIT, it was the case that the Tribunal had applied Article 11 of the treaty, and thus there was no manifest excess of powers.

(ii) BG Group plc. v. Argentina, UNCITRAL Arbitration Rules, UK-Argentina BIT, Final Award, December 24, 2007.

[Summary of the decision]

a) <u>The BIT does not contain any clause on state of necessity.</u>

b) <u>The BIT excludes the invocation of state of necessity under customary international law against the obligations contained in the BIT.</u>

c) <u>Even if a state of necessity under customary international law has been found, the obligation to compensate damages would not be precluded.</u>

d) <u>State of necessity under customary international law is a most exceptional remedy subject to the "very strict conditions."</u>

A UK company, BG, held indirect shareholding of MetroGAS, a gas company in Argentina. BG submitted a request for arbitration in 2003, claiming that various measures introduced by the Argentine government constituted a violation of the UK-Argentina BIT. The Arbitral Tribunal determined that the Argentine government's measures in dispute constituted a violation of Article 2(2) of the BIT, which provides the fair and equitable treatment obligation and the prohibition of unreasonable and discriminatory measures. The Tribunal then examined the Argentina's claim of a state of necessity based on Article 4 of the BIT and customary international law. Article 4 of the BIT provides that *"investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency [...] shall be accorded by the latter Contracting Party treatment, as regards [...] compensation [...] no less favorable than that which the latter Contracting Party accords to its own investors or to investors of any third State."*

Firstly, the Tribunal noted that Article 4 of the BIT provides for the national treatment and most favored nation treatment in relation to the compensation of losses resulting from certain actions. The Tribunal determined that the BIT does not provide for an exception equivalent to Article 11 of the US-Argentina BIT.

Next, the Tribunal referred to state of necessity under customary international law. The Tribunal stated that the BIT implicitly excludes reliance on state of necessity and noted that Argentina would not be entitled to invoke state of necessity to revoke rights vested to investors that are designed to operate in situations where a run on the currency would lead to a situation of necessity. The Tribunal also stated that, assuming that state of necessity were to justify measures by Argentina, an obligation to compensate would still remain. While noting that it is unclear whether the Draft Articles on Responsibility of States for Internationally Wrongful Acts (the ILC Draft Articles) concerning international obligations between sovereign States can be applied to a private entity, the Tribunal examined the present dispute based on Article 25 of the ILC Draft Articles. The Tribunal found that, while a state of necessity "is a most exceptional remedy subject to the very strict conditions," the measures taken by the Argentine government in dispute did not appear to meet such "very strict conditions." In conclusion, the Tribunal determined that Argentina could not invoke a state of necessity under customary international law.

(iii) Continental Casualty Company v. Argentina, ICSID Case No. ARB/03/9, US-Argentina BIT, Award, September 5, 2008.

[Summary of the decision]

a) <u>The general and security exception clause under the BIT and state of necessity under customary international law share the same purpose and practical effects, but are different in their nature and conditions of application.</u>

b) <u>The general and security exception clause under the BIT does not require that "total collapse" of the country or that a "catastrophic situation" has already occurred before the responsible national authorities may have recourse to its protection.</u>

c) <u>The objective assessment of the application of the BIT must contain a "significant margin of appreciation" for the state applying the particular measure.</u>

d) <u>Necessity of the measure under the BIT is determined based on the requirements of Article XX of GATT.</u>

The Argentina regulations require insurance companies in its territory to invest a certain percentage of their assets in the country's assets. An Argentina company, CNA ART, owned by a US company, Continental, had invested both in assets denominated in Argentine pesos and those denominated in US dollars. Continental submitted a request for arbitration, claiming that a series of measures taken by the Argentine government during the economic crisis constituted a violation of the US-Argentina BIT. In response, the Argentine government alleged that there was no violation of the substantive obligations and invoked the application of the state of necessity under Article 11 of the BIT and customary international law.

Firstly, the Arbitral Tribunal examined whether Article 11 of the BIT applied in this case, since if it applies, detailed examination concerning the state of necessity under general international law would be unnecessary. As a premise for examining this issue, the Tribunal clarified the differences between these two, stating that Article 11 of the BIT is defined as a safeguard clause to regulate substantive obligations, whereas the state of necessity under customary international law is a ground for precluding the wrongfulness of an act. The Tribunal also noted that the conditions of application are also different, since their scopes of regulation cover different matters; that is, state of necessity under customary international law can only be accepted on "an exceptional basis" when strict conditions are satisfied, while Article 11 of the BIT is not necessarily subject to the same conditions, according to its language and purpose of the BIT. The Tribunal noted, however, that they share the same purpose and practical effects, and the Tribunal would therefore refer to customary international law only insofar as the concept in it assisted in the interpretation of Article 11 of the BIT.

The Tribunal then determined that the scope of the concept of "public order" and "security" under Article 11 of the BIT is broad, and thus the Article is applicable to an economic crisis. The Tribunal then stated that it was clear that the "maintenance of public order" and the "protection of essential security interest" of Argentina were at stake. The Tribunal stated that it was not required that "total collapse" of the country or that a "catastrophic situation" already had occurred before application of the measures to protect "essential security interest." The Tribunal also noted that, while Article 11 of the BIT does not allow for self-judging by a party invoking it, the BIT is a bilateral reciprocal treaty and thus objective assessment of its application must contain a "significant margin of appreciation" for the State applying the particular measure.

With respect to the necessity of the measures, the Tribunal stated that, since Article 11 of the BIT derives from Article XX of GATT, it is appropriate to refer to the GATT and WTO case law, which have extensively dealt with the concept and requirements of necessity as provided under that Article. The Tribunal stated that whether the measures were "necessary" should be determined through a process of weighing and balancing of factors, including: [1] the relative importance of interests or values furthered by the challenged measures; [2] the contribution of the measure to the realization of the ends pursued by it; and [3] the impact of the measure on international commerce. The Tribunal added that a measure is not necessary if there is an alternative measure that is reasonably available, by which the state concerned may achieve its objective.

Based on the above principles, the Tribunal determined that a series of government measures, excluding the restructuring of the Ministry of Economy's debts that was conducted too late, were material or decisive to react positively to the crisis, and thus constituted "necessary" measures as provided under Article 11 of the BIT. The Tribunal stated that early abandonment of convertibility could not be an alternative measure, and it did not believe that the Argentine government could choose any other alternative measure. Accordingly, the Tribunal determined that the requirements for exemption from liability as provided under Article 11 of the BIT were satisfied. Although measures adopted to protect "essential security interests" damaged by the state itself cannot be deemed as "necessary" measures, the Tribunal determined that the Argentine government would not be inhibited from invoking Article 11 of the BIT by its own acts, based on the results of analysis that regarded the series of the measures as sound economic policies.

As seen above, the Tribunal accepted many of the Argentine government's claims based on Article 11 of the BIT. The Tribunal determined that there was no violation in this case other than that the restructuring of the financial instruments issued by the Ministry of Economy constituted a violation of the obligation of fair and equitable treatment.

(iv) National Grid plc. v. Argentina, UNCITRAL Arbitration Rules, UK-Argentina BIT, Award, November 3, 2008.

[Summary of the decision]

a) A violation of the BIT is determined by taking into account all circumstances, including the economic crisis.

b) The obligation of fair and equitable treatment is not an absolute parameter. What is unfair and inequitable depends on the situation.

c) The BIT does not preclude the application of state of necessity under customary international law against the obligations under the BIT.

A UK company, National Grid, is a major shareholder of a power supplier in Argentina, Transenar. National Grid submitted a request for arbitration, claiming that measures taken by the Argentine government in response to the economic crisis were inconsistent with the commitments and guarantees based on which the company made its investments, and that they constituted a violation of the UK-Argentina BIT.

With respect to the violation of the obligation of fair and equitable treatment, the Tribunal noted that, while a series of measures taken by the Argentine government was a violation of the obligation under Article 2(2) of the BIT, the Tribunal should make a decision on the violation of the BIT by taking into account "all circumstances" of this case; that is, the circumstances of the economic crisis in Argentina could not be neglected. The Tribunal also noted that the obligation of fair and equitable treatment is not an absolute parameter; what would be a violation of the obligation in normal circumstances might not be so in a situation of an economic and social crisis. Based on the above, the Tribunal determined that the only violation of the obligation of fair and equitable treatment was the renegotiation on the terms of the contract dated June 5, 2002, which required that Transenar renounce the legal remedies it might have as a condition to renegotiate the contract. The Tribunal also found that this measure was a violation of the obligation to provide "protection and constant security" provided under Article 2(2).

The Tribunal then stated that the BIT did not contain any agreement that the treaty precluded a defense based on state of necessity under customary international law. The Tribunal then analyzed the case against the requirements enumerated in Article 25 of the Draft Articles on State Responsibility. It found that internal factors, such as indebtedness, financial policies and rigidity of the labor market, contributed to the crisis in Argentina. Moreover, the Tribunal also found that the Argentine government's response further enhanced the severity of the crisis. Based on these findings, the Tribunal determined that the requirements of Article 25(2)(b) of the Draft Articles were not satisfied and therefore dismissed the defense based on state of necessity under customary international law.

(v) Sempra Energy International v. Argentina, ICSID Case No. ARB/02/16, US-Argentina BIT, Decision on the Application for Annulment, June 29, 2010.

[Summary of the decision]

a) <u>Measures to which Article 11 of the BIT applies are not inconsistent with state responsibility and are not "wrongful" in the first place. Article 25 of the Draft Articles on State Responsibility (the ILC Articles) provides a ground for precluding the wrongfulness of an act. It cannot be a reference for the interpretation of Article 11 of the BIT.</u>

b) <u>The Tribunal engaged in a manifest excess of powers by failing to continue legal analysis on the application of Article 11 of the BIT, after it denied the defense of necessity based on Article 25 of the ILC Articles. This constitutes grounds for the annulment of the award.</u>

The Tribunal had determined that the Argentine government's measures against the claimant constituted a violation of the obligation of fair and equitable treatment and the umbrella clause and dismissed Argentina's defense based on state of necessity and Article 11 of the BIT. Based on Article 25 of the ICSID Convention, Argentina submitted an application for the annulment of the award, opposing the Tribunal's decisions on the emergency measures under Argentine law, the state of necessity under customary international law, and exceptions under Article 11 of the BIT.

Firstly, the Ad Hoc Committee (the "Committee") examined whether manifest errors of law, manifest excess of powers, or failure to state reasons as provided under Article 52 of the ICSID Convention were present in the award, and would be grounds for the annulment of the award. Article 11 of the US-Argentina BIT provides that *"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 interests."* The Tribunal denied the self-judging nature of this Article with respect to the invocation of necessity by Argentina. The Committee noted that the Tribunal failed to clearly distinguish the question of whether Article 11 has a self-judging nature and the question of its scope and application, which are more basic problems. The Committee rejected the reasoning by the Tribunal concerning the applicability of Article 11 for the following reasons.

Firstly, the Committee accepted that it might be appropriate to look to customary international law as a guide to the interpretation of terms used in the BIT. However, the Committee continued that it does not follow that customary law (Article 25 of the ILC Articles in this case) establishes a peremptory definition of necessity. Secondly, the Committee stated that Article 11 of the BIT and Article 25 of the ILC Articles are different in all important aspects and Article 25 does not offer a guide to interpretation of the terms used in Article 11. More importantly, the Committee noted that Article 25 is concerned with the invocation by a state party of necessity as a ground for precluding the wrongfulness of an act, while Article 11 provides that "This Treaty shall not preclude" certain measures, so that where Article 11 applies, the taking of such measures is not incompatible with the State's international obligations and is not therefore "wrongful." Thirdly, the Committee stated that invocation of a state of necessity under the terms of a bilateral treaty need not necessarily be "legitimated" by a "rule" of international law, noting that there may be no rule governing such questions. Fourthly, the Committee determined that, while there may be certain norms of international law, including customary law, which would render it unlawful under international law for States to agree to adopt a provision inconsistent with those norms, this is not the case in this dispute. Fifthly, the Committee noted that the statement that "judicial control must be ... concerned with whether the requirements under customary law or the Treaty have been met and can thereby preclude wrongfulness" begged the question, and stated that the prior question is whether there is wrongfulness. The Committee noted that it is true that the BIT does not stipulate whether the Article is of a self-judging nature; however, if the measures are appropriately determined as "necessary", there would exist no violation of the treaty.

The Committee then stated that whether the error of law in question constituted a manifest excess of powers should be determined based on whether that error amounted to a failure to apply the law or if it was mere misapplication of the law. The Committee determined that the Tribunal failed to apply the applicable law by failing to continue legal analysis on the application of Article 11 of the BIT after it denied the defense of necessity based on Article 25 of the ILC Articles. Moreover, the Committee concluded that the Tribunal engaged in an excess of powers by its failure to apply Article 11 of the BIT. The Committee also stated that it is obvious from a reading of the reasons of the Tribunal that it did not identify or apply Article 11 of the BIT as the applicable law.

Based on the above, the Committee concluded that the excess of powers on the part of the Tribunal was manifest. The Committee concluded that the award of the prior instance deprived Argentina of its right laid down in Article 11 of the BIT and therefore must be annulled.