MAJOR CASES INVOLVING INVESTMENT TREATY ARBITRATION

Although not binding as a precedent, arbitral awards under investment agreements have a significant influence on subsequent arbitral awards. We will briefly summarize the principal issues which have been debated in the leading investment treaty arbitration cases. 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 amiable 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.

1) Decisions on Jurisdiction

(a) Jurisdiction in Personam

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

Summary of the Decision

“Investor” can include enterprises established in the home country and owned or controlled by nationals of the host country.

Tokios Tokelés, a business enterprise established under the laws of Lithuania, owned a publishing company in Ukraine. Tokios Tokelés filed for arbitration, contending that because the Ukrainian publishing company in which Tokios Tokelés had invested published a book that favorably portrayed a politician in the opposition party, Tokios Tokelés became subject to tax investigations by Ukrainian authorities that hindered its business activities, and that, for that reason, Ukraine breached the Ukraine-Lithuania BIT. The Ukrainian government claimed that because Tokios Tokelés was 99% owned and controlled by Ukrainians, it did not fall under the definition of an “investor” who was protected under such BIT.

The arbitral tribunal held that the nationality of a company is determined not based on the provisions of Article 25(2)(b) of the ICSID Convention but by the respective BIT. Consequently, it rendered a decision that Tokios Tokelés would be deemed to be a Lithuanian investor, as the BIT only defines an investor to be “any entity established in conformity with the laws and regulations in the Republic of Lithuania.”
(For the decision concerning investments, refer to 1) (d) (iii) below.)

(ii) The Rompetrol Group N.V. v. Romania (ICSID Case No. ARB/06/3), [Decision on Jurisdiction and Preliminary Objections], April 18, 2008

Summary of the Decision

a) “Investor” under the ICSID Convention shall be determined based on the definition under the BIT.

b) “Investor” under the relevant BIT includes a corporation that is established in a home country, and owned and controlled by citizens of a host country.

Rompetrol Group, a Dutch company, acquired the majority of shares of Petromidia, an oil refinery, from the Romanian privatization authority and renamed it as Rompetrol Rafinare S.A. (RRC). Later, RRC was investigated by the Romanian prosecutors with regard to this transaction. The claimant filed a request for arbitration, alleging that such investigations breach the Netherlands-Romania BIT. The Romanian government objected to the jurisdiction of the arbitral tribunal on the grounds that the claimant is solely or mainly controlled by individuals who have Romanian nationality and reside in Romania, and its funds have originated in Romania.

The arbitral tribunal understood that a State determines the citizenship of its nationals by its law, and that “nationals” of a contracting party as “investors” under Article 25(2)(b) of the ICSID Convention are determined based on a BIT concluded by the State. The tribunal stated that the language of this Article indicating this is clear and that the claimant’s claim alleging the abuse of the ICSID mechanism (dissenting opinion in the Tokios Tokelés case) cannot be upheld. The tribunal then stated that the relevant BIT clearly defines an “investor” to be “any corporation established in conformity with the laws and regulations of the Contracting State” and no grounds are shown for narrowing the interpretation. Consequently, a decision was rendered that the claimant is a corporation established in the Netherlands and therefore falls under the category of an investor under the relevant BIT.

(b) Subject Matter Jurisdiction

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

Summary of the Decision

a) Even when the relevant investment contract has a clause that limits the jurisdiction over disputes regarding the contract to a separate tribunal, the arbitral tribunal under the BIT has jurisdiction over such disputes insofar as the claim is essentially based on a breach of the BIT.

b) The “umbrella clause” of the relevant BIT does not have the effect of characterizing a claim only based on a breach of investment contract as a breach of the obligations under the BIT, and the arbitral tribunal has no jurisdiction over a dispute regarding such breach of the investment contract.
SGS, a Swiss company, entered into an agreement to provide pre-shipment inspection services to the government of Pakistan. Because the Pakistani government reneged on the agreement after SGS had provided such services for a certain period, SGS requested arbitration claiming a breach of the Switzerland-Pakistan BIT. The Pakistani government objected to the jurisdiction of the arbitral tribunal, claiming that the request of SGS pertained to the substance of the agreement and disputes regarding the agreement were required to be resolved by a separate process under the choice of forum clause.

The arbitral tribunal examined the “umbrella clause” provided for in the BIT, which is the clause providing that the State parties undertake to observe any contractual obligation they may have entered into with an investor of the other State party, in order to determine whether the clause, irrespective of a choice of forum clause in a State contract, was intended to characterize a mere breach of such State contract as a breach of the BIT. The arbitral tribunal held in the negative due to a lack of clear evidence with respect to the BIT. As a result, the arbitral tribunal concluded that it had no jurisdiction.

(ii)  

**SGS Société Générale de Surveillance S.A. v. Republic of the Philippines** (ICSID Case No. ARB/02/6), [Decision of the Tribunal [on Objections to Jurisdiction]], January 29, 2004

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**Summary of the Decision**

Based on the “umbrella clause” in the relevant BIT, the arbitral tribunal has the authority to exercise jurisdiction over cases regarding breach of contract. However, as long as the relevant contract chooses the national court as a dispute settlement body, there is no possibility that a request for arbitration will be accepted in this case.

SGS Philippines entered into a contract to provide import cargo inspection services for the Philippines government. Subsequently, the Philippines government did not make payment pursuant to the agreement, and SGS, the Swiss parent company, requested arbitration on the grounds that such failure of payment constituted a breach of the Philippines-Switzerland BIT. The Philippines government claimed that the arbitration provisions of the BIT did not apply to disputes that were purely contractual, and further, the contract provided that domestic courts were to be used in any dispute regarding the contact.

Under the dispute settlement procedure clause of the BIT, the arbitral tribunal held that it had jurisdiction over disputes arising from contracts. In addition, the tribunal understood that the “umbrella” clause subjects disputes regarding the performance of contractual obligations to the protection provided in the BIT. However, the arbitral tribunal determined that it would not accept the case, and, therefore, would not exercise its jurisdiction over the subject dispute, indicating that SGS entered into a contract with the Philippines government, agreeing to submit disputes concerning the contract only to domestic courts.

Subject matter jurisdiction is also examined when the claimant (investor) insists on extending the provisions provided for in a BIT between a non-party country and the host country, based on the most-favored nation clause in the BIT between the investing country and the host country, and when it is related to the jurisdiction of the arbitral tribunal. (For examples, refer to 2) (b) (i) and (ii)
(c-1) Jurisdiction *Ratione Temporae* (Jurisdiction over the Timing): Concerning Conflicts of Views and Legal Disputes among Related Parties before a BIT Comes into Effect

(i) *Empresas Lucchetti S.A. and Lucchetti Peru S.A. v. Peru* (ICSID Case No. ARB/03/4), [Jurisdiction Award], February 7, 2005

**Summary of the Award**

When judging the identity of disputes, the identity of the subject matter is an essential element. Furthermore, it should be reviewed whether the facts and consideration from which the initial dispute arose continue to be the key in subsequent disputes.

Lucchetti Peru, a subsidiary company of Lucchetti (Chile) in Peru, intended to construct a pasta factory in the vicinity of the environmentally protected area in Lima, but Lima city issued an order to disapprove the construction in 1997 on the grounds of the need to preserve the environment and the claimants’ violation of law. Lucchetti Peru fought against the order in national court and the order was revoked the following year. Therefore, the company constructed the factory and started operation. However in 2001, Lima city issued an order to suspend the license and close the factory. Empresas Lucchetti and Lucchetti Peru submitted the dispute for arbitration, alleging that the order breached the BIT. The government of Peru asserted that this case is out of the jurisdiction *ratione temporae* of the arbitral tribunal on the grounds that the dispute was identical to the one that arose from the order issued in 1997 and that the Chile-Peru BIT, which came into effect on August 3, 2001, provides in Article 2 that “the BIT shall not apply to any conflicts of views or disputes that arise before the BIT comes into effect.”

The arbitral tribunal held that the order issued in 2001 aimed to establish a framework for regulations for the environmentally protected area and pointed out that the preface of the order refers to the fact that the claimants’ violation of law since 1997 had caused bad effects in the area, as well as the developments of the disputes with the claimants since 1997. Admitting that the dispute in 1997 and 1998 and the dispute in 2001 originated from the same source, i.e. a conflict between efforts by Lima city to ensure the implementation of its environmental preservation policies and efforts by the claimants to suspend the application of the relevant policies to their factory, the tribunal rendered an award that the dispute in question became crystallized by 1998 and continued to exist up to 2001.

* A request to annul this award was filed by the claimants but dismissed by the special committee on September 5, 2007.

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

(Case where it was admitted that disputes before and after a BIT comes into effect relate to each other but constitute different “legal disputes”)

Jan de Nul, a Belgian company, concluded a contract concerning dredging of the Suez Canal with the Suez Canal Authority in 1992. The company submitted this case to arbitration,
alleging that the government of Egypt committed fraud concerning significant information upon concluding this contract and that the decision rendered by the Egyptian administrative court in 2003 that did not uphold the alleged fraud was in breach of the relevant BIT. The government of Egypt objected to the jurisdiction of the arbitral tribunal on the grounds that the relevant BIT, which came into effect in 2002, provided in Article 12 that “the BIT shall not apply to any disputes that arise before the BIT comes into effect,” while covering investments made prior to the effectuation as those to be protected.

The arbitral tribunal held that the purport of Article 12 is to exclude any disputes that became “crystallized” before the effectuation of the BIT and are deemed to be “conventional disputes,” and affirmed the jurisdiction of the tribunal by pointing out that the actions taken by the government of Egypt up to the rejection of remedies by the administrative court increased the damage and that actions under the court system are different from contracts.

(iii) **Chevron Corp. and Texaco Petroleum Corp v. Ecuador** [Interim Award], Ad hoc—UNCITRAL, December 11, 2008

**Summary of the Award**

a) The temporal scope of a BIT and the jurisdiction *ratione temporae* of the arbitral tribunal are determined according to the intentions of related countries that are admitted through the interpretation of the provisions of the BIT.

b) “Investments” under the relevant BIT are supposed to cover a broad scope, and are to be protected under the relevant BIT during the entire period from the commencement to the final completion of the investment, including the period for the settlement and lawsuits concerning debt disposal.

Texaco Petroleum (U.S.), which is a wholly-owned subsidiary of Chevron Corporation (U.S.), signed a concession agreement concerning oil exploitation with the government of Ecuador and other related parties in 1973 and then signed a supplemental agreement in 1977. Negotiations to extend the 1973 agreement fell apart and the agreement expired on June 6, 1992. The claimants filed breach-of-contract cases against the Ecuadorian government in Ecuadorian courts from the end of 1991 to the end of 1993, alleging that the Ecuadorian government breached the agreements through actions such as acquiring oil in excess at domestic market prices, but no decision was rendered. Therefore, the claimants submitted the case to arbitration in December 2006, based on the U.S.-Ecuador BIT, which came into effect on May 11, 1997, alleging that the Ecuadorian government breached the agreements through actions such as acquiring oil in excess at domestic market prices, but no decision was rendered. Therefore, the claimants submitted the case to arbitration in December 2006, based on the U.S.-Ecuador BIT, which came into effect on May 11, 1997, alleging that the egregious delays in trial and the government’s interference in the judiciary constitute the rejection of trials under the relevant BIT and customary international law. The Ecuadorian government objected to the jurisdiction of the arbitral tribunal on the grounds that the actions and the facts, on which the complaint in question was based, took place or extinguished before the effectuation of the BIT and are not subject to the jurisdiction *ratione temporae* of the BIT.

Reviewing the language of the BIT, the arbitral tribunal stated that investments under the relevant BIT cover a broad scope, including the settlement of investment and lawsuits concerning debt disposal, and once investments were made, they are to be protected under the BIT until being completely settled. The arbitral tribunal continued that as long as lawsuits on the agreements with the Ecuadorian government proceed, the investments did exist at the time of the effectuation of the BIT, as well as at the time of the commencement of arbitration, and
pointed that the issue is not the retroactive application of the BIT but how to interpret the provisions. The tribunal concluded that the relevant BIT should apply to “investments that exist at the time of its effectuation” and that the claimants’ investments had already existed when the relevant BIT came into effect.

Admitting the jurisdiction over requests under customary international law, the arbitral tribunal held that an “investment agreement” concerning “investments” protected under the relevant BIT is also to be protected, and admitted its jurisdiction over disputes concerning the rejection of trials that started after the effectuation of the BIT, with regard to a concession agreement reached before the effectuation.

(iv) Société Générale v. the Dominican Republic (LCIA Case No. UN 7927) [Award on Preliminary Objections to Jurisdiction], Ad hoc—UNCITRAL, September 19, 2008

Summary of the Award

a) The language of the relevant BIT does not show any clear intention to apply the convention retroactively, and the arbitral tribunal shall have the jurisdiction only over actions or events after the effectuation of the BIT.

b) When any action taken before the effectuation of the BIT continues and is proved to constitute a breach of the convention at the time of this case, such action shall be subject to the jurisdiction of the arbitral tribunal.

Société Générale, a French company, which made an investment in an electricity company established in the Dominican Republic based on a joint venture agreement with the Dominican government, filed arbitration by alleging a breach of contract, etc. by the country. In response, the Dominican government asserted that the BIT shall not apply retroactively and objected to the jurisdiction of the arbitral tribunal, alleging that the actions and events on which the relevant complaint is based took place prior to the acquisition of the property by the claimant, who is a French national, or the effectuation of the BIT, and therefore the tribunal does not have the jurisdiction over this case.

Stating that conventions, in principle, shall not apply retroactively and that the relevant BIT contains no clear intention to be applied retroactively, the tribunal decided that it had jurisdiction only over a breach of the convention regarding actions or events that took place after the BIT came into effect. However, the tribunal added that if any actions taken before the effectuation of the BIT continue and were proved, at the time of this case, to constitute a breach of the convention that came into effect afterwards, the jurisdiction of the tribunal would cover such actions as well.

Furthermore, regarding the objection concerning the claimant’s nationality, the tribunal held that the language of the BIT shows that it aims to protect only nationals and companies in contracting parties, and concluded that as the relevant investments are not to be protected under the BIT until they are owned by the claimant, the tribunal does not have jurisdiction over actions and events prior to that moment.
Mobil Corporation, Venezuela Holdings, B.V. v. Venezuela (ICSID Case No. ARB/07/27), The Netherland-Venezuela BIT, [Decision of the Tribunal], June 10, 2010

(c-2) Jurisdiction Ratione Temporae (Jurisdiction over the Timing): Provisional Application of the Energy Charter Treaty

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

Summary of the Decision

a) The scope of the provisional application set forth in Article 45(1) of the ECT is the entirety of the treaty.
b) Even in the case where a country has not declared that it is not able to accept provisional application based on Article 45 (2)(a) of the ECT, if the treaty is inconsistent with its constitution, laws, or regulations, the country is not obliged to apply the ECT provisionally based on Article 45 (1).

The claimant, who is a Greek national, alleged that the company whose shares he/she holds concluded a concession contract concerning pipelines with Georgia but Georgia expropriated the contact, and submitted the case to arbitration based on the ECT and the Greece-Georgia BIT. Greece and Georgia signed the ECT on December 17, 1994, and the ECT came into effect on April 16, 1998. As the event in question occurred around that time, how to interpret the provisional application prescribed in Article 45 of the ECT became an issue.

The arbitral tribunal reviewed the language of Article 45(1), which provides that “this treaty” shall provisionally apply, and Article 31(3)(c) of the Vienna Convention on the Law of Treaties, and construed that the provisional application set forth in Article 45 shall be interpreted to mean that the ECT is to apply upon the effectuation of the entire treaty. Furthermore, the tribunal held that even without a declaration prescribed in Article 45(2)(a), if the treaty “is inconsistent with the constitution, laws, or regulations of respective countries,” they are not obliged to apply the ECT provisionally, but that the respective countries bear the burden of proof of the inconsistency. Examining the national laws of Georgia and Greece, the tribunal found no conflict in either of them, and concluded that the ECT was to be applied provisionally for both countries 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 ..., 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. ...” At present, the Republic of Belarus
has signed but has not ratified the ECT, and has not delivered a declaration of not accepting provisional application. Therefore, it is construed that the ECT is provisionally applicable to the Republic of Belarus.

(ii) *Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, (PCA Case No. AA227), Energy Charter Treaty [on Objection to Jurisdiction], November 30, 2009*

- **Summary of the Decision**

  - The provisional application under Article 45 (1) of the Energy Charter Treaty is not intended to make judgments on the inconsistencies of each provision of the Energy Charter Treaty with corresponding provisions of the Russian constitution, laws or regulations.
  - A declaration that it is not able to accept provisional application based on Article 45 (2) does not relate to the acceptability.

  The claimant, a company in the Isle of Man, is a shareholder of the Russian company, Yukos Oil Corporation OJSC. The claimant, along with two other companies, requested arbitration in February 3, 2005, regarding the measures taken by the Russian government in criminal prosecutions conducted on the managers and a large amount of additional tax before Yukos went bankrupt. (Refer to 2) (d) (V) for the background of Yukos' bankruptcy.)

  Russia signed the Energy Charter Treaty on December 17, 1994; however, there was a dispute regarding the jurisdiction of the arbitral tribunal based on the Energy Charter Treaty because the treaty had not been ratified. Also, Russia notified that it would not become a member of the Energy Charter Treaty on August 20, 2009.

  With regard to countries that have not ratified the treaty, Article 45 (1) of the Energy Charter Treaty states 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) states "Notwithstanding paragraph (1) any signatory may, when signing, deliver to the Depositary a declaration that it is not able to accept provisional application." These provisional application clauses were the main points of dispute in determining whether the tribunal had jurisdiction.

  The claimant indicated that Russia was unconditionally bound by clause (1) because it had not made a declaration based on clause (2). In response, Russia argued that (1) and (2) of Article 45 are independent clauses, and making a declaration mentioned in clause (2) is not obligatory, and therefore does not relate to the acceptability of provisional application described in clause (1). The arbitral tribunal accepted Russia's argument, finding that the declaration in clause (2) was not obligatory. Also, the tribunal stated that the acceptability of the provisional application may be questioned even if inconsistencies with the national constitution, law or regulation are not declared or notified in advance.

  Then, the interpretation of Article 45 (1) was discussed. Russia claimed that the acceptance of provisional applicability should be determined by reviewing the inconsistencies of each provision of the Energy Charter Treaty with corresponding provisions of the Russian constitution, laws or regulations. The claimant responded by stating that review should be carried out regarding the inconsistencies in the provision and principle of the provisional application and not on each provision of the treaty. The tribunal's decision was that both interpretations were incorrect but because the text -- "such provisional application" -- was to be construed in accordance with its context, the intention of clause (1) was to review any inconsistencies with the Russian constitution, laws or regulations in order to determine
whether the provision regarding provisional application should be applied. Therefore, the tribunal concluded that the jurisdiction of the arbitral tribunal would be determined as long as such inconsistencies were not verified.

The Russian side also raised questions about the claimant's position as an investor and the invested properties, but they were dismissed by the tribunal. Also, the tribunal determined that the interpretation of Taxation under Article 21 of the Energy Charter Treaty should be determined during the proceeding by reason of being the core matter of the dispute.

(d) Investments

(i) Fedax N.V. v. Republic of Venezuela (ICSID Case No. ARB/96/3), Decision on Tribunal [on Objection to Jurisdiction], July 11, 1997

- Summary of the Decision

A promissory note constitutes “title to money” and therefore can be an “investment” protected under Article 25 of the ICSID Convention and the BIT.

Fedax N.V., a Dutch enterprise, requested arbitration claiming payment was owed on Venezuelan government-issued promissory notes it owned. Venezuela objected to the jurisdiction of the arbitral tribunal on the grounds that a promissory note did not constitute an “investment” as defined by the Article 25 of the ICSID Convention and Netherlands-Venezuela BIT.

The arbitral tribunal held that an “investment” provided in such BIT included “every kind of asset, including titles to money.” The tribunal further held that “titles to money” included loans and other credit facilities, and that a promissory note is by definition an instrument of credit.

Therefore, the tribunal held that the promissory notes were “investments” provided in the BIT or ICSID Convention.

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.

**Summary of the Decision**

a) For the arbitral tribunal based on the ICSID Convention to have jurisdiction, the right concerned must relate not only to an “investment” as defined in the BIT but also “investment” as used in the ICSID Convention.

b) When determining whether it falls under the category of “investment” under the ISCID Convention, [i] economic contribution, [ii] the period of time for which the contract was implemented, [iii] sharing of risks on the transaction, and [iv] contribution to the economic development of the host country are all taken into consideration.

Salini, an Italian company, requested arbitration, claiming that the company suffered damage since its contract for road construction with the Société Nationale des Autoroutes du Maroc, a private entity financed by the Moroccan government, was terminated. The Moroccan government objected to the jurisdiction of the arbitral tribunal, insisting that the claimant’s contract for highway construction does not fall under the category of an “investment” as defined in the Italy-Morocco BIT nor an “investment” under the ICSID Convention.

As shown in a) above, the arbitral tribunal first held that the contract concerned falls under the category of an “investment” as defined in the BIT, holding that the contract satisfies all of the elements of “investment” in the ICSID Convention as shown in b) above by referring to the commentary and the preamble to the ICSID Convention. Firstly, the tribunal affirmed the “economic contribution,” citing that the claimant had provided know-how, necessary equipment and capable personnel. Regarding the contract term, the tribunal held that the contract fulfilled the requirements of a minimum term of 2 to 5 years, because the duration was 32 months at the beginning and 36 months after the extension. With regard to risks, the tribunal stated that definite costs cannot be determined in advance for a long-term construction project, making it a clear risk for a contractor. Lastly, the tribunal affirmed the claimant’s contribution to the economic development of the host country, based on the public interest and the know-how provided upon the construction.

* The case settled before the decision was made.

(iii) *Tokios Tokelés v. Ukraine* (ICSID Case No. ARB/02/18), [Decision on Jurisdiction], April 29, 2004

**Summary of the Decision**

a) The definition of “investment” in the BIT, that determines whether arbitration is appropriate, governs the interpretation of “investment” in Article 25 of the ICSID Convention.

b) The scope of “investments” covered by BITs is wide, and does not necessarily require the cross-border transfer of capital.
The Ukrainian government argued that the claimant had not shown that the source of capital used for its fundraising was non-Ukrainian, and therefore did not constitute an “investment” as defined in Article 25 of the ICSID Convention and in the Ukraine-Lithuania BIT. The arbitral tribunal held that “the parties [to the ICSID Convention] have broad discretion to decide the kinds of investment they wish to bring to ICSID.” In addition, it indicated that while the Ukraine-Lithuania BIT defined an 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,” the treaty contained no requirement that limited the scope of the “investment” depending on where the capital originated. Therefore, it concluded that as long as an enterprise established in accordance with the laws and regulations of Lithuania was making investments in Ukraine, the investment should be protected by the BIT.

(iv) Joy Mining Machinery Ltd. v. Egypt (ICSID Case No. ARB/03/11), [Award on Jurisdiction], July 30, 2004

Summary of the Decision

a) For the arbitration based on the ICSID Convention to have jurisdiction, the right concerned must relate not only to an “investment” as defined in the relevant BIT but also an “investment” as used in the ICSID Convention.

b) An ordinary sales contract does not qualify as an “investment” under Article 25 of the ICSID Convention and disputes arising from the relevant contract are not subject to the jurisdiction of the ICSID arbitration.

Joy Mining, a British company, concluded a contract for providing equipment necessary for the mining of a phosphate mine with the Egyptian government and offered letters of guarantee for contract performance and advance payment to the government. The Egyptian government paid for the total cost of introduced equipment but insisted that the relevant letters of guarantee should not be returned until full operation of the equipment is confirmed. Joy Mining requested arbitration, alleging that this action constitutes a breach of the UK-Egypt BIT. In response, the Egyptian government objected to the jurisdiction of the arbitral tribunal on the grounds that this case involves no “investment” under the relevant BIT or the ICSID Convention.

Firstly reviewing whether or not the bank guarantee in question relates to an “investment” as defined in the relevant BIT, the arbitral tribunal decided that the relevant guarantee is simply a contingent liability and cannot be regarded as an “investment” to be protected under the BIT. Furthermore, the tribunal pointed out that even if the counter performance and the return of the letters of guarantee hold a financial value, a dispute on a bank guarantee in essence will never develop into an investment dispute.

Furthermore, regarding Article 25 of the ICSID Convention, the arbitral tribunal held that in order to be recognized as an “investment” as defined in that Article, the contract needs to satisfy the relevant requirements (a certain duration, profits on a regular basis, sharing of risks, economic contribution in real terms, and contribution to the economic development of the host country), and judgment should be made by reviewing the entirety of the activities. The tribunal stated that the clauses of this contract, including bank guarantees, are those for an ordinary sales contract and include no reference to investment under the contract, and also pointed out that, in addition to the fact that no Egyptian system for investment was used, the
production and supply of the kind of equipment involved in this case is 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 demands of the Egyptian government. The
payment finished at an early stage and there were no profits arising on a regular basis. The
risks here are not different from those involved in any commercial contract, and although
bank guarantees are economic contributions in real terms, such contributions are only limited
to a part of the projects that can be recognized to have contributed to the economic
development of the country. Holding such a view, the tribunal stated that this contract was far
from any concession contracts for public works, and that investment contracts should be kept
distinct from sales or procurement contracts involving a State agency, except in exceptional
circumstances, for the sake of stable legal order.

The arbitral tribunal concluded that this case is out of the scope of the relevant BIT
and the ICSID Convention and the tribunal does not have the jurisdiction over this dispute.

(v) Mytilineos Holdings S.A. v. Serbia and Montenegro and Serbia, [Partial Award
on Jurisdiction and Dissenting Opinion], Ad hoc—UNCITRAL Arbitration
Rules, September 8, 2006

Summary of the Award

Four requirements for falling under the category of “investments” under Article 25 of
the ICSID Convention are unique for the convention and are not to be applied to the case of
an ad-hoc arbitration prescribed in the BIT as an alternative other than the ICSID.

(vi-1) Malaysian Historical Salvors Sdc, BHD v. The Government of Malaysia,
ICSID Case No. ARB/05/10, Decision on Jurisdiction, May 17, 2007

Summary of the Decision

a) For the arbitral tribunal based on the ICSID Convention to have
jurisdiction, the right concerned must be not only “investment” as defined
in the BIT but also the “investment” as used in the ICSID Convention.
b) When determining whether it falls under the category of “investment” in
the ISCID Convention, the 4 factors set out in the decision on Salini ((ii)
above) are important, but other factors also should be taken into
consideration depending on the issues in dispute.

Malaysian Historical Salvors, a British company, signed a contract with the
Malaysian government to discover and raise a sunken ship. Per the contract, the company had
to bear the cost of research and raising the ship, and the reward was to be paid to the company
only if the raising of the ship and the subsequent auction were successful. The company
submitted to arbitration a claim that the payment by the Malaysian government did not satisfy
the amount in the contract. The Malaysian government objected to the jurisdiction of the
arbitral tribunal, claiming that the company’s contract did not constitute an “investment” as
defined in the ICSID Convention.

Referring to arbitral precedents related to “investment” as used in Article 25 of the
ICSID Convention, the arbitral tribunal made the two statements, a) and b), set out above in
the “Summary of the Decision.” It examined the extent to which the characteristics of
“investment” were satisfied. It held that it did not have jurisdiction over the case, based on
the following reasons: (1) the factor of regularity of profit does not exist in this contract, (though this factor is not particularly decisive); (2) economic contribution is affirmative, since the company provided equipment, know-how and personnel; (3) the contract term is satisfied quantitatively, but not qualitatively when considering the factor of economic development stated below; (4) regarding risks, the contract may be said to be superficially risky, but the company did not prove that the risk exceeded normal commercial risks; and (5) the economic contribution to the host country must be a significant contribution, and the profit from this contract is not a significant contribution to the public interest and economy of the host country, since it does not have continuity, unlike infrastructure or financial projects.

* The claimant applied for annulment.

(vi-2) *Malaysian Historical Salvors Sdc, BHD v. The Government of, Malaysia (ICSID Case No. ARB/05/10), England-Malaysia BIT, [Decision on the Application for Annulment], April 16, 2009*

**Summary of the Decision**

The term “investment” as used in Article 25 of the ICSID Convention only means that the dispute in question should be a legal dispute and related parties should be a Contracting State and a national of another Contracting State.

After the aforementioned decision – 1)(d)(vi-1) – was rendered, Malaysian Historical Salvors applied for the annulment of the decision on jurisdiction, stating that the arbitral tribunal interprets the term “investment” in Article 25(1) of the ICSID Convention excessively narrowly, against the process of drafting the Convention, and that the four cited requirements are not derived from the main clause of the ICSID Convention and are inconsistent with their ordinary terminology. In response, the Malaysian government asserted that “investment” in that Article refers to investment for the economic development of the host country but the company’s investment does not have such aim and therefore is not under the jurisdiction of the arbitral tribunal.

The ad-hoc committee, admitting that the contract among the related parties falls under the category of “investment” under the relevant BIT, pointed out that as Article 7 of the BIT limits the submission of disputes only to ICSID arbitration, it is difficult to construe that both Contracting States knew that the submission of disputes over an “investment” under the relevant BIT is limited due to how the term “investment” is defined under the ICSID Convention.

The committee stated that provisions without a clear definition of the term “investment” were adopted intentionally in the process of drafting the ICSID Convention and have been used as the decisive criteria for related parties to reach an agreement on jurisdiction, and that the outer limits of the jurisdiction prescribed in Article 25(1) of the convention are only that the dispute should be a legal dispute; related parties should be a Contracting State and a national of another Contracting State; and the contract is not that for sales. Accordingly, the committee decided that the arbitrator made a mistake in reviewing the definition of the term “investment,” resulting in a significant error of failing to execute its jurisdiction.
Against this decision, committee member Shahabudeen expressed an opinion to oppose the annulment, by reviewing the preamble to the ICSID Convention, stating that “investment” under the convention refers to investment contributing to the economic development of a host country and that such contribution should be substantial or significant.

(vii) Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines, ICSID Case No. ARB/03/25, Award, August 16, 2007

Summary of the Award

The Germany-Philippines BIT clearly limits the protection to the investment that is legal under Philippine law. When a claimant makes investment that violates the domestic law, being fully aware of this illegality, the investment concerned does not constitute an “investment” as defined in the BIT.

Fraport, a German company, invested in PIATCO, which entered into a contract with the Philippines government for the construction of an airport terminal. The contract was opposed by domestic companies in related businesses, and its illegality was alleged. The Philippines government at first tried to renegotiate the contract, but finally judged that it was invalid from the beginning since it did not satisfy the corresponding contract’s requirement for capital. The government nationalized the terminal, which was almost complete, and expressed its intention to offer compensation. While these processes were underway, Fraport submitted to arbitration based on the Germany-Philippines BIT. The Philippines government objected to the jurisdiction of the arbitral tribunal.

The arbitral tribunal held that it did not have jurisdiction over the case. In its determination, the arbitral tribunal referred to three Articles in the BIT, including the definition of invested assets and the instrument of ratification, and held that conformity to domestic laws was an important condition for being protected by the BIT. The tribunal also understood that this condition meant that conformity at the time of investment, and the illegality of activities after the investment, must be examined by this tribunal. Based on the foregoing, the secret shareholder agreement whose existence was revealed during the process of arbitration (rather than the violation that became an issue in the Philippines at the beginning) violated the domestic law that limited the management of national enterprises by foreigners. Pointing out that this violation was made as a secret agreement – with full awareness of the illegality based on legal advice – the arbitral tribunal held that the investment concerned did not constitute an “investment” protected by the Germany-Philippines BIT.


Summary of the Award

An appeal was made, based on ICSID Treaty Article 52 Item 1, for the annulment of the original arbitral award which rejected the jurisdiction of the original arbitral tribunal. This is a case in which an arbitral award was annulled by a special committee since a fair hearing opportunity based on the provision was not held and also because this was a major great violation of the principal rules of the fundamental procedure.
The original arbitrary award (See the previously mentioned (vii)) dismissed the claim by the claimant since the claimant’s investment does not constitute as “investment asset”, which is protected under the investment agreement, since the claimant had acted in a manner that infringe upon the domestic law of the host country. Upon receiving this award, the claimant requested for the annulment of the original arbitral award, basing the request on “ICSID Convention Article 52 Clause 1 (d), in instances in which there was a significant divergence from procedural principle”, leading to the formation of a special committee.

The original arbitral award had the fact that the prosecutor deferred the cases of indictment of violations of Philippines law after the conclusion of arbitral trial be rejected to be used as evidence, claiming that there was a suspicion that the verdict of the persecutor is based on biased evidence. The special committee pointed out that the deferment of prosecution over the violation of domestic law should have been used as a significant piece of evidence for the original arbitral tribunal to decide on jurisdiction. The committee stated that both involved parties should have been given an opportunity to state their opinions in order to dispel doubts.

Thereafter, based on the fact that the arbitration court did not offer such an opportunity for stating opinions, the committee acknowledged that the arbitral tribunal significantly violated the fundamental procedural principles, annulling the arbitral award.

(ix)  *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), Energy Charter Treaty (ECT), [Decision on Jurisdiction], August 27, 2008

**Summary of the Decision**

Definition of the term “investment” under the ECT does not contain any language indicating the requirement of consistency with specified laws, but for any investment made in violation of national laws or applicable international laws, the protection under the ECT can be denied.

Plama, a Cypriot company, requested arbitration on the grounds that an action of the Bulgarian government toward Nova Plama in Bulgaria, whose shares Plama acquired upon its privatization, is in breach of the ECT. The Bulgarian government objected to the jurisdiction of the arbitral tribunal, alleging that it thought the shares of Nova Plama in question were to be sold to a joint venture established by André & Cie (André) and Norwegian Oil Tradings (NOT), but the claimant acquired the shares by misrepresenting that fact, in other words, through fraudulent misrepresentation. The claimant insisted that the memorandum of understanding (MOU) of the share purchase agreement says that the shares are to be transferred to “a company presented by NOT and André” but that this does not refer to a joint venture established by these two companies.

The arbitral tribunal referred to documents exchanged between the related parties upon the privatization of Plama and stated that the Bulgarian government believed that the purchaser of the shares was a joint venture established by the two companies, and that under the recognition that the purchaser’s financial and technological capabilities are important for this contract, the Bulgarian government would not have sold the shares if it had known that an individual, who did not have sufficient assets, was going to purchase the shares in a company’s name. Furthermore, the tribunal admitted that the claimant was obliged to tell the government that the company was not a joint venture by the two companies, but intentionally neglected to do so. The tribunal held that the claimant’s investment constitutes fraud and
admitted the breach, stating that the principle of good faith under Bulgarian contract laws encompasses, in principle, the obligation for contractors to provide all related facts upon concluding a contract. In contrast to other BITs, the ECT does not contain any language indicating the requirement of consistency with specified laws, but leaves a possibility of a breach of “applicable rules and principles of international law” (Article 26, paragraph (6)). Referring to past arbitration decisions, the arbitral tribunal decided that the claimant’s acts were in breach of the principle of good faith under international law and concluded that the claimant’s investment may not be protected under the ECT.

* Refer to 2)(b-1)(ii) below for the award concerning the most-favored-nation treatment in the decision on jurisdiction.

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

Summary of the Award

a) An “investment” as defined in the BIT holds “an inherent meaning” and the scope of an “investment” does not change irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings.

b) The “investment” as defined in the relevant BIT means a “contribution” that extends over a “certain period of time” and that involves some “risk.”

Romsak, a Swiss company, concluded a contract for the supply of wheat with the government of Uzbekistan. The company, which had performed the contract but was not paid for it, requested arbitration for a breach of the contract and the request was accepted. However, the arbitration award was not executed smoothly, so the company requested arbitration based on the Switzerland-Uzbekistan BIT. The government of Uzbekistan objected to the jurisdiction of the arbitral tribunal, alleging that the supply contract in question and the arbitration award concerning the breach of the contract do not fall under the category of the “investment” under the relevant BIT.

The arbitral tribunal held that the investments listed in Article 1(2) of the relevant BIT, which defines the term “investment,” are examples and that their scope shall be determined through interpreting the provisions in line with the Vienna Convention on the Law of Treaties. As Article 9(3) of the relevant BIT provides for the possibility to resort to ICSID arbitration, in addition to proceedings based on UNCITRAL arbitration rules, the tribunal stated that it is unreasonable and irrational to construe that the definition of the term “investment” as well as the scope of the protection under the BIT vary depending on where to submit the case and that such interpretation also contravenes the general rule that the same wording shall have the same meaning in the same context. Furthermore, the tribunal pointed out that contracting party countries may include all assets and transactions in “investments” by clearly defining the term in BITs but the relevant BIT does not contain any provisions to show the intention of contracting party countries to add special meanings to the term. Consequently, the tribunal found that the term “investment” in the relevant BIT holds “an inherent meaning,” referring to a “contribution” that extends over a “certain period of time” and that involves some “risk,” irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings.
Regarding this case, the arbitral tribunal firstly decided that the arbitration award based on contractual breaches cannot be an “investment” as long as the contract, the preface of the arbitration, does not fall under the category of an “investment” under the relevant BIT. Then, the tribunal stated that regarding “contracts and economic relations entered into with Uzbek public entities,” Romsak’s wheat delivery cannot be recognized as a contribution in relation to that transaction unless it aims to promote investment, and that it was the first and last economic transaction. The tribunal also pointed that risks assumed by Romsak in this case were not the investment risks of the unpredictability of transaction results, but only the usual risks of non-performance that are often to be assumed by contracting parties.

Accordingly, the arbitral tribunal denied the jurisdiction on the grounds that the claimant did not own “investments” under Article 1 of the relevant BIT.


**Summary of the Award**

Investment is not a single right, but a collection of rights. The rights of arbitration construct individual investment asset.

ATA, a Turkish company, requested for ICSID arbitration, disputing the legality of the decree of nullity given by the Jordanian domestic court award on arbitration based on the contract that ruled in favor of the company concerning the dispute that rose from the collapse of levee that ATA had built in Jordan. The Jordanian government argued that the dispute in question arose before the Turkey-Jordan BIT came into effect, and since this dispute has been fought in court due to arbitral and judiciary proceedings for six years, it does not possess temporary jurisdiction.

The ICSID determined that the arbitral court cannot accept temporal jurisdiction, after referring to the Lucchetti case verdict concerning the invalidity of the final award of the arbitration on the contract, viewing that it is the same dispute as the FIDIC arbitral proceeding. However, concerning the rights during arbitration, ICSID invoked the Sapien case award, which held that the “overall activities” which include “contract, building itself, retention money, approval and related ICC arbitration” as investment asset mentioned on the ICSID Treaty Article 25. ICISD held that international commerce arbitration award also constitutes as investment asset. Therefore, the rights of arbitration are rights for valid activities that possess values for financial administration related to investment. Since they construct different investment assets, the tribunal approved temporal jurisdiction. ICSID then held that the nullity of rights due to the conclusion of arbitral agreement based on the contract executed by the Jordanian domestic court violates the purpose and wording of BIT which stipulated fair and equal treatment in the preamble, ordering the subsequent Jordanian domestic court proceedings to stop.

(xii) *Saber Fakes v. Turkey*, (ICSID Incident number ARB/07/20), Arbitral Rule, July 14, 2010

The subjective definition of investment assets should not only be referred by the agreement of involved countries, but one that should be sanctioned within the framework of ICSID treaties. Its requirements are (i) contribution (ii) implementation period of the contract to a certain degree, (iii) exposure to risk.
The claimant submitted to an arbitration tribunal stating that shares of Telsim, in which the claimant claimed to have owned 66.9% of the shares, was confiscated by the Turkish government, forcing the claimant to sell the asset to a third part. The claimant claims that this is an act that expropriated the investment assets of the claimant, incurring loss to the claimant. The government of Turkey claimed that the claimant did not have any proof that the claimant was a stockholder of Telsim, pleading for jurisdiction claiming that the claimant was a merely a dummy stockholder to substitute the Uzan family whose possessions were confiscated for being complicit in the fraud case in Turkey.

The arbitral tribunal made the aforementioned claim, holding that the contribution to the economic development of the host country, which was adopted as another requirement after the Salini case ruling, is mainly based on the ICSID Convention preamble. The tribunal therefore determined that it was unreasonable to attribute meaning and roles to wordings of the treaty, despite the fact that such things are not clear from the wording. As result, the tribunal held that it is something that is anticipated and there cannot be seen as an independent requirement. Furthermore, the tribunal did not acknowledge its legality or the duty of candor as additional requirements for the definition of investment. For this case, the tribunal held that the requirement of the ICSID Convention Article 25 (1) was fulfilled. However, the claimant’s claim of owning shares was dismissed, indicating that the claimant did not have methods of accessing company shares by referring to the process of purchasing shares and their prices. As a conclusion, the arbitral tribunal denied jurisdiction, claiming that the claimant did not possess shares that constitute investment assets.

(xiii) Mobil Corporation, Venezuela Holdings, B.V. v Venezuela, (ICSID Incident number ARB/07/27), the Netherland-Venezuela BIT, Arbitral Rule, June 10, 2010

Summary of the Award

There is no distinction in the application of direct and indirect investment in the Netherlands/Venezuela BIT. Therefore, the shares held by an individual stockholder, from a country involved in BIT, of a company or of a joint venture as well as profits arising from the shares may become invest asset to be protected by the BIT. The claimant referred to an arbitration tribunal claiming Venezuela nationalized the oil development plan without making appropriate compensation, incurring the claimant the loss of investment asset. The government of Venezuela claimed that the agreement of the nation in terms of investment law arbitration is not clear and that the claimant is not a direct holder or rules of investment within the Venezuelan territory. The government of Venezuela claimed that the claimant therefore does not receive protection from indirect investment based on the BIT, disputing for the jurisdiction of the arbitration tribunal (See C-1 (v) above for facts). The arbitral tribunal pointed out that “investment property” is extremely-broadly defined as “various types of property” in the Netherland-Venezuela BIT, and that the BIT does not clearly refer to either a direct or indirect investment. The tribunal then held that the shares held by a Dutch shareholder of a company or a joint venture conducting investment within Venezuelan territory, as well as other profits, to become subject of protection. The tribunal furthermore acknowledged that there were no requirements stipulated that an intermediary company shall not exist between the final owner of a company or a joint venture and investment asset. Therefore, it was certified that there were no wordings that excluded indirect investment, and that this does not constitute as wordings that exclude indirect investment. The tribunal dismissed the claim of the government of Venezuela that indirect investment is not protected on BIT.
Exclusion of Matters of Taxation

Occidental Exploration and Production Company v. The Republic of Ecuador (LCIA Case No. UN3467), The United States-Ecuador BIT, [Final Award], Proceedings based on UNCITRAL Arbitration Rules, July 1, 2004

Summary of the Award

The arbitral tribunal shall have the jurisdiction even over disputes concerning matters of taxation as long as they relate to the observance and enforcement of investment contracts under the relevant BIT.

Occidental, a U.S. company, concluded a contract for the provision of services with Petroecuador, a state-owned corporation of Ecuador, to undertake exploration for and production of oil in Ecuador. (See below “Petroleum Industry” in (Reference 2) Major Disputes by Industry for details.) The company applied to the Servicio de Rentas Internas (SRI; national tax administration) for the reimbursement of Value–Added Tax it had paid on purchases required for its exploration and exploitation activities under the contract and the ultimate exportation of the oil produced. Such reimbursement was made on a regular basis. However, after the contract was changed into a participation contract in line with the amendment of the Ecuadorian law, SRI suspended the reimbursement and decided to demand the return of the money already reimbursed. Occidental requested arbitration, alleging that this action constituted a breach of the U.S.-Ecuador BIT. The government of Ecuador objected to the jurisdiction of the arbitral tribunal, asserting that the VAT and the reimbursement thereof fall under the tax exclusion set forth in Article 10 of the relevant BIT and are excluded from the application of the BIT. Article 10(2) of the BIT provides that the provisions of this Treaty shall apply to matters of taxation only with respect to (a) expropriation, pursuant to Article 3, (b) transfers, pursuant to Article 4, and (c) the observance and enforcement of terms of an investment agreement or authorization as referred to in Article 6.

The arbitral tribunal firstly dismissed the claimant’s allegation, stating that the allegation that the relevant tax exclusion applies only to matters of direct taxation lacks persuasiveness. Then, the tribunal pointed out that this case involves neither transfers nor expropriation and the issue is whether or not this dispute relates to the observance and enforcement of an investment contract prescribed in Article 10(2)(c) of the BIT. The tribunal affirmed its jurisdiction, holding that this case is a dispute over whether the reimbursement of VAT is included as a factor of the participation contract and that this dispute relates to the observance and enforcement of the investment contract.

* Refer to 2)(a)(iii) below for the award concerning the national treatment.
Summary of the Award

Measures concerning the reimbursement of VAT taken by the government authority in conformity with related laws fall under taxation measures that are provided to be excluded under Article 12, paragraph (1) of the relevant BIT and are not covered by the jurisdiction of the arbitral tribunal except for cases falling under exclusion under the BIT.

EnCana, a Canadian company, concluded a participation contract with Petroecuador, a state-owned corporation of Ecuador, via its subsidiary Ecuadorian corporation, to undertake exploration for and production of oil in Ecuador. The Servicio de Rentas Internas (SRI; national tax administration) had accepted the reimbursement of VAT on goods and services that the company used for the production of oil for export, but later suspended the reimbursement and decided to demand the return of the money already reimbursed. EnCana requested arbitration, alleging that this action constituted a breach of the Canada-Ecuador BIT. The government of Ecuador objected to the jurisdiction of the arbitral tribunal, asserting that the entitlement to the reimbursement of VAT falls under the taxation measures set forth in Article 12(1) of the relevant BIT. Article 12 of the BIT provides in paragraph (1) that “Except as set out in this Article, nothing in this Agreement shall apply to taxation measures” and as the exception, it provides that this Treaty shall apply to “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 the Contracting parties” (paragraph (3)), and that Article 8, concerning expropriation, may also apply to tax measures (paragraph (4)). The arbitral tribunal reviewed the issue of jurisdiction together with this case.

Firstly, the tribunal stated that the term “tax measures” in question should be interpreted pursuant to the ordinary meaning in the context of the Treaty and admitted as follows: the relevant measures are [i] measures to be taken under the law; [ii] “taxes” include not only direct taxes but also indirect taxes such as VAT; [iii] decisions regarding the amount of tax or reimbursement also fall under “measures”; and [iv] whether the relevant measures fall under “tax measures” is not a matter of economic effects but the operation of law. The tribunal then stated that, even though the application of rules on VAT by SRI was inconsistent as claimed by the claimant, the relevant measures were taken by tax officials in conformity with related laws and were also subject to a court hearing, and therefore they fall under “tax measures.” The tribunal stated that this case is not a claim on breach of an agreement with the central government and does not fall under what is prescribed in Article 12, paragraph (3) of the BIT, and that it is therefore out of the applicable scope of the BIT except for Article 8 concerning expropriation, and concluded that the tribunal does not have the jurisdiction over this case.

(ii) EnCana Corporation v. The Republic of Ecuador (LCIA Case No. UN3481), [Award], Proceedings based on UNCITRAL Arbitration Rules, February, 3, 2006
(iii) Duke Energy Electroquil Partners and Electroquil S.A. v. Ecuador (ICSID Case No. ARB/04/19), [Award], Agreement on U.S.-Ecuador BIT and Individual Arbitration, August, 18, 2008

Summary of the Award

Although the relevant BIT provides the exclusion from application of the BIT with regard to “matters of taxation” other than specified matters listed, claims on customs duties are “matters of taxation” and therefore such claims are out of the jurisdiction of the arbitral tribunal.

Duke Energy, a U.S. company, acquired shares of Electroquil, a power generation company created and incorporated under the laws of Ecuador. Electroquil concluded a power purchase agreement (PPA) with state-owned INECEL and supplied power. Based on the PPA concluded in 1996 that stipulates tax-free importation of “goods required to generate electricity,” Electroquil imported turbines free of customs duties, but one of the turbines broke down in 1998. The customs law was amended later, and Electroquil’s request for the exemption of customs duties for the import of a new turbine was rejected. Regarding the claimant’s allegation of a breach of the BIT, the arbitral tribunal’s jurisdiction was challenged. The tribunal held that claims on customs duties are “matters of taxation” excluded by virtue of Article 10(2) of the relevant BIT. The claimant alleged that the jurisdiction is to be affirmed on the grounds of Article 10(2)(c) that provides that the BIT shall be applied exceptionally to matters concerning the observance and enforcement of terms of an investment agreement or authorization. The tribunal held that the PPA in question was not concluded between Duke Energy and the government of Ecuador and does not fall under an “investment agreement” as prescribed in that Article, and consequently denied the jurisdiction over the claim on customs duties.

* The arbitral tribunal admits other breaches. Refer to 2)(c)(v) and 2)(e)(iv) below.

2) Awards on Substantive Obligations

(a) National Treatment


Summary of the Award

a) If a domestic investor and foreign investor are both in the same economic or business sector, then they are deemed to be in “like circumstances.”

b) In finding a breach of the national treatment requirements in the governmental measure, a greater weight is given to the actual “impact” of the measure on the investment business rather than the “intent” of the government in introducing such measure.
S.D. Myers, a U.S. company, was planning a business which involved establishing a subsidiary in Canada for treating PCB waste obtained in Canada in the U.S. There were competitors in Canada, but because the U.S. facility of S.D. Myers was located near the PCB waste, it had a cost advantage. Although S.D. Myers had obtained import approval from the U.S. Environmental Protection Agency, it was unable to continue business due to PCB export prohibition measures of the Canadian government. It requested arbitration on the grounds that the export prohibition measures were in breach of the national treatment requirement under NAFTA, which reads “[e]ach Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors.”

The arbitral tribunal agreed that the export prohibition constituted a breach of national treatment on the following ground. In interpreting “like circumstances,” it referred to the OECD Declaration on International Investment and Multinational Enterprises, of which the U.S. and Canada were both members, and stated that whether the relevant foreign investor was in the same economic or business sector should be examined. In addition, it stated that “protectionist intent” was not necessarily decisive in deciding whether there was any action contrary to the discipline of national treatment, and that practical impact such as creating a disproportionate benefit for nationals over foreign investors, was significant. Canada claimed the purpose of the restriction was to maintain Canada’s ability to process PCB within Canada. Although the arbitral tribunal found this purpose to be legitimate, it dismissed Canada’s claim on the grounds that there were legitimate alternative measures.

(ii) Pope & Talbot, Inc. v. The Government of Canada, Arbitration under the UNCITRAL Arbitration Rules, NAFTA Award on the Merits [of Phase 2], April 10, 2001

Summary of the Award

a) If a domestic investor and a foreign investor are both in the same economic or business sector, then they are deemed to be in “like circumstances.”

b) A difference in treatment between domestic investors and foreign investors is justifiable if it is based on reasonable policy decisions and not intended to favor domestic investors.

Pope & Talbot, a U.S. company, established a subsidiary in Canada and was engaged in the manufacture and sale of softwood lumber. Most of its lumber was exported to the U.S. The company became subject to export restrictions under the Canada-U.S. bilateral agreement. These measures applied a complex regime of export quotas to duty-free exports permitted from certain provinces including that in which Pope & Talbot’s Canadian subsidiary was located, but did not impose any restrictions on exports from other provinces. Pope & Talbot claimed a breach of national treatment on the grounds that this export restriction was de facto disadvantageous treatment.

As mentioned above, NAFTA provides that the contracting party country accord to the investors of the other contracting party country treatment no less favorable than that it accords, “in like circumstances,” to its own investors. In determining whether the foreign investor and domestic investor were in like circumstances, the arbitral tribunal considered that it was necessary to compare the foreign investor with the domestic investor in the same economic or business sector. In addition, even if there was a difference in treatment between
the foreign investor and domestic investor, it could be justified if it was “shown that it is based on reasonable policy decisions and not intended to favor domestic investors over foreign investors.” As a consequence, the tribunal held that the imposition of export restrictions on certain regions in order to prevent the application of countervailing duties by the U.S. was a reasonable policy decision, and that the domestic investor in the region to which the export restriction did not apply and Pope & Talbot were not in “like circumstances,” and therefore there was no breach of national treatment.

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

Summary of the Award

In light of the objective of the national treatment provision, a domestic investor and foreign investor may be found to be in “like situations” even if they are not in the same business sector.

Occidental, a U.S. company, requested arbitration on the grounds that a denial of a refund of a value-added tax provided under Ecuadorian tax law was in violation of national treatment under the U.S.-Ecuador BIT. The Ecuadorian government claimed that since Petroecuador, a domestic oil company, was also denied a refund of the value-added tax, it was not discriminatory treatment against foreign investors.

The national treatment provision in the investment treaty provided that treatment not less favorable than accorded to domestic enterprises shall be accorded to foreign investors in “like situations.” The arbitral tribunal stated that the objective of national treatment was to protect foreign investors compared to domestic vendors, and the determination of “like circumstances” could not be simply made by comparing the business sector in which certain business activities were being conducted. In addition, it stated that while the concept of “like product” in GATT was considered to relate to competitive and substitutable products, the “situation” can be interpreted to relate to all exporters that share such condition.

(iv) Champion Trading Company Ameritrade International, Inc. v. Arab Republic of Egypt, ICSID Case No. ARB/02/9, Award, October 23, 2006

Summary of the Award

“Like circumstances” are defined as similar situations that should be evaluated in the same business sector or same economic field.

Champion Trading, a U.S. company, et al. requested arbitration, claiming that since compensation was paid to a national cotton company (corresponding to the price differential between market price and the price specified by the government) and not paid to foreign companies including Champion Trading, a breach of the national treatment provision in the U.S.-Egypt BIT had occurred.

The national treatment provision in the investment treaty provided that treatment no less favorable than for domestic enterprises shall be accorded to foreign investors in “like circumstances.” The arbitral tribunal pointed out that, for the compensation to be paid under the system, the cotton had to be purchased not through the market but through the
government’s “Collection Center,” with the price specified by the government, and that the companies that purchased from the market (at market price) and the companies that purchased from the Collection Center at the fixed price were very different. The claimant purchased cotton only from the market, and was determined not to be in a comparable situation with other companies in the payment of compensation. Based on the foregoing, the arbitral tribunal concluded that the claimant and other companies were not in “like circumstances,” and, therefore, it would not examine whether or not there was discrimination based on the difference of nationality.


Summary of the Award

a) When claiming violation of Article 1102 of NAFTA, a foreign investor must prove: (1) the government gave treatment to establishment, acquisition, expansion or management; (2) the foreign investor or foreign investment was in “like circumstances” to domestic investors or domestic investment; and (3) the NAFTA member country accorded less favorable treatment to the foreign investor or foreign investments than it accorded to its domestic investors or investments.

b) When determining “like circumstances,” all of the relevant circumstances to which the treatment of state was accorded should be taken into consideration.

UPS, a U.S. company, requested arbitration on the grounds that the customs laws used by the Canadian government favored Canada Post (a state-owned company, which monopolized postal services but not courier services) and was in breach of the national treatment requirement under NAFTA.

First, the arbitral tribunal held that the measures concerned were “treatment.” Second, the tribunal held that, concerning whether UPS and Canada Post were in “like circumstances,” it would take into consideration all the relevant circumstances to which the treatment was accorded. It held that the problem was due to the distinction between Canadian customs’ treatment of postal products and of products imported by courier such as UPS. Concerning the customs measures, it held that postal traffic and courier shipments were not “like circumstances.” The tribunal pointed out the following three factors as distinctions: (1) a courier notifies a recipient regarding a shipment in advance, allowing customs to check and perform risk assessment; (2) the difference between the voluntary check of the courier and the check by customs staff; and (3) the high degree of safety of courier transport by routing and trading network management. It held that UPS and Canada Post were not in “like circumstances” and so there was not a violation of the national treatment obligation.
Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. Mexico (ICSID Case No. ARB(AF)/04/05), [Award], NAFTA, November 21, 2007

Summary of the Award

a) The object of Article 1102 (National Treatment) of the NAFTA is to ensure that a national measure does not upset the competitive relationship between domestic and foreign investors.

b) A breach of the national treatment obligations occurs when a foreign investor has unreasonably been treated less favorably than domestic investors in like circumstances.

The claimants, both U.S. companies, established a joint venture, ALMEX, in Mexico to manufacture High Fructose Corn Syrup (HFCS). The government of Mexico imposed a 20% tax on transactions of soft drinks and syrup using sweetener (including HFCS) other than sugar. The claimants requested arbitration, alleging that this is unfavorable tax treatment for the HFCS industry compared with the sugar industry in breach of the national treatment obligations.

Firstly, the arbitral tribunal examined whether HFCS manufacturers and the sugar industry in Mexico are in “like circumstances.” Referring to precedents concerning the NAFTA, the tribunal affirmed that they are in “like circumstances” on the grounds that both are part of the same sector and are in a competitive relationship in supplying sweetener to the soft drink and processed food markets. Furthermore, regarding discriminatory treatment, the tribunal pointed out that [i] the tax on HFCS was higher than that on domestic products, and [ii] the tax treatment had the intention and effect of protecting the sugar industry in Mexico, and concluded that the measures taken by the government of Mexico were discriminatory and amounted to a breach of the national treatment obligation.

(b-1) Most-Favored Nation Treatment – Concerning Arbitration Proceedings

(i) Emilio Augustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on the Tribunal on Objections to Jurisdiction, January 25, 2000

Summary of the Award

If the most-favored nation clause provides a wide scope of application, advantageous provisions regarding arbitration procedures stipulated in other BITs may be equally applied even when no specific reference is provided to such procedures, unless otherwise limited by public policy considerations.

After his investment in Spain failed, Maffezini, an Argentinean national, requested arbitration on the grounds that the Spanish government was in violation of the Argentina-Spain BIT, stating the business failure was due to acts and omissions of his partner in a joint venture, a Spanish financial institution. The Spanish government objected to the jurisdiction of the arbitral tribunal on the grounds that the relevant BIT required that a dispute must first be referred to the domestic court of Spain before submitting it to arbitration, and that this procedural requirement had not been satisfied. Maffezini claimed that because the Spain-Chile BIT allowed submission of a case to arbitration without going through a domestic trial,
he should be accorded the same right under the most-favored nation treatment of the Argentina-Spain BIT.

The arbitral tribunal noted that the most-favored-nation treatment provision under the Argentina-Spain BIT is applicable to “all matters subject to this Agreement,” and referred to the role of investment treaty arbitration in protecting investors, and concluded that the most-favored-nation treatment provision applied to dispute settlement provisions as well. On the other hand, it stated that whether most-favored-nation treatment would be extended to a matter was subject to limits arising from “public policy considerations” but that it did not apply to this case.

(ii)  *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision Jurisdiction, February 8, 2005

Summary of the Award

Determining whether the entire arbitration procedures provided by other BITs apply by virtue of most-favored-nation treatment requires demonstration of a clear and unambiguous agreement to that effect by the parties to the treaty providing the most-favored nation treatment.

Plama, a Cypriot company, requested arbitration on the grounds that an act of the Bulgarian government discriminating against Plama’s Bulgarian subsidiary was in breach of the Bulgaria-Cyprus BIT. The Bulgarian government objected to the jurisdiction of the arbitral tribunal on the grounds that in order to rely on the relevant BIT, a separate agreement of the party country submitting to arbitration was required. Plama claimed that based on the most-favored-nation clause in the relevant BIT, the arbitration procedure contemplated under the Bulgaria-Finland BIT, *i.e.*, ICSID arbitration, applied.

The arbitral tribunal reviewed the text of the most-favored-nation obligation, its context, and its object and purpose, and found that there was no decisive evidence that arbitration procedures were covered by the BIT. In addition, it referred to the negotiation process for revision of the Bulgaria-Cyprus BIT, and found that the party countries did not intend to apply most-favored-nation treatment to arbitration procedures, and did not agree that the MFN provision of the Bulgaria-Cyprus BIT should be interpreted to constitute the consent of Bulgaria to submit a dispute under the BIT to ICSID arbitration.

(iii)  *Wintershall Aktiengesellschaft v. Argentina* (ICSID Case No. ARB/04/14), [Award], December 8, 2008

Summary of the Award

a) The requirements before resorting to arbitration proceedings as prescribed in the dispute resolution clause of the relevant BIT (search for amicable settlement, domestic court proceedings, etc.) are essential factors that can be a preliminary step to arbitration agreement among States.

b) The most-favored-nation clause shall not be construed to apply to dispute-settlement procedures unless it clearly indicates to that effect.
Wintershall Aktiengesellschaft, a German company, requested arbitration, alleging that the measures taken by the Argentine government at the time of the financial crisis that started in 2001 infringed the interests and benefit of the company’s local subsidiary and that such action breached the Germany-Argentina BIT. Article 10 of the BIT provides, as requirements before resorting to arbitration proceedings, that investment disputes should be referred to local courts and no substantive decision be rendered or the disputes continue even after the rendering of a decision for a period of at least eighteen months. Although the local subsidiary in question had not brought the dispute to a local Argentine court, the claimant alleged that pursuant to the most-favored-nation clause in the relevant BIT, the dispute-settlement provision in the Argentina-U.S. BIT, which does not contain the eighteen-month requirement, should apply in this case.

The arbitral tribunal did not admit the application of the most-favored-nation clause and denied the jurisdiction, on the grounds of a) and b) above, as well as the following: c) “activities related to investments” prescribed in the relevant BIT refer to business activities in the territory of the host State rather than to activities related to the settlement of disputes; and d) dispute-settlement procedures under the Germany-Argentina BIT and the Argentina-U.S. BIT are completely different, with available arbitration bodies being different accordingly.


Summary of the Award

A case that held that if (a) a clause that approves filing a lawsuit to a domestic court and (b) a clause that states referring to an arbitration becomes possible eighteen months after filing a lawsuit to a domestic court are both present in BIT, it is mandatory to first file a suit to a domestic court, due to the consideration given to the wording and the context of the treaty. It was held that eighteen months have to pass for a person to refer to an international arbitration.

Impregilo S.p.A. (claimant), an Italian company, had been providing services by establishing an Argentinian subsidiary AGBA based on the concession contract between the state government and water supply business. Since the state government notified the stopping of fare collection and prohibition of increasing fare after being affected by the economic crisis, AGBA demanded to review the contract. Since the state government did not accept this request but accepted the increase of fares and the provision of grant money to the other regional companies, AGBA demanded an equal treatment, claiming that such actions were discriminatory. However, this request was rejected. Furthermore, the state government subjected AGBA to fines, citing contract violation as a reason, notifying the end of the contract and the transference of the company’s license to another company.

The government of Argentina objected to the jurisdiction of the arbitral tribunal, citing the violation of BIT Article 8 Clause 2 (filing a suit to a domestic court) and Clause 3 (referring to arbitration needs to occur eighteen months after a domestic trial). The arbitral tribunal stated that there are two possible interpretations: (a) filing a suit to a domestic court is an option; therefore, only when this option has been selected, the clause 3 will become applicable; and (b) filing a suit to a domestic court first is mandatory, and therefore referring for arbitration will not be possible unless eighteen months have passed by. Building upon this, the tribunal held that in order to dispel this ambiguity, the context of the treaty and not just its wording needs to be considered as well. Therefore, the tribunal pointed out that if (a) is adopted, the investor will be able to select the option of an immediate arbitral referral as well.
as arbitral referral after a waiting period of eighteen months. However, this will go against the intention of the contracting country. Therefore, the tribunal pointed out that (2) 3 does not presume an exceptional situation in which the filing of lawsuit has not gone through a domestic procedure; the clause has been written to imply it to be a general requirement for referring to arbitration. Based on the foregoing, the tribunal concluded that the interpretation (b) should be adopted, accepting the claims made by the government of Argentina. Furthermore, this interpretation was also adopted in other arbitral ruling based on similar wordings in a treaty (i.e., Maffezini case, Wintershall case).

(b-2) Most-Favored-Nation Treatment – Concerning Substantive Obligations

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

a) To say that an investor in the BIT contracting party country and in a third-party country are in “like circumstances,” both investors should belong to the same economic or same business sector.

b) Unfavorable treatment of an investor by the BIT contracting party country is permissible, when a legitimate purpose of a state can justify its different treatment of the invested asset at issue, which results in the condition that both investors are not in “like circumstances.”

Summary of the Award

Parkerings, a Norwegian company, signed a contract with the Vilnius City Government of Lithuania on the design, construction and operation of a public parking system in what was designated as an historic district. It was revealed that the contract violated Lithuanian law and the negotiation for a contract revision encountered difficulties. During this time, government agencies expressed their opinion that the proposed construction of the parking lot did not complement the historic landscape and surroundings of Vilnius City. Vilnius City terminated the contract on the grounds of a failure in the performance of contractual obligations, including providing periodic updates of the project’s progress. The company requested arbitration on the grounds that it was discriminatory in comparison with the treatment of companies in other countries that concluded similar contracts and that it violated the most-favored-nation clause in the Norway-Lithuania BIT.

For the interpretation of “like circumstances” in the most-favored-nation clause, the arbitral tribunal referred to the precedent of Pope & Talbot and stated (a) and (b) above. Based on the foregoing, the arbitral tribunal compared the plan proposed by the claimant and the plans of other companies, and held that they were not “like circumstances” from the viewpoint of the size of the parking facility and proximity to the important cultural district. The Tribunal held that it was not a violation of the most-favored-nation clause.

* Refer to 2)(c)(iv) below for awards concerning the fair and equitable treatment.

* When the BIT that a submission to arbitration is based on contains a most-favored-nation clause, favored treatment under the host country and a third country may sometimes be applied equally, depending on how to interpret that clause. For example, in the case of the telecommunications industry shown in “Major Disputes by
Industry” below, the BIT in question did not contain a fair and equitable treatment clause, but the same treatment was prescribed in a BIT between the host country and a third country, and therefore it was construed that the claimant was entitled to receive that treatment pursuant to the most-favored-nation clause in the BIT in question.

(ii)  **MTD Equity Sdn. Bhd. And MTD ChileS.A. v. Chile, ICSID Case No. ARB/01/7, Arbitration ruling, May 25, 2004**

**Summary of the Award**

Excluding taxation measures and regional cooperation from the target of the most-favored-nation treatment signifies that other clauses including fair and equitable treatment also becomes a target (See <Reference 2> land development mentioned later for facts). MTD Equity Sdn., a Malaysian company, and its Chilean corporation submitted for arbitration after having been denied by the Department of Housing and Urban Development a change to segment of an urban planning necessary for their business, despite having conducted investments after receiving approval from Chile’s Foreign Investment Committee.

The claimant argued for the application of fair and equitable treatment clause of Chile-Croatia BIT, based on the most-favored-nation treatment regulation of Malaysia-Chile BIT. The arbitral tribunal stated that the following interpretations should be made: a) the fact that taxation measures and regional cooperation are excluded in the most-favored-nation treatment provision of Malaysia-Chile BIT signifies that fair and equitable treatment and other clauses are covered by the most-favored-nation treatment clause; and, b) the regulation of fair and equitable treatment should be interpreted to meet the objective of the BIT, which was to create investment protection and a favorable investment environment. The tribunal indicated the fact that approving equitable treatment based on the most-favored nation treatment will meet this objective, accepting the claim made by the claimant (See <Reference 2>, “Land Development” for facts).

(c)  Fair and Equitable Treatment

(i)  **CMS Gas Transmission Company v. The Argentine Republic, ICSID Case No. ARB/01/8, Award, May 12, 2005**

**Summary of the Award**

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

CMS, a U.S. company, obtained shares in an Argentinean privatized gas company (TGN). Upon the occurrence of an economic crisis in Argentina, the government did not maintain the tariff regime prescribed in the laws, regulations and license agreements, thus placing a burden on TGN’s profit structure.

In response to CIT’s claim regarding a breach of the BIT, the arbitral tribunal, stating that the government was not exempted from liability due to a state of emergency in this case, concluded that the government was in violation of its fair and equitable treatment obligation. In finding a breach of obligation, the arbitral tribunal, referring to the Preamble of the U.S.-Argentina BIT, stated that a stable legal and business environment is an essential element of
fair and equitable treatment. In addition, it stated that such obligation provided in other BITs was inseparable from stability and predictability. Based on the foregoing, it held that by dismantling the tariff regime, the Argentinean government breached guarantees crucial for investment decisions, thereby breaching its obligation.

* The Argentine government applied for annulment, which was upheld by an ad hoc committee on September 25, 2007. The award has not yet been annulled.

(ii) **Eureko B.V. v. Republic of Poland**, Ad Hoc Arbitration, The Netherlands-Poland BIT, Partial Award, August 19, 2005

Summary of the Award

An act of the government which is arbitrary and driven by political motives is in breach of fair and equitable treatment.

Eureko, a Dutch company, entered into an agreement with the Polish government to purchase additional shares in PZU, a former state-owned Polish insurance company, at the time of its public offering. By this additional purchase, Eureko was scheduled to own a majority of the shares of PZU. However, the government unilaterally changed plans, and at the time of the arbitral award, the shares of PZU had not yet been offered to the public. Eureko requested arbitration claiming that because privatization of PZU became a political issue, the Polish government purposefully took various actions which delayed PZU’s IPO, in violation of the Netherlands-Poland BIT.

The arbitral tribunal referred to a statement of the State Treasury Minister, resolutions of the Council of Ministers and reports of the Poland’s Supreme Audit Chamber, and found that the government changed the PZU privatization plan based on the decision that the Ministry of Treasury needed to maintain control over PZU. It concluded that the measures of the country were in breach of fair and equitable treatment as such acts of the government were “for purely arbitrary reasons linked to interplay of Polish politics and nationalistic reasons of a discriminatory character.”

(iii) **Saluka Investments BV (The Netherlands) v. The Czech Republic**, Arbitration under the UNCITRAL Arbitration Rules, The Netherlands-Czech Republic BIT, Partial Award, March 17, 2006

Summary of the Award

In order to comply with the fair and equitable treatment obligation, the government must: (i) perform consistent, transparent, reasonable and non-discriminatory acts; and (ii) not frustrate the investor’s reasonable expectations.

Saluka, a Dutch company (and a subsidiary of a Japanese company), held 46% of the shares of IPB, a former state-owned bank of the Czech Republic. IPB and three other state-owned banks dominated important positions in the financial market, but all had serious non-performing loan problems. The Czech government extended financial assistance to the three state-owned banks but not to IPB, which was in a comparable situation with them. Also, it did not provide Saluka with an opportunity for negotiations with the government in accordance with Saluka’s request. Because IPB’s operations worsened, the central bank
decided on forced administration, and IPB was subsequently transferred to another state-owned bank.

The arbitral tribunal stated that, in connection with the fair and equitable treatment obligation provided for in the Netherlands-Czech BIT, a foreign investor is entitled to expect that the state will not act in a way that is manifestly inconsistent, non-transparent, unreasonable or discriminatory. Based on the foregoing, the arbitral tribunal indicated that the Czech government discriminated against IPB by unreasonably excluding it from financial assistance and negotiating in bad faith and in a non-transparent manner, thus frustrating the legitimate and reasonable expectations of investors. The tribunal concluded that it was in violation of the fair and equitable treatment obligation.

* This is the only published case in which an enterprise with Japanese capital used BIT arbitration.

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

Summary of the Award

a) Breach of fair and equitable treatment obligation is deemed when legal predictability – that the environment at the time of agreement does not change – is denied.

b) The investor will have a right to protection of its legitimate expectations provided it exercised due diligence and that its legitimate expectations were reasonable in light of the circumstances.

(For the facts, refer to 2) (b-2) (i) above.) Parkerings claimed that the following acts of Vilnius City breached the fair and equitable treatment obligation: (1) the city did not disclose that the billing method provided for in the contract was against Lithuanian law during the negotiation of the contract, although the city knew this fact; and (2) the city blocked the company's legitimate expectations that the legal environment would not change, and this was a breach of the fair and equitable treatment obligation.

The arbitral tribunal did not hold that either of the two points constituted breach of fair and equitable treatment, on the following grounds. Regarding (1), mentioning that the company was also researching the legitimacy of the contract with Lithuanian law, it held that the foreign investor investing in Lithuania must have known that the legal base would not be stable when the country's political regime and economy was drastically changing. It also pointed out that the determination of the legitimacy was not based on information available only through the city government. Regarding (2), as the reason it did not constitute a breach of the fair and equitable treatment obligation, the arbitral tribunal stated (a) and (b) as the understanding on the obligation concerned, and pointed out that the expectation that the legal environment would not change was not created by the explicit or implicit promise of Lithuania. The tribunal also held that 1998, when the contract was signed, was a time when the countries of the former Soviet Union were becoming EU members and a time of political transition, and that investors would have acknowledged the risk of changes in laws after signing contracts. Furthermore, it held that it could not be proved that the law was revised to damage the company's investment.
Summary of the Award

a) 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 at the time when the investor made the investment, and such expectations arise from the conditions that the State offered the investor, which the latter relied on when deciding to invest.

Electroquil, the first private power generator established in Ecuador, concluded a Power Purchase Agreement (PPA) with INECEL, a state-owned entity, and started to supply electricity in 1995. PPAs, which were concluded in 1995 and 1996, contained provisions on [i] the purchase price and the establishment of payment trusts for securing payment, and [ii] INECEL’s entitlement to impose a fine when Electroquil’s supply is below the warranted amount. In 1998, Duke Energy, a U.S. company, acquired a controlling interest in Electroquil. In 1999, INECEL dissolved based on the provisions of laws, and the Ecuadorian government assumed the rights and obligations of INECEL pursuant to an executive decree. As there were disputes between the claimants and the Ecuadorian government over the unpaid amount and the legality of imposing fines and penalties, Electroquil submitted the case to domestic arbitration based on the arbitration agreement. The Ecuadorian Attorney-General objected to the jurisdiction but the objection was dismissed. Finally, the arbitration clause was determined to be invalid based on Ecuadorian law. The claimants alleged that these actions taken by the Ecuadorian government were in breach of the BIT.

The arbitral tribunal examined the possibility of a breach of the fair and equitable treatment obligation from the viewpoints of [i] the performance of the PPAs, [ii] the government’s failure to guarantee payment, and [iii] the language of the arbitration and conciliation agreements (Med-Arb Agreements). Regarding the delay in payment and irregular imposition of fines and penalties based on the PPAs ([i]), the tribunal stated that such acts constitute conduct which any contract party could adopt and are thus not capable of amounting to a breach of fair and equitable treatment. Furthermore, the tribunal denied the allegation that Duke Energy had reasonable expectations that there would be no outstanding penalties, by stating that the company should have known about the possibility of fines and penalties at the time of making investment, and so this did not admit a breach of the fair and equitable treatment obligation. Regarding point [ii] above, the tribunal stated that the PPA concluded in 1996 provided for the payment guarantee of the State and that Electroquil’s expectations are not regarded as “mere” contractual expectations. In addition, the tribunal stated that as Duke Energy requested certain guarantees from the State as a condition precedent to its investment, Duke Energy’s expectations are also deemed reasonable. The tribunal thus admitted a breach of the fair and equitable treatment obligation against Electroquil and Duke Energy. With regard to point [iii] above, the Med-Arb Agreements were concluded more than two years after Duke Energy made investment, and the tribunal concluded that their expectations are not to be protected under the fair and equitable treatment standard.
Refer to 1)(e)(iii) above for the award concerning the exclusion of matters of taxation.

(vi)  *Glamis Gold Ltd. v. United States*, [Award], Ad hoc—UNCITRAL Arbitration Rules, NAFTA, June 8, 2009

Summary of the Award

a) The fair and equitable treatment standard under Article 1105 of the NAFTA refers to the minimum standard of treatment that a State must grant to foreigners under customary international law.

b) Since its establishment in the 1920s, there have been basically no changes to that standard, but “bad faith” as a consequence of subsequent evolution shall not amount to a breach of the fair and equitable treatment obligation.

Glamis, a Canadian mining company, which conducts gold mining business in California requested arbitration with the U.S. government, alleging that a series of measures of the federal government and the State of California, including the order to backfill the site, taken out of concerns over the impact on the environment and culture, breach the minimum standard under international law guaranteed by Article 1105 of the NAFTA.

The arbitral tribunal, after confirming that there had been no disputes among related parties over the concept that the fair and equitable treatment standard under Article 1105 of the NAFTA is the minimum standard of treatment demanded by customary international law, examined possible subsequent evolution of the minimum standard established in the arbitration award for the *Neer v. Mexico* case in 1926, i.e., “an outrage, bad faith, willful neglect of duty, or an insufficiency of governmental action” that is so short of international standards that every reasonable and impartial person would readily recognize its insufficiency. Firstly, as most BITs contain more detailed provisions than customary international law, the tribunal limited the examination targets only to arbitration awards that are deemed to be based on the minimum standard of treatment demanded by customary international law. Secondly, regarding the scope of the minimum standard under customary international law, the tribunal concluded that the *Neer* standard may apply even today, except for the requirement of “bad faith,” although the meaning of the language of the standard had changed as time went by. The tribunal stated that as the fair and equitable treatment is an absolute non-contingent standard of treatment, as opposed to the relative standards embodied in national treatment, a breach thereof should be determined based on an objective standard, holding that a breach of Article 1105 of the NAFTA may be exhibited by a “gross denial of justice or manifest arbitrariness falling below acceptable international standards;” or the creation by the State of “objective expectations in order to induce investment” and the subsequent repudiation of those expectations.

The arbitral tribunal asserted that none of the Department of the Interior’s rejection of the claimant’s plan of operations, procedures of the federal government’s review of the plan, or legislation and emergency regulations by the State of California fall under any of the arbitrariness standards mentioned above, nor damage the justifiable expectations of investors. Even considering measures taken by the federal government and the State of California as a whole, the tribunal found no breach of the fair and equitable treatment obligation in this case. Accordingly, the tribunal dismissed the claim by Glamis based on Article 1105 of the NAFTA.
Summary of the Award

Walter Bau v. Thailand, UNCITRAL, June 1, 2009

Long-term non-compliance with a reasonable road usage fee setting and a complete shutting down of an airport infringe part of reasonable expectation of investors, causing a violation to the obligation of fair and equitable treatment. The claimant concluded a concession contract with the Thai government related to the repairs of the highway that connect the capital with the airport and established a joint venture operation with a local corporation. However, the elevated road direction alteration proposal, which was in the initial plan, was later rejected by the respondent, causing delay to the entire repair, decreasing the collection of road usage fair. The claimant referred for arbitration, stating that the change to the plan and the continuous rejection of the request for the increase of road usage fare had incurred a loss to the claimant. The respondent rejected the temporal jurisdiction of the arbitral tribunal claiming that the dispute started before the BIT was issued. The arbitral tribunal determined that reasonable fare rates are a part of a reasonable expectation of the claimant from the following four points: the semi-public nature of the concession operation, the characteristic unpredictability that there is no expectation for a reasonable profit, the only manner to collect the investment was the collection of road usage fare, that the poor financial situation of a company could be resolved by using a memorandum and that there was an additional consideration on the financial feasibility of concession. Therefore, a long-term rejection of usage fare requested by a memorandum was held to be in breach of a fair and equitable treatment by the respondent. The tribunal furthermore held that the complete shutdown of an airport for six months, construction of toll-free road with other contractors and changes to transportation network do not account as the “usage of airport” and the “changes to transportation management”, which according to the memorandum do not form a breach to the concession. The tribunal held that this infringed upon a reasonable expectation of the investor, violating the obligation for fair and equal treatment.

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, France-Argentina BIT, Spain-Argentina BIT, Arbitration ruling, July 30, 2010

Summary of the Award

The concept of sufficient protection and safety are incorporated in the concept of fair and equitable treatment, while its application range is narrow. Such provisions stipulate the obligation for the host country to pay sufficient attention in order to protect investment from physical damage. Therefore, this provision does not include the maintenance of safety and legal safety of business environment. The claimants claimed that concerning the dispute emerging from the concession contract concluded with the government of Argentina, the government’s action since the financial crisis in 1989 can be deemed as direct and indirect expropriation, breaching the obligation to protect investment and its safety, as well as a fair and equitable treatment. The respondent stated that the BIT violation was rejected due to the emergency evacuation defence based on the international law, as well as the government being freed from other obligations stipulated on BIT, based on the provisions related to extreme situations on France-Argentina and UK-Argentina BIT. Concerning the guarantee of protection and safety, the arbitral tribunal deemed that traditionally-speaking the said criterion
are applied if damage was caused to the physical property of investors by a third party due to the host country not fulfilling the duty of care.

Although several arbitral tribunals can point out that the obligation’s scope and content exceed the physical damage to investment property, expanding to encompass the illegal administrative and legal actions of the government, based on the wording from the France-Argentina BIT that states investors “need to be sufficiently and completely protected (omission) based on the fundamental rule of fair and equitable treatment stipulated in Article 3”, the concept of sufficient protection and safety is incorporated in the concept of fair and equitable treatment. Moreover, according to the arbitral tribunal that stated its range to be narrower than the fair and equitable treatment, an excessively expanded interpretation of the criteria will lead to an unnecessary and invalid duplication with other criterion of investment and protection. Furthermore, the fact that the word “full” or “fully” is not included in the UK-Argentina and Malaysia-Argentina BIT supports the interpretation that the obligation for protection and safety are restricted to the physical protection and legal relief concerning the assets of claimants from Spain and the United Kingdom. As result, this provision can be interpreted to include obligation for paying sufficient attention to protect investment from physical risk, but does not extend to the obligation to maintain the stability of business environment and legal safety. Accordingly, the tribunal did not follow the rulings of CME case and the Azurix case.


Summary of the Award

If there are no special commitments that prohibit the installation of new regulations in future, measures that are conducted non-discriminatory based on a formal purpose of regulation do not constitute as being in breach of fair and equitable treatment.

AES Summit (claimant), a British company, concluded a power purchase contract with a Hungarian state-run business in 1996, thereafter conducting additional investment based on a new contract in 2001. However, after the power company became involved in political dispute alleging that they are making unjustifiably high profits, the Hungarian government advising lowering the price. Furthermore in the following year, the council revised the electricity law, introducing an electricity price control regulation. The claimant referred to ICSID for arbitration, claiming that such measure violates the energy chapter. The claimant claimed that the measure ➊ violates the obligation to provide stable legal and commercial frameworks, ➋ violates the obligation to meet reasonable expectation, and that the arbitrary, unclear, and unsuitable proceedings during the introduction of electricity price control regulation is in a reach of the obligation to provide fair and equitable treatment, and ➌ price regulation is an unreasonable measure, and discriminates only certain companies. The arbitral tribunal found that concerning ➊, the Hungarian government did not make any special commitment that restricts its sovereignty related to legislation change, and that the claimant was aware when concluding the contract in 2001 that the law revisions could occur. Concerning ➋, the tribunal mentioned that the Hungarian government provided various adjustment measures to claimants before implementing the measures, stating that inadequacy in proceedings could not be acknowledged. Concerning ➌, the tribunal stated that the fact that the Hungarian government dealt with the situation in which the lack of competitions and regulations was allowing excessive profits to claimants was reasonable and valid. Since the same calculation criteria was applied to all electrical power companies, the tribunal denied the claim stating that the measures do not constitute as discriminatory measures.
(x) Chemtura Corporation v. The Government of Canada, Arbitration under UNCITRAL, NAFTA Arbitration Award, August 2, 2010

Summary of the Award

The termination of pesticide business in lindane-based products by a Canadian regulatory agency was not discriminatory and was based on health risk grounds. Therefore, the case was not recognized as a breach of obligations under NAFTA Articles 1105 (minimum standard of treatment) and 1103 (most favored nation clause).

Chemtura Corporation ("Claimant"), a United States corporation, manufactured and sold lindane-based pesticides through a subsidiary in Canada. Lindane is mainly used for canola (rapeseed); however, the use, distribution, and sales of lindane were not authorized.

In January 1998, a decision was made by the EPA, and in December of the same year, the Claimant agreed to voluntarily withdraw canola claims from their product labels by the end of 1999. In October 1999, a Withdrawal Agreement was entered into between the Claimant and the PMRA and in December of the same year, the Claimant ceased manufacture of lindane products for canola use in Canada and canola use was removed from its labels.

After that, in April 2001, the Claimant commenced judicial review procedures regarding the prohibition of the use of lindane, and in May, it filed a request with the PMRA for reinstatement of canola use on its lindane labels. PMRA refused the application and the Claimant challenged this refusal before the Federal Court of Canada.

The PMRA announced the phased-out termination of lindane registrations through voluntary suspension or termination of registration, and notified the Claimant to terminate the registration of lindane products.

In October 2003, the government of Canada established a Lindane Board of Review in light of the Claimant's request. A Re-evaluation Note (REN) was prepared; however, the Claimant filed a complaint with reasons such as the absence of dialog.

The Claimant requested arbitration alleging in essence that Canada had breached its obligations under NAFTA Articles 1105 (minimum standard of treatment) and 1103 (most favored nation clause).

The arbitral tribunal decided that Canada's termination of lindane registration through the PMRA was not an arbitrary or unjustifiable act, considering the fact that there had been significant international concern regarding lindane since the 1970s, and that it was included in the list of chemicals designated for elimination under the Stockholm Convention on Persistent Organic Pollutants (POPs). Also, the tribunal concluded that PMRA had given the Claimant treatment equivalent to other companies registering lindane within the discretionary mandate of Canadian regulations, based on the fact that the PMRA provided the Claimant options to phase-out by suspension or voluntary discontinuation in the same way as for other companies registering lindane, but the Claimant had not availed itself of the opportunity. Therefore, the government of Canada did not breach to Article 1105(1) of NAFTA.

(xi) Spyridon Roussalis v. Romania, (ICSID Case No. ARB/06/1), Greece - Argentina BIT, Award, December 7, 2011

Summary of the Award

- Sanctions imposed by government authorities on investors that are guilty of misconduct are not considered a breach of the investment treaty.
The dispute settlement procedures of investment treaties only cover the investment recipient country, and do not cover respondent's counterclaims. The claimant was a Greek citizen who was the owner of a Romanian company, the Continent Marine Enterprise Import Export. Romania created the Authority for State Assets Recovery (AVAS) to manage the privatization of state-owned enterprises. AVAS and the company concluded a Share Purchase Agreement in order to partially privatize the company and to purchase the state-owned enterprise, Malimp. Following the acquisition, the company name was changed to Continent Marine Enterprise.

The claimant contended that a share capital increase of 1,400,000 US dollars was to enable the former Malimp to issue new shares in Continent in compliance with the investment obligation. However, the respondent disputed that post-purchase investments were made. The claimant argued that measures taken by the Romanian authorities towards former Malimp's accounting, prohibiting the claimant to leave the country, a food and safety claim, and a tax claim on consultant fees paid by former Malimp constituted an indirect expropriation or at least a substantial inhibition on the claimant's investment. The claimant requested arbitration, claiming that Romania's measures were in violation of the requirement to provide fair and equitable treatment and the obligation to provide full protection and security under the Greece-Argentina BIT.

The respondent responded with a comprehensive objection to the jurisdiction of the arbitral tribunal. Also, the respondent filed a counterclaim against the claimant, stating that an order should be given to Continent to fulfill its obligations under the Share Purchase Agreement. The arbitral tribunal refused all requests made by the claimant. The additional investment from Continent to former Malimp under the Share Purchase Agreement was a fraudulent scheme and the claimant himself had been convicted by the Romanian police for fraud and tax evasion. The tribunal decision was that sanctions taken against investors that were guilty of misconduct would not be considered a breach to the investment treaty.

Regarding the counterclaim filed by the respondent, the arbitral tribunal ruled that it did not have jurisdiction. As for the Greece-Argentina BIT, there were no obligations imposed on investors, and therefore, the counterclaims of the respondent could not be settled in the BIT dispute settlement procedure. Thus, only violations by the investment recipient country were covered in BIT dispute settlement procedures.

(d) Expropriation

(i) Pope & Talbot Inc. v. The Government of Canada, Arbitration under UNCITRAL, Interim Award, June 26, 2000

Summary of the Award

In order to be deemed “expropriation,” a substantial deprivation of property is required.

(See Item 2) (a)(ii) above for factual background.) Pope & Talbot, a U.S. company, claimed that the quantitative export restrictions under the Softwood Lumber Agreement between the U.S. and Canada constituted expropriation. The arbitral tribunal decided that the intangible right of access to the U.S. market was an “investment” protected under NAFTA. However, as to the issue of whether the export restriction constituted expropriation, it stated that there was no “substantial deprivation” because the claimant did not lose control of the company, and although income decreased due to a decrease in export volume, the business
was continuing with a certain degree of income. It therefore concluded that the restriction did not constitute expropriation.

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

Summary of the Award

“[Measures tantamount to] expropriation” includes measures which have the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property.

Metalclad, a U.S. company, acquired COTERIN, a company which obtained a hazardous waste landfill permit in a state in Mexico. Metalclad was informed by federal government officials that the only permit necessary for the construction and operation of the landfill was a federal permit, and that the municipal government could not refuse granting the permit. However, after construction, the municipal government ordered the operation of the facilities to be stopped due to, among other things, Metalclad’s lack of a permit from the municipal government. Metalclad could not operate and, thus requested arbitration claiming a breach of NAFTA.

The arbitral tribunal found that this measure was “tantamount to expropriation.” In so finding, it held that “expropriation” included not only the open taking of property, but also any act 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. United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003

Summary of the Award

In determining whether a governmental measure constitutes “expropriation,” the impact on investment is a key element. At the same time, whether the government’s measures are proportional to the public interest and to the protection legally granted to investments should be considered.

Tecmed, a Spanish company, was engaged in a hazardous landfill operation in Mexico, but was denied renewal of authorization to operate the landfill due to a violation of restrictions. (See below Construction and Operation of Hazardous Waste Disposal Facilities in (Reference 2) Major Disputes by Industry for details.) Tecmed requested arbitration on the ground that such measure constituted expropriation within the meaning of the Spain-Mexico BIT.

The arbitral tribunal, referring to a declaration of the government and minutes of its meetings, found that the violation of the restrictions was acknowledged by the government to be minor, and that the true reason for denying the renewal of the permit was the opposition of the local residents. In determining whether the measure constituted expropriation, the arbitral tribunal stated that it required consideration of “whether such actions 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.” In particular, the arbitral tribunal examined whether denying the renewal because of a minor violation and opposition from local residents was proportionate but held in the negative, and found it constituted expropriation.

(iv) Rumeli and Telsim v. Kazakhstan (ICSID Case No. ARB/05/16), Turk-Kazakhstan BIT, [Award], July 29, 2008

Summary of the Award

a) The judicial process is usually commenced by private individuals for the purpose of their own interests, but a transfer of assets to a third party may amount to an expropriation attributable to the State if the judicial process was instigated by the State.

The claimants, Turkish companies, established a stock company, KaR-Tel, jointly with a local company and acquired a GSM license. (See below “Telecommunication” in Reference 2 Major Disputes by Industry for details.) KaR-Tel later concluded a contract for the establishment of a GSM-standard communications network with the Investment Committee. Three years later, the Investment Committee cancelled the contract with KaR-Tel on the grounds of a breach of contract. At the extraordinary general meeting of shareholders convened upon request from the claimants’ local partner, the purchase of the claimants’ shares in KaR-Tel was adopted in the absence of the claimants. Subsequently, the local partner filed a suit against the claimants with a domestic court to purchase the shares in question. The claimants fought against the suit but the Supreme Court permitted forced purchase of the shares. The claimants requested arbitration, alleging that these acts taken by the government of Kazakhstan breach the Turkey-Kazakhstan BIT.

The arbitral tribunal stated as shown in a) above, with regard to expropriation by judicial proceedings. Based on the relationship between the cancellation of the contract by the Investment Committee and the convening of the extraordinary general meeting of shareholders upon request from the local partner, the tribunal admitted that there was a conspiracy between them. The tribunal concluded that this was a case of “creeping expropriation,” instigated by the decision of the Investment Committee to cancel the contract with the claimants, which was then improperly communicated to the local partner, culminating in the final decision of the Supreme Court to admit forced purchase of the shares.

(v) RosInvestCo UK Ltd. v. Russia, SCC Case No. 079/2005, Arbitration ruling, September 12, 2010

Summary of the Award

An accumulation of a series of measures such as additional taxation and the sales of subsidiary’s shares was held as being equivalent to expropriation. RosInvestCo (claimant), a British company, acquired shares of Yukos, a Russian oil company, in November and December 2004. Even before this, the Putin administration had been taking antagonistic measures, such as arresting the Yukos manager who had been presenting critical attitude toward the administration. However, as result of subjecting the company to several measures from December 2004 to 2007 (i.e., a large additional taxation and transfer of the company to a state-run operation through sales of shares of subsidiaries), Yukos was led into a default, then
dismantled and nationalized. The claimant submitted to an arbitration procedure seeking compensation, claiming that the series of measures are based on an arbitrary intention, which constitutes as illegal appropriation.

Based on the fact that the Denmark-Russia investment BIT, which the claimant has sought to employ via the most-favorable-nation treatment clause, had the tax treatment excluded, the government of Russia claimed the non-existence of jurisdiction. However, the arbitral tribunal approved the jurisdiction, since this case does not only concern with the taxation measures, but instead aims to question whether the accumulation of a series of measures constitutes as appropriation. Furthermore, the tribunal pointed out that the government of Russia conducted each measure with an arbitrary intention to seize the control of assets of Yukos, perceiving that each measure is a factor of cumulative combination of measures that followed such intention. Based on the foregoing, since the series of measures led to the seizure of all assets of Yukos, the tribunal gave the verdict that the measures constitute nationalization and appropriation.

(vi) **Chemtura Corporation v. The Government of Canada**, Arbitration under UNCITRAL, NAFTA Arbitration Award, August 2, 2010

**Summary of the Award**

The termination of pesticide business in lindane-based products by a Canadian regulatory agency was a valid exercise of the police power and not an Expropriation under Article 1110 of NAFTA. (Refer to 2) (c) (x) for case overview.)

In view of the fact that lindane products were a relatively small portion of overall sales, and the fact that the sales amount had not dropped after the termination of lindane registration, the violation of the claimant's investment property by the respondent did not constitute a substantial deprivation. Also, the measures taken on lindane were not discriminatory and within the discretionary mandate of the PMRA, validly exercising the police powers against lindane's health risks.

(vii) **Telenor Mobile Communications A.S. v. Republic of Hungary**, (ICSID Case No. ARB/04/15), Norwar - Hungary BIT, [Award], September 13, 2006

**Summary of the Award**

The delay and loss incurred in business due to the exercise of government regulations, tax imposition, and irrational measures taken by the government do not rise to the level of expropriation unless there is a substantial economic deprivation of the investment value.

Pannon, wholly owned by the claimant, Telenor, a Norwegian company, concluded a concession contract with Hungary in November 1993 to provide mobile telecommunication services. A fixed-fee system was adopted in the contract; however, the government of Hungary started to revise the telecommunications systems in 2002, when universal provision of a low-price service was made compulsory by the EC Directive. Hungary set up a new telecommunications system whereby certain fixed-line operators could become "universal service providers" and would be funded by forced contributions from all telecommunication providers including Pannon. Also, Connection Fee Regulations were imposed on the telecommunication providers.

The claimant requested ICSID arbitration ICSID in December 2003, on the grounds of losing business opportunities due to the restriction of universal service providers to fixed-line operators, unjustly collecting forced contributions to provide funds for the fixed-line
operators, and the respondent's violation of the provisions on expropriation and fair and equitable treatment by reason of exercising the Connection Fee Regulation for the purpose of supporting the fixed-line operators. Although the fair and equitable treatment clause is not covered by the dispute settlement provisions in the basic Norway-Hungary BIT, the claimant further claimed that the provision to approve the request for arbitration based on the fair and equitable treatment clause via the most-favored nation clause under a third-country treaty should be equally accessible. The respondent argued that Pennon maintained a considerable market share, producing sufficient profit, and there had been no "substantial economic deprivation" of investments. Respondent also argued that the regulation on fees was not a non-discriminatory measure imposed equally on all providers and it did not constitute an expropriation. Incorporation of the most-favored nation clause was limited to substantial rights, and the expansion of jurisdiction to cover this matter based on the most-favored-nation clause was inappropriate. The respondent also contended that the fair and equitable treatment clause was not within the scope of dispute settlement procedures and that jurisdiction was absent.

The tribunal concluded that the delay and loss incurred in business due to the exercise of regulations by the government, tax imposition, and irrational measures taken by the government do not rise to the level of expropriation unless there was a substantial economic deprivation of the investment value, and investors concluding a concession contract should acknowledge that investment activities entail risks of regulations and impositions. Moreover, the tribunal judged that a substantial economic deprivation did not exist by reasons of: contributions paid by Pannon amounting to approximately 1% of its assets; the stable growth of Pannon's profit and overall assets; and the fact that the same measures were being imposed equally on other competitors. Expansion of jurisdiction of the dispute settlement clause via the most-favored nation clause was denied on the basis that the invalidation of limited rights intentionally chosen by both contracting countries would not be approved. For the above reasons, the tribunal concluded that it had no jurisdiction over any of the claims brought by the claimant. It ordered that the cost of the proceedings including cost incurred by the respondent be borne by the claimant because of a considerable degree of error in its interpretation of the provisions and in the proceedings.

The arbitral tribunal concluded that the MFN Clause of the Argentina-France BIT permitted claimants to incorporate the umbrella clauses from the Argentina-Luxembourg or Argentina-Germany BITs. The Concession Agreement granted to foreign investors for certain investment property in this case was within the scope of protection by the umbrella clause, and thus constitutes a violation of "commitments … undertaken with respect to investors" (Argentina-Luxembourg BIT) and "a commitment undertaken in connection with the investments made by nationals or companies from the other Contracting Party" (Argentina-Germany BIT).

In addition, the tribunal concluded that the failure of the Provincial government to raise tariffs in a timely manner, so as to restore balance when rates were set in US dollars, constituted unfair and inequitable treatment in and of itself. The tribunal made its determination on the respondent's breach of the specific commitments embodied in the Currency Clause followed by its failure to restore EDEMSA's financial equilibrium in a timely fashion.
(e) **Umbrella Clause**

(i) *Noble Ventures Inc. v. Romania* (ICSID Case No. ARB/01/11), [Award], October 12, 2005

**Summary of the Award**

When the wording of the umbrella clause is clear, a breach of contract under municipal law can be admitted as a breach under international law.

Noble Ventures, a U.S. company, signed a privatization agreement with the Romanian government and acquired shares of the state-owned steel company CSR. Noble Ventures requested arbitration, alleging that the Romanian government breached the contractual obligations to negotiate CSR’s debt rescheduling with State budgetary creditors in good faith and this constitutes a breach of the umbrella clause in the U.S.-Romanian BIT.

In the umbrella clause providing that “Each Party shall observe any obligation it may have entered into with regard to investments,” the arbitral tribunal noted the wording “shall observe,” “any” obligation, and “with regard to investments.” The tribunal stated that although a breach of municipal law and a breach of international law are considered to be quite different under international law, the wording of this umbrella clause is the most general and direct formulation tending to an assimilation of a breach of contract under municipal law to a breach under international law. However, the tribunal did not express any definitive conclusion as to whether the umbrella clause “perfectly” assimilates “any” breaches under municipal law to breaches of the BIT, unless the breach of contract in this case is clearly proved.

(ii) *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award, September 28, 2007

**Summary of the Award**

A commercial breach of contract is not a breach of treaty. The distinction should be based on whether it was a breach of contract as a contracting party or an act practiced by an authorization or power of a sovereign state.

Sempra, a U.S. company, started a gas distribution business after the privatization of the gas industry in Argentina. Sempra asserted that the rate system on a dollar basis corresponding with changes in the U.S. consumer price index, which was based on the laws and ordinances of Argentina, was an important factor in judging investment. Also, it claimed that the overturn of the system by various measures against financial crisis violated the umbrella clause, and requested arbitration.

Referring to the two decisions on SGS discussed previously, the arbitral tribunal held that normal commercial breach of contract is not a breach of treaty. Furthermore, it held that the distinction should be based on whether there was a breach of contract by the government acting as a contracting party or whether the breach resulted from an act practiced by an authorization or power of a sovereign state. Based on the foregoing, it held that the act of the Argentine government was the result of a legal change caused by the government and it was
an act that only the government could conduct. As a conclusion, the tribunal held it to be a violation of the umbrella clause.

* Also refer to 1) (b)(i) and (ii) above, since the interpretation of the umbrella clause is also discussed with respect to subject matter jurisdiction.

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

**Summary of the Award**

a) The umbrella clause in the ECT (the final sentence of Article 10(1)) covers contracts between a State and an investor or for investor’s investments (a local company, etc.), but shall not apply when a contracting party is a juridical person other than a State.

b) Article 22 of the ECT provides general obligations so as to “ensure” that State enterprises should fulfill obligations under Part III of the ECT and does not go so far as to impose liability on the State in the event that a state-owned legal entity does not discharge its contractual obligations.

AMTO, a Latvian company, acquired shares of EYUM-10, a Ukrainian company. EYUM-10, which is the largest creditor of state-owned Energoatom, obtained a court judgment concerning the fulfillment of obligations and sought execution based thereon. However, the execution was suspended due to bankruptcy proceedings of Energoatom, and later both parties signed an agreement relating to Energoatom’s outstanding debts to EYUM-10. AMTO requested arbitration, alleging that the action by the Ukrainian government is in breach of the umbrella clause in the ECT.

The arbitral tribunal noted the fact that the related parties of the contract in question are [i] Energoatom, which is a juridical person other than a State, and [ii] EYUM-10, which is a corporation different from AMTO. Considering that 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,” the tribunal affirmed that any contract that involves EYUM-10 as a related party shall be included but stated that the umbrella clause shall not be applied on the grounds of [i] above. Furthermore, as Energoatom is wholly-owned by the State, the tribunal reviewed 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 held that Article 22 imposes on the State a general obligation to ensure that state-owned entities conduct activities which, in general terms of governance, management and organization, make them capable of observing the obligations specified under Part III of the ECT and does not go so far as to impose liability on the State in the event that a state-owned legal entity does not discharge its contractual obligations. In conclusion, the tribunal did not admit a breach of the umbrella clause.

* Part III of the ECT defines substantive obligations for protecting investments.

(A case where domestic parties have agreed, in an individual arbitration agreement, that the BIT shall apply to contract disputes)

Summary of the Award

(Refer to 2)(c)(v) above for the facts of the case.)

Based on the agreement between the parties and Article 25(2)(b) of the ICSID Convention, Electroquil S.A., which is an Ecuadorian corporation and a subsidiary of Duke Energy, shall be treated as a U.S. corporation in this case, and the arbitral tribunal admitted a breach (under municipal law) of the PPA concluded between Ecuador and Electroquil. Regarding the umbrella clause, the tribunal pointed out [i] that the wording of the clause is broad as it refers to “any obligation,” [ii] that there is an express agreement by the parties in the Arbitration Agreement that the BIT applies to contract disputes, and [iii] that an executive decree was specifically issued when Ecuador decided to assume INECEL’s rights and obligations, and found that a breach of the PPA constitutes a breach of the umbrella clause. However, the tribunal did not admit a breach in relation to Duke Energy, and rendered the decision that Electroquil is entitled to compensation.

* Refer to 1)(e)(iii) above for the award concerning the exclusion of matters of taxation.

(vii) alicorp Ltd. v. Egypt, (ICSID case no. ARB/08/18), Arbitration Rules, February 7, 2011

Summary of the Award

If a contract includes an exclusive dispute processing clause, under normal conditions whether a breach of contract occurred or not is determined by following the said clause in the contract. However, if the government has doubts on the validity of the dispute process based on the said contract, the government can utilize the dispute process procedure on the BIT. Malicorp (claimant), a British company, concluded a concession contract related to the construction of an international airport with the government of Egypt. However, there were disagreements concerning perceptions in different areas between the two parties, ultimately resulting in the notice of the termination of the contract and the suspension of the project. The claimant has filed for international commercial arbitration based on the arbitration clause of the contract. Cairo Administrative Tribunal found the arbitral clause of the contract to be ineffective based on the claims by the government of Egypt, ordering the Cairo arbitral tribunal to halt the proceedings. However, the tribunal continued the proceedings despite the nonparticipation of the arbitrator appointed by the government of Egypt, rendering an award. However, since the claimant couldn’t exercise the awarding, the claimant filed for ICSID arbitration. Despite the fact that under natural circumstance the decision on whether a breach of contract been made or not needs to be done in a method which follows the clause (Cairo arbitral tribunal) due to the exclusive dispute processing clause is in place, in this case the government of Egypt has raised doubts on the validity of the Cairo arbitral tribunal. Since this procedure lacks certainty, the arbitral tribunal pointed out that the dispute processing
procedure on BIT could be used for this case, approving the establishment of jurisdiction. The tribunal examined whether the dissolution of the contract was legitimate, basing on the Egyptian civil law, the governing law of the contract. The tribunal held that the content the claimant explained was one that causes essential mistake to the government of Egypt, approving that it was sufficient as a basis to review and terminate the contract, dismissing the claimant’s allegation.

(f) General and Security Exceptions

(i-1)  
CMS Gas Transmission Company v. Argentine Republic (ICSID Case No. ARB/01/8), [Award], May 12, 2005

Summary of the Award

a) In an economic crisis, the state of necessity may be invoked, under customary international law and the relevant BIT, only in the case where there is a situation of a “total collapse” of the economy.
b) The invocation of the state of necessity shall not depend on self-judgment, but the arbitral tribunal shall consider whether the requirements under international law are met and whether wrongfulness can be precluded.

The Argentine government embarked on economic reforms, which included the privatization of public utilities, and introduced in 1991 a fixed exchange rate system, fixing the Argentine peso on par with the United States dollar. In order to attract foreign investment to privatized gas companies, etc., the government guaranteed the following: [i] tariffs would be calculated in dollars and converted into pesos at the time of billing; [ii] tariffs would be adjusted every six months in accordance with the United States Producer Price Index; [iii] the license would not be altered or abolished without an agreement by a licensee or any breach of laws and regulations or the license, [iv] the neutrality of subsidies would be ensured; and [v] gas charges would not be frozen.

CMS, a U.S. company, acquired shares of TGN, an Argentine gas company, in 1995 under these conditions. However, the Argentine government, after experiencing a serious economic crisis at the end of the 1990s, froze the revision of gas charges in 2000 and established the Emergency Law in 2002 to abolish the fixed exchange rate system. As a result, TGN’s revenue declined sharply. CMS requested arbitration with the Argentine government, alleging that the series of these acts constitute a breach of the U.S.-Argentine BIT. The arbitral tribunal admitted that the government’s act in question constituted a breach of the fair and equitable treatment obligation, etc. (refer to 2)(c)(i) above), and then reviewed the Argentine government’s allegation of the state of necessity based on customary international law and general and security exceptions based on Article 11 of the relevant BIT. Article 11 of the U.S.-Argentine BIT provides that “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.”

The arbitral tribunal firstly reviewed the state of necessity under customary international law in line with the requirements set forth in Article 25 of the draft Articles on International Responsibility, stating that the issue is embodied in that Article. Article 25 of the draft stipulates that necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act ((2)(a) of that Article) not in conformity with an international
obligation of that State ((2)(b)), unless the act is the “only way for the State to safeguard an essential interest against a grave and imminent peril ((1)(a))”; and “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 ((1)(b)).”

The arbitral tribunal pointed out that the economic crisis in question was not a “total collapse” of the economy, having only relative effects, and therefore does not fall under “a grave and imminent peril” that relates to “an essential interest.” Furthermore, the tribunal stated that there were other means available and the acts were not the “only way” nor was there any impairment of the interest of the international community as a whole, and found that the Argentine government policies and their shortcomings significantly contributed to the crisis and the emergency.

Regarding Article 11 of the relevant BIT, the tribunal admitted that economic crises are included in “essential security interests” under the Treaty, but stated that as the Treaty aims to protect investments even under economic difficulties, the defense of necessity cannot be admitted unless a situation of “total collapse” can be observed. The tribunal concluded that this case does not fall under such situation and the circumstances in this case may only be considered for the calculation of the damage.

As to whether or not the relevant provisions depend on the discretionary power of each country invoking the state of necessity, when establishing any rights to unilaterally justify a breach of obligations, a Treaty should contain provisions to that effect clearly, but the relevant provisions do not indicate such effect; therefore the tribunal stated that it shall also consider whether requirements under international law are met and whether the wrongfulness can be precluded.

Accordingly, the tribunal dismissed the Argentine government’s assertion of the state of necessity.

(i-2) CMS Gas Transmission Company v. Argentine Republic (ICSID Case No. ARB/01/8), [Decision on Annulment], September 25, 2007

Summary of the Decision

a) The provisions on general and security exceptions under the relevant BIT and the state of necessity under customary international law are different from each other in terms of scope, requirements and legal nature, and cannot be treated as identical.

b) Whether or not the case falls under the state of necessity under customary international law should be examined only in the case where a breach is not excluded pursuant to the provisions on general and security exceptions under the relevant BIT, which is to be the primary rule.

In response to the award rendered on May 12, 2005 (refer to 2)(c)(i) above), the Argentine government filed a request for annulment based on Article 52(1) of the ICSID Convention, alleging that the tribunal had manifestly exceeded its powers and that it failed to state the reasons on which it was based.
With regard to the government’s allegation that the arbitral tribunal failed to add any reasons for its award based on Article 11 of the relevant BIT, the ad-hoc committee firstly pointed out that the tribunal treated that Article as identical to the state of necessity under customary international law and construed that unless necessity under customary international law is admitted, a defense under Article 11 shall be dismissed. The committee then stated that this point should have been clearly indicated, but if the arbitration award is read carefully, the reasoning of the tribunal can be well understood. Holding that view, the committee dismissed the government’s allegation on this point.

Regarding the government’s allegation that the tribunal had manifestly exceeded its powers by having treated general and security exceptions under Article 11 of the relevant BIT as identical to the state of necessity under customary international law and having examined the latter in advance of examining Article 11 of the relevant BIT, the committee stated that Article 11 provides the conditions under which the Treaty may be applied and excludes the application of the substantive obligations under the Treaty, while the state of necessity under customary international law is an excuse where there is a breach of substantive obligations, and that exceptions and the state of necessity differ both in terms of the scope of application and the requirements. On these grounds, the committee determined that the tribunal made manifest errors of law. The committee pointed out that the tribunal should have reviewed firstly whether a breach of the Treaty should be excluded under Article 11 of the relevant BIT, which is the primary rule, and then only if any act not in conformity with the BIT is found, should the tribunal have reviewed whether the responsibility could be precluded in the state of necessity under customary international law, which is the secondary rule. However, although the tribunal erred in its construction of Article 11 of the BIT, the committee concluded that the tribunal applied that Article and cannot be construed to have exceeded its powers.

(ii)  
BG Group plc. v. Argentina, [Final Award], Ad hoc—UNCITRAL Arbitration Rules, (referred to ICSID), U.K.-Argentina BIT, December 24, 2007

Summary of the Award

a) The relevant BIT contains no provisions on the state of necessity.
b) The relevant BIT precludes the invocation of necessity under customary international law against obligations under the BIT.
c) Even if the state of necessity under customary international law is admitted, obligations to pay damages shall not be exempted.
d) The state of necessity under customary international law is a most exceptional remedy subject to “very strict conditions.”

A British corporation, BG, has an indirect ownership interest in MetroGAS, a gas company in Argentina. BG requested arbitration in 2003, alleging that various measures that the Argentine government introduced because of the economic crisis constitute a breach of the Argentina–U.K. BIT. The arbitral tribunal determined that the measures taken by the Argentine government were in breach of the fair and equitable treatment obligation and the prohibition of unreasonable or discriminatory measures set forth in Article 2, paragraph (2) of the relevant BIT, and then examined the Argentine government’s assertion regarding the state of necessity based on Article 4 of the BIT and customary international law. Article 4 of the BIT provides that Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to “war or other armed conflict, revolution, state of national emergency, etc.” shall be accorded treatment by such other Party no less favorable
than that accorded to its own nationals or companies or to nationals or companies of any third country.

The arbitral tribunal stated that Article 4 of the BIT provides for a specific expression of the national treatment and most-favored-nation standard in relation to compensation for losses resulting from certain actions, and that the relevant BIT does not contain exceptions corresponding to Article 11 of the U.S.-Argentine BIT.

Regarding the state of necessity under customary international law, the arbitral tribunal pointed out that the relevant BIT is supposed to preclude the invocation of a state of necessity, and that Argentina would not be entitled to invoke necessity to unilaterally revoke vested rights designed precisely to operate in situations where a run on the currency would lead to a situation of necessity. Furthermore, the tribunal stated that even if the state of necessity is admitted, Argentina remains obligated to pay compensation. While reserving judgment on whether the International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts, which relates to responsibilities among sovereign States under international law, can be applied to private individuals, the tribunal examined Article 25 of the ILT Draft Articles in line with the Argentine government’s assertion, and determined that as the state of necessity should be “a most exceptional remedy subject to very strict conditions,” the measures taken by the Argentine government in this case cannot be deemed to meet the “very strict conditions” and therefore Argentina is not entitled to invoke necessity under customary international law.

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

Summary of the Award

a) General and security exceptions under the relevant BIT and the state of necessity under customary international law are identical in their intention and practical results, but different in their nature and conditions of application.

b) As requirements to admit general and security exceptions under the relevant BIT, it is not required that “total collapse” of the country or a “catastrophic situation” has already occurred at the stage of taking measures.

c) When a third party appreciates the application of the relevant BIT, the State may enjoy “a certain margin of appreciation.”

d) The necessity of the measures under the relevant BIT shall be judged in accordance with the requirements set forth in Article XX of the GATT.

Insurance companies in Argentina are obliged to invest a certain percentage of their assets in Argentina under regulations of the State, and CNA ART, which is an Argentine corporation owned by U.S. company Continental, made investments both in pesos and dollars. Continental requested arbitration, alleging that the series of measures taken by the Argentine government because of the economic crisis constituted a breach of the U.S.-Argentina BIT. In response, the Argentine government insisted that it had not breached substantive obligations and asserted the state of necessity under Article 11 of the relevant BIT and customary international law.
The arbitral tribunal firstly examined whether Article 11 of the BIT is applicable, holding that if the application of that Article is admitted, detailed examination of the state of necessity under general international law would be unnecessary. As a prerequisite, the tribunal referred to the differences between the two, pointing out that Article 11 of the BIT is a safeguard clause to restrict substantive obligations, while the state of necessity under customary international law is a ground for precluding the wrongfulness of an act. Furthermore, the tribunal stated that the two regulate different targets and have different conditions of application, as the necessity under customary international law should only be accepted on an “exceptional basis” that meets strict requirements, while Article 11 of the BIT is not necessarily subject to the same requirements according to its language and purpose. However, holding that they share the same intention and practical results, the tribunal decided to refer to customary international law only insofar as the concept there used assists in the interpretation of Article 11 of the BIT.

The arbitral tribunal admitted that the scope of the concept of “public order” and “security interests” set forth in Article 11 of the BIT is wide-ranging and that the Article can be applied even to economic crises, and that it cannot be denied that “the maintenance of public order” and “the protection of essential security interests” of Argentina were in danger under the circumstances in this case. The tribunal stated that measures for protecting “essential security interests” do not require that “total collapse” of the country or a “catastrophic situation” has already occurred before applying the Article. Furthermore, the tribunal pointed out that the Article does not allow discretionary power of a State invoking the state of necessity but that, as the relevant Treaty is a bilateral mutually-beneficial treatment, when objectively appreciating the application thereof, the State that takes the measures may enjoy “a certain margin of appreciation.”

Regarding the necessity of the measures, the tribunal stated that it is appropriate to refer to the GATT and WTO case law, which has extensively dealt with the concept and requirements of necessity set forth in Article XX of the GATT, on the grounds that Article 11 of the BIT derives from Article XX of the GATT. The tribunal concluded that “the necessity” of a measure should be determined through a process of weighing and balancing factors, such as [i] the relative importance of interests or values furthered by the challenged measures, [ii] the contribution of the measure to the realization of the ends pursued by it, and [iii] the restrictive impact of the measure on international commerce, and that when there is any alternative measure that is reasonably available to achieve the objectives, “the necessity” of the measure in question cannot be admitted.


Summary of the Award

a) A breach of the relevant BIT shall be determined by taking into account all circumstances including economic crises.

b) The fair and equitable treatment obligation is not an absolute parameter and the threshold for admitting a breach of the fair and equitable treatment obligation can vary depending on the situation.

c) The relevant BIT shall not preclude the invocation of the state of necessity under customary international law against the obligations under the BIT.
A British company, National Grid, is a major shareholder of a power supplier Transenar. National Grid requested arbitration, alleging that the measures introduced by the Argentine government because of the economic crisis infringed the promise and guarantees, which were the prerequisites of the investment, and constitute a breach of the U.K.-Argentina BIT.

While admitting that the series of measures taken by the Argentine government constitute a breach of the fair and equitable treatment obligation set forth in Article 2(2) of the relevant BIT, the tribunal pointed out that it should take into account “all circumstances” to determine whether such measures are in breach of the relevant BIT and the critical circumstances that Argentina had faced cannot be ignored. Furthermore, the tribunal stated that the fair and equitable treatment obligation is not an absolute parameter, and referred to the possibility that what would be unfair and inequitable in normal circumstances may not be so in a situation of an economic and social crisis. Accordingly, the tribunal determined that only the measure taken on June 5, 2002, i.e. requiring the claimant to renounce the legal remedies as a condition to re-negotiate the concession, constituted a breach of the fair and equitable treatment obligation and that the measure also was in breach of the obligation to provide “protection and constant security” set forth in Article 2(2) of the BIT.

The tribunal further stated that the relevant BIT contains no agreement to preclude the possibility of pleading the defense of the state of necessity under customary international law, and examined the requirements listed in Article 25 of the Draft Articles on State Responsibility. The tribunal determined that Argentine internal factors, such as the fiscal deficit, indebtedness and rigidity of the labor market, caused the deterioration of the crisis, and the government’s crisis responses have worked to further increase the crisis; and therefore the requirements set forth in Article 25(2)(b) of the Draft Articles are not met. The tribunal concluded that the defense of the state of necessity under customary international law cannot be admitted.

(v)  
*Sempra Energy International v. Argentine*, (ICSID Case No. ARB/02/16)  
Annulment decision, June 29, 2010

Summary of the Award

a) Measures in which BIT Article 11 is applied do not violate national responsibility, and is not illegal to begin with. ILC Treaty Draft Article 25 is a text which serves as the basis of denying illegality, Article 25 is not a reference for interpreting the context of Article 11.

b) Not conducting legal examination based on BIT Article 11 after having the defense of state of necessity on ILC Treaty Draft Article 25 being rejected is a clear exceeding of powers of the tribunal, which constitutes a matter for annulment.

In the original awarding, the measure from Argentina to the claimant was determined to be in a breach of fair and equitable treatment obligation toward the claimant and of the Argentinian Umbrella Treaty. Therefore, the state of necessity and defense based on Article 11 by the government of Argentina were not approved. Basing on the ICSID Convention Article 25, the government of Argentina requested the annulment of procedure and the awarding of the tribunal basin on the emergency measures in the Argentinian law, the state of emergency in the customary international law, and awarding given to the exceptional cases on the BIT Article 11.
The special committee firstly confirmed whether there was any negligence in the clear
defect of law in the arbitral awarding and the clear exceeding of power and rationalization, as
stipulated in ICSID Convention Article 52, which has been approved to be used as a basis of
annulling the awarding. Thereafter, concerning the US-Argentine BIT Article 11 which
stipulated that “This treaty should not prevent the application of necessary measures of any
concerned countries for the maintenance of public order, execution of obligations related to
the maintenance or restoration of international peace and safety and for the protection of
significant interest of security guarantee”, the tribunal acknowledged that the committee
acknowledged that whether Article 11 include self-judgment or not and the fact that the
preceding issue of scope and application are not clearly differentiated in regard to the
awarding of the tribunal which dismissed the self-judgment during a state of emergency. From
the following reasons, the committee dismissed the rationalization of the tribunal concerning
the applicability of Article 11. Firstly, although the committee does approve referring to an
appropriate customary international law for interpreting wording on BIT, the committee
deems that the customary international law (in this case, ILC Treaty Draft Article 25) is not a
definitive definition for state of emergency. Secondly, the BIT Article 11 and ILC Treaty
Draft Article 25 differ in all significant points. Therefore Article 25 cannot be used as a
reference for interpreting wording of Article 11. In particular, Article 25 is an article that
serves as a basis of denying illegality. On the other hand, Article 11 does not “prevent the
execution of specific measures”, the measures in which Article 11 is applied does not violate
the international responsibility of the nation and is not illegal to begin with. Thirdly,
triggering the state of emergency based on bilateral agreement does not always need to be
valid according rules in the International Law, and there are no provisions that regulate such
issues. Fourthly, even if a law exists that make provision which does not accord with the law
of a specific international law which also includes the common laws of the international law,
this is not applicable in this case. Fifthly, opinions that state, “a judiciary control must have
requirements from the common law or the treaty agree, and must be involved with the
question of whether to deny illegality or not” will raise issues. The first issue is the existence
of illegality. Although it is true that BIT is not regulated to determine whether one possesses
self-judgment or not, in cases when such measures are deemed to be “necessary”, the
violation of treaty obligation does not exist.

In respect to the issue whether the defect of law in question constitutes the clear
exceeding of power, the committee deemed that it was necessary to determine whether such
excess neglected to apply the law or was simply the misuse of law. Therefore, the committee
held that the fact that the tribunal didn’t conduct further legal examination related to the BIT
Article 11 after rejecting the defense of the government of Argentina on the basis of status of
emergency stipulated on the ILC Treaty Draft Article 25 constitutes as the negligence of
application of an applicable law. Furthermore, the committee concluded that the tribunal
committed an exceeding of power due to the overall default of applying BIT Article 11.
Additionally, the committee held that it was clear that the tribunal did not certify or apply the
BIT Article 11 judging from the tribunal’s rationale. Accordingly, the committee held that it
was evident that the tribunal exceeded its power and that its awarding should be annulled
since it took away the rights guaranteed to Argentina as stipulated in Article 11.

Applying these standards, the tribunal admitted that the series of measures, excluding
the long overdue restructuring of government debts, are material or decisive in order to react
positively to the crisis and are “necessary” under Article 11 of the BIT. The tribunal stated
that the abolition of the convertibility regime at an early stage cannot be an alternative nor can
any alternative measures be deemed to have been available, and concluded that this case meets the requirements for the exclusion of the application of Article 11 of the BIT.

In cases where the State damages its own “essential security interests,” any measures taken therefor cannot be deemed to be “necessary,” but the tribunal held that as the series of policy measures had been appreciated as being sound, the Argentine government shall not be precluded from invoking Article 11 of the BIT due to its actions.

The arbitral tribunal upheld most of the allegation of the Argentine government based on Article 11 of the BIT, and only admitted a breach of the fair and equitable treatment obligation in relation to the restructuring of government debts.