Sonderdruck aus:

GERMAN YEARBOOK OF INTERNATIONAL LAW

JAHRBUCH FÜR INTERNATIONALES RECHT

Volume 46 · 2003

DUNCKER & HUMBLOT / BERLIN 2003

Contents

Forum

Jochen Abr. Frowein: Is Public International Law Dead? 9

Focus Section
1973–2003: Thirty Years of German Membership in the United Nations

Andreas Zimmermann: Introductory Remarks 17

Jochen Abr. Frowein: From Two to One – Germany and the United Nations 20

Ingo Winkelmann: Germany's Role in the Security Council of the United Nations – Past and Present Involvement, Future Participation and European Accentuation – 30

Torsten Stein: German Military Participation in United Nations Peacekeeping Operations – Maybe too late, but not too little – 64

Robert Uerpmann: Implementation of United Nations Human Rights Law by German Courts 87

Ulrich Beyerlin and *Martin Reichard:* German Participation in United Nations Environmental Activities: From Stockholm to Johannesburg 123

Wolfgang Weiß: Shift in Paradigm: From the New International Economic Order to the World Trade Organization – Germany's Contribution to the Development of International Economic Law – 171

Kirsten Schmalenbach: Germany's Contribution to the Development of International Criminal Law, International Disarmament Law, and the Law of Bioethics. 226

General Articles

Christof Heyns, Evarist Baimu, and *Magnus Killander:* The African Union. 252

Allan Rosas: International Dispute Settlement: EU Practices and Procedures. 284

Claus Dieter Classen: The Draft Treaty Establishing a Constitution for Europe: A Contribution to the Improvement of Transparency, Proximity, and Efficiency of the European Union. 323

Joachim Schwind: The Preamble of the Treaty Establishing a Constitution for Europe – A Comment on the Work of the European Convention. 353

Max Uebe: Cyprus in the European Union. 375

Gaetano Pentassuglia: Minority Issues as a Challenge in the European Court of Human Rights: A Comparison with the Case Law of the United Nations Human Rights Committee. 401

Awards and Decisions of ICSID Tribunals in 2003

By Richard Happ*

A. Introduction

I. Scope and Purpose of this Report

This report covers the awards and decisions[1] of arbitral tribunals of the International Centre for the Settlement of Investment Disputes (ICSID).[2] It will be published annually and cover awards dispatched to the parties[3] between the December of the year preceding the report and November of the year of the report. Thus, this first report covers the period from December 2002 to November 2003. Since awards are only published with the consent of at least one party, every report will include only those awards either published or made available to the author.

The purpose is to analyze and identify the legal reasoning as regards the international law issues considered decisive by a tribunal for each case. Facts and legal positions of the parties will only be reported as far as they are considered necessary for the understanding of the tribunal's reasoning. Although it is not possible to prevent that the summary of an award of 80 pages length on 2–3 pages will be influenced by the understanding of the author, this report does not purport to evaluate the decisions.

---

* Dr. iur., Rechtsanwalt (German lawyer), Hamburg.

[1] The ICSID Convention differentiates between decisions on objections to jurisdiction (Art. 41) and the award itself (Art. 48). Pursuant to Art. 41 para. 2, the tribunal can decide whether to decide about objections to jurisdiction in a separate decision or to join that question to the merits (and to deal with it in the final award).

[2] Convention on the Settlement of Investment Disputes, 14 October 1966, UNTS, vol. 575, 159.

[3] Under the ICSID Convention, the decisive date for the award is not its completion, *i.e.* the date of the signatures, but the date of dispatch to the parties. *Cf. Christoph Schreuer,* Commentary on the ICSID Convention, 1996, Art. 49 para. 22.

II. ICSID Tribunals in 2003

2003 has been a busy year for ICSID. At the time of writing, 29 new cases have been registered, bringing the total number of pending cases to 66. Sixteen of those new cases have been filed against Argentina. The remaining cases have been brought against Peru (2), El Salvador, The Philippines, Bulgaria, Hungary, Congo, Egypt, Saudi-Arabia, Ecuador and Pakistan (2).[4] As far as information is available, nearly all of those cases have been filed on the basis of bilateral investment treaties.[5] One case, *Nova Plama v. Bulgaria,* is based on the arbitration mechanism of Article 26 Energy Charter Treaty (ECT).[6]

Between December 2002 and November 2003, twelve decisions and awards have been rendered by various tribunals. The awards in the cases *AIG Capital Partners and CJSC Tema Real Estate Company v. Kazakhstan, Generation Ukraine v. Ukraine* and *Autopista Concesionada v. Venezuela* had not been published at the time this report was finished. Provided they have been published in 2004, they will included in the 2004 report. The report thus covers the following three decisions on objections to jurisdiction and six awards: *Feldman Karpa v. Mexico* (Section B.), *ADF v. United States* (Section C.), *Zhinvali v. Georgia* (Section D.), *Semos v. Mali* (Section E.), *Tecmed v. Mexico* (Section F.), *Loewen v. United States* (Section G.), *CMS Gas Transition v. Argentina* (Section H.), *Fireman's Fund v. Mexico* (Section I.) and *SGS v. Pakistan* (Section J.).

B. Marvin Roy Feldman Karpa v. United Mexican States

The first award to be reviewed is the Award of 16 December 2002 in the matter of *Marvin Roy Feldman Karpa* against the United Mexican States.[7] The case arose on

[4] The ICSID publishes a list of pending cases on its website at http://www.worldbank.com/icsid/cases/pending.htm.

[5] Pursuant to 20 ICSID News (Summer 2003), at least all of the fifteen cases submitted until June are based on bilateral investment treaties.

[6] Energy Charter Treaty, 17 December 1994, reprinted in: ILM, vol. 34, 360 (hereinafter: ECT); the ECT is a multilateral treaty with 46 Contracting Parties which entered into force on 16 April 1998 and which, *inter alia,* protects investment in the energy sector. It has a dispute settlement clause (Art. 26) which is comparable to those of modern bilateral investment treaties. For an overview of the investment protection provisions and the dispute settlement mechanism, see *Richard Happ,* Dispute Settlement Under the Energy Charter Treaty, German Yearbook of International Law, vol. 45, 2002, 331–362.

[7] Hereinafter: *Feldman Award.* The texts of the Award, of the dissenting opinion and of the decision on the correction and interpretation of the Award of 13 June 2003 are available at: http://www.worldbank.com/icsid/cases/awards.htm.

the basis of Chapter 11[8] of the North American Free Trade Agreement (NAFTA).[9] The Tribunal consisted of Professor *Konstantinos D. Kerameus* as President and Mr *Jorge Covarrubias Bravo* and Professor *David A. Gantz* as Members of the Tribunal.

I. The Dispute

Mr *Marvin Roy Feldman Karpa* (*Feldman*) is a national of the United States of America and owner of the Mexican enterprise *Corporacion de Exportaciones Mexicanas, S.A. de C.V.* (*CEMSA*). *CEMSA* is an enterprise active, *inter alia,* in the field of exporting cigarettes. The case concerned the tax rebates available under a certain Mexican tax law (the IEPS law) when cigarettes are exported. To be elegible for the tax rebates, the IEPS tax on the cigarettes must be stated separately and expressly on the invoices submitted for the rebates. *CEMSA,* however, purchased the cigarettes from certain volume resellers at a price that included the IEPS tax, but was not itemized separately on the invoices. *CEMSA* could not obtain such invoices. During 1992 to 1997, it was never clarified whether *CEMSA* was entitled to tax rebated. Nevertheless, *CEMSA* received rebates at least from 1996–1997. After a change of the IEPS law in 1997, rebates no longer were granted to resellers such as *CEMSA* and, after a tax audit, the Mexican tax authorities demanded in 1998 that *CEMSA* repaid approx. US-$ 25 million of rebates obtained from 1996 to 1997. Against this decision, *CEMSA* instituted legal proceedings pending at the time of the Award. *Feldman* submitted his Notice of Arbitration to the ICSID Additional Facility on 30 April 1999, claiming damages of US-$ 50 million.

II. The Decision

1. Jurisdiction

The Tribunal first had to deal with certain jurisdictional objections of Mexico. While most of these objections related to certain specific provisions of the NAFTA, it is to be noted that Mexico also raised the objection of exhaustion of local remedies. Mexico challenged the Tribunal's jurisdiction on the ground that the de-

[8] NAFTA, Chapter 11 contains the provisions on protection of foreign investments. Subchapter A (Arts. 1101–1114) contains the substantive investment protection provisions. Subchapter B (Arts. 1115–1138) contains the procedural provisions on the settlement of disputes between an investor and a party to NAFTA.

[9] North American Free Trade Agreement, 17 December 1992, reprinted in: ILM, vol. 32, 1993, 605.

cisive issue of whether *CEMSA* had a right to tax rebates was subject to Mexican court proceedings pending at the time of the proceedings. Mexico's international responsibility could not be engaged, it argued, until the measure had been tested at the local level and had become final by pronouncement of the highest competent court.

The Tribunal dismissed this objection, stating that the lawfulness or unlawfulness of Mexico's actions under Mexican law were not determinative for the lawfulness or unlawfulness under NAFTA and international law.[10] That the issues in dispute had not been finally resolved by Mexican courts could not bar its jurisdiction, as a State could otherwise delay arbitral proceedings by delaying local court proceedings.[11]

2. *Merits*

The Tribunal had to decide over two claims put forward: first, that Mexico's measures and omissions were tantamount to an expropriation of his business, and thus amounted to a creeping expropriation, and secondly, that *CEMSA* had been discriminated against as Mexican competitors had been granted tax rebates.

a) Expropriation

The Tribunal first dealt with the expropriation claim and acknowledged that tax measures could constitute a creeping expropriation.[12] However, it noted that drawing the line between legitimate regulation and expropriation was difficult, and that "governments must be free to act in the public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like."[13] The Tribunal then found that Mexico's actions did not constitute an expropriation and based its finding on the following four factors: firstly, it held that not every business problem experienced by a foreign investor was an expropriation.[14] Tax authorities in most countries "do not always act in a consistent and predictable way" and *Feldman* had failed to obtain a formal ruling on his alleged right to rebates.[15] Secondly, NAFTA and principles of customary international law did not require states to permit cigarette exports by resellers. Thirdly, the Tribunal noted that at no time Mexico had installed a ban on the export of cigarettes. *Feldman,* through *CEMSA,* could export cigarettes and obtain rebates if he fulfilled the legal requirements which already existed before he started his business. That the actions of the tax authorities with respect to the rebates were sometimes arbitrary and intransparent did not lead the Tribunal to a different result. It noted that lack of transparency alone could not rise to the level of violation of NAFTA and international law, relying on the decision of the British Columbia Supreme Court in its review of the *Metalclad*[16] decision. It again noted that *Feldman* should have sought a formal administrative ruling on the alleged right to tax rebates, including a court review.[17] Fourthly, the Tribunal noted that the regulatory action of Mexico had not deprived *Feldman* of his control of *CEMSA,* which could continue other lines of business activity.

The Tribunal then found that its conclusion that no expropriation existed was consistent with earlier NAFTA awards dealing with expropriation claims, namely *Metalclad, S.D. Myers*[18] and *Pope & Talbot,*[19] and shortly examined the relevant passages of these awards.[20]

---

[10] *Cf.* the discussion in the annulment decision in the ICSID case of *Compania des Aguas de Aconquija S.A. and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentina,* Decision of 3 July 2002, Case No. ARB/97/3 (*Fortier/Crawford/Rozas*), reprinted in: ILM, vol. 41, 2002, 1135 *et seq.,* paras. 97–102 (hereinafter: *Vivendi Annulment*).

[11] *Feldman Award* (note 7), para. 78.

[12] *Id.,* para. 101.

[13] *Id.,* para. 103.

[14] *Id.,* para. 112. The Tribunal relied on the award in the NAFTA case of *Robert Azinian and Others v. Mexico,* ICSID Case No. ARB(AF)/97/2 (*Civiletti/Paulsson/Wobeser*) and noted: "[t]o paraphrase *Azinian,* not all government regulatory activity that makes it difficult or impossible for an investor to carry out a particular business, change in the law or change in the application of existing law that makes it uneconomical to continue a particular business, is an expropriation under Art. 1110."

[15] *Id.,* paras. 113–114.

[16] *Metalclad Corporation v. The United Mexican States,* Award of 25 August 2000, ICSID Case No. ARB (AF)/97/1 (*Civiletti/Lauterpacht/Siqueiros*) available at: http://www.naftaclaims.com.

[17] *Feldman Award* (note 7), paras. 132–134.

[18] *S.D. Myers, Inc. v. The Government of Canada,* Partial Award of 13 November 2000 (*Schwartz/Hunter/Chiaisson*), available at: http://www.naftaclaims.com.

[19] *Pope & Talbot, Inc. v. The Government of Canada,* Interim Award of 26 June 2000 (*Lord Dervaird/Greenberg/Belman*) available at: http://www.state.gov/s/l/c3747.htm. The Tribunal rendered also a final Award on the merits of 10 April 2001 and an Award on Damages of 31 May 2002.

[20] *Feldman Award* (note 7), paras. 142–153.

b) National Treatment

The Tribunal further reached the conclusion that Mexico had breached its obligation to provide national treatment (Article 1102 NAFTA) by discriminating against *Feldman's* investment *CEMSA*. The Tribunal analyzed this claim in a three-step approach: firstly, it examined which domestic investors were active in the same business as *Feldman* and, secondly, whether the investments of these domestic investors were in like circumstances as *CEMSA*. Thirdly, the Tribunal then found that there was a *prima facie* case of a *de-facto* discrimination against *Feldman*, and that Mexico had failed to introduce evidence to rebut that presumption. The Tribunal held that *Feldman* did not need to prove that the discrimination was due to his nationality, as it would be "virtually impossible for any claimant to meet the burden of demonstrating that a government's motivation for discrimination is nationality rather than some other reason."[21]

c) Damages

Having found that Mexico had breached its obligation of national treatment, but had not expropriated *Feldman's* investment, the Tribunal noted that *Feldman* could not claim the full market value - compensation standard due for an expropriation. *Feldman* could only claim for compensation for the loss actually incurred.[22] The Tribunal awarded approx. US-$ 1.7 million instead of the claimed US-$ 50 million.

3. Dissenting Opinion

Arbitrator *Bravo* issued a Dissenting Opinion. While he agreed with the description of the facts and allegations and also with the holding as regards expropriation, he did not agree with the conclusions of the Award concerning national treatment or discrimination. In his opinion, *Feldman* had failed to prove that the other Mexican resellers of cigarettes had received more favorable treatment than *CEMSA*. He considered that in order to prove discrimination, international law required a systematic policy or practice by the responsible State, and that it was not sufficient if only one other investor was treated better. Since that other investor had also not been entitled to tax rebates, the holding of the majority seemed to

[21] *Id.*, para. 183.

[22] *Id.*, para 194: "It follows that, in case of discrimination that constitutes a breach of Art. 1102, what is owed by the responding party is the amount of loss or damage that is adequately connected to the breach. In the absence of discrimination that also constitutes indirect expropriation or is tantamount to expropriation, a claimant would not be entitled to the full market value of the investment which is granted by NAFTA Art. 1110."

imply that Mexico should have violated its domestic law not once, but twice. He observed that

> If the approach taken in this Award were to prevail, it would suffice for any investor from a NAFTA State to show that another State party to the same Treaty has made only one mistake or miscalculation in the administration of a tax, favoring a single national investor – whose circumstances are apparently similar – to the detriment of its public finance.[23]

Consequently, he found no discrimination and could not support the majority's award for damages.

C. ADF Group Inc. v. United States of America (Case No. ARB/AF/00/1)

On 9 January 2003, the Tribunal in the matter of *ADF Group Inc.* (hereinafter: *ADF*), a Canadian Company, and the United States of America (United States), rendered its Award.[24] The Tribunal consisted of Judge *Florentino P. Feliciano* as President and Professor *Armand deMestral* and Ms *Carolyn B. Lamm* as Members.

I. The Dispute

The underlying facts of the dispute relate to the construction of the Springfield Interchange Project (Springfield Project). The Springfield Interchange is a heavily-used and accident-proned highway junction, located in Northern Virginia approximately 20 kilometers south of Washington, D.C. The Springfield Project entailed the construction of a series of lanes, ramps and bridges to increase safety and efficiency. For the financing of the project, Virginia received federal funding assistance.

The contract for the main phases of the project was awarded to by Virginia to *Shirley Contracting Corporation* (*Shirley*), which in turn subcontracted certain parts. The supply of the structural steel requirements was subcontracted to ADF International, Inc. (*ADF U.S.*), the U.S. subsidiary of *ADF*. The sub-contract incorporated certain provisions of the main contract between Virginia and *Shirley*, which in turn incorporated statutory provisions, pursuant to which in federal-aid highway construction projects all manufacturing processes for steel must occur in the United States (the 'Buy-America clause').

[23] Dissenting Opinion of *Jorge Covarrubias Bravo*, 3 December 2002, available at: http://www.state.gov/documents/organization/16647.pdf.

[24] Hereinafter: *ADF Award*. The text of the Award is available at: http://www.state.gov/documents/organization/16586.pdf.

When *ADF U.S.* planned to carry out certain fabrication work on U.S.-produced steel in the Canadian factory of *ADF*, it applied for a waiver of the Buy-America requirement. Although it had a factory in Florida, that factory would not have been able to perform the necessary manufacturing. That waiver was finally denied by Virginia in July 1999, and *ADF U.S.* had to sub-contract most of the work to other U.S. fabricators, leading to a massive increase in costs.

On 29 February 2000, *ADF* filed its Notice of Intention to Submit a Claim to Arbitration pursuant to Article 1119 NAFTA. It follows a mandatory 90-day 'cooling-off' period before a claim can be submitted. On 22 July 2000, *ADF* then submitted its claim to the Additional Facility of the ICSID.[25]

II. The Decision

1. Jurisdiction

The Tribunal first dealt with two jurisdictional objections by the United States. The first objection related to the claim that the measures of the United States were in breach of Article 1103 NAFTA.[26] *ADF* had not mentioned Article 1103 NAFTA in its Article 1119 Notice of Intention or in its Notice of Arbitration. Consequently, the United States argued, the jurisdiction of the Tribunal did not extend to Article 1103. The Tribunal did not accept the United States' strict and formalistic argumentation. Analyzing the circumstances under which the claim concerning Article 1103 had been raised, it did not believe that *ADF* "was seeking unfairly to inflict tactical surprise upon Respondent."[27] It dismissed the objection. The second objection related to the scope of the claim. *ADF* had not only submitted a claim concerning the Springfield Project, but also claims relating to other Federal-aid construction projects. The Tribunal held these claims to be inadmissible as *ADF* had not substantiated them.[28]

[25] The Additional Facility of the ICSID was created in 1978 and allows for the submission of disputes if either the home State of the investor or the respondent State is not a party to ICSID. In this case, the dispute was submitted to the Additional Facility because Canada is not a party to ICSID.

[26] Art. 1103 NAFTA contains a most-favored nation treatment obligation.

[27] *ADF Award* (note 24), para. 136.

[28] *Id.*, para. 145: "Putting the matter in slightly different terms, the Investor has presented to the Tribunal no bases, factual or legal, for passing upon the Respondent's liability for breaches of any provision of Chapter 11, Section A in the 'other projects.' There has been, therefore, nothing for the Respondent to controvert and disprove or rebut."

2. Merits

ADF claimed that the legislative statutory provisions containing the 'Buy-America Clause,' its implementing administrative provisions and the contractual provisions applying them in the Springfield Project were in breach of certain provisions of Chapter 11 NAFTA.

In addressing the merits of the case, the Tribunal first turned to the alleged violation of Article 1102 NAFTA. Article 1102 NAFTA establishes a national-treatment obligation.[29] *ADF* submitted that it was discriminated against as compared with U.S. Steel manufacturers and fabricators. It was prohibited from fabricating the steel in Canada and selling it to *ADF U.S.*, it alleged, because its facilities in Canada were treated less favorably than any like facilities in the United States.[30] The Tribunal accepted the United States' defense that there was no *de-jure* discrimination since both steel of a foreign investor and of a U.S. investor must be fabricated in the United States. Such steel fabricated in the United States was not treated differently, depending on the nationality of the investor.[31] It furthermore found that the Claimant had not produced enough evidence for a *de-facto* discrimination.[32]

ADF furthermore claimed the violation of Article 1106 NAFTA, which prohibits domestic-content requirements with regard to the establishment, expansion, management, conduct and operation of an investment in its territory. The Tribunal started its analysis by noting that the U.S measures seemed to be clear requirements of local content and performance requirements. However, it found that the dispute arose out of government 'procurement.' Pursuant to Article 1108 paras. 7 and 8 NAFTA, Articles 1102, 1103, and 1106 do not apply to procurement by a Party or State enterprise. It thus held that the U.S. measures in question were not inconsistent with Article 1106.[33]

A further claim of *ADF* related to Article 1105 para. 1 NAFTA, pursuant to which "[e]ach Party shall accord to investments of investors of another Party treat-

[29] Art. 1102 states in its relevant part: "Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investment. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investment."

[30] *ADF Award* (note 24), para. 64.

[31] *Id.*, para. 156.

[32] *Id.*, para. 157.

[33] *Id.*, para. 174.

ment in accordance with international law, including fair and equitable treatment and full protection and security." The Tribunal first analyzed the content of Article 1105 para. 1 and accepted the interpretation issued by the NAFTA Free Trade Commission (FTC).[34] The Tribunal furthermore held that the 'international minimum standard' was in a constant process of development, but that the contemporary content of the rule was unclear. It nevertheless reviewed whether the U.S. measures were inconsistent with a supposed general international law standard to accord 'fair and equitable treatment' and 'full protection and security' and found that this was not the case. *ADF* had argued that the domestic-content requirements were *per se* unfair and inequitable. The Tribunal rejected this argument, noting that domestic-content requirements in governmental procurement were common to all three NAFTA Parties. *ADF* furthermore submitted that it had had legitimate expectation that the waiver applied for would be granted, and that the federal U.S. authorities, when refusing to grant such waiver, had acted *ultra vires*. The Tribunal noted that the expectations had not been created by federal authorities and that it had no authority to review the legal validity of U.S. measures under U.S. administrative law.[35]

ADF's last claim alleged a breach of the most-favored-nation treatment obligation under Article 1103 NAFTA. *ADF* submitted that by virtue of this clause, it was entitled to better treatment under the U.S.-Albania and U.S. – Estonia Bilateral Investment Treaty (BIT). Both BIT's provide for "fair and equitable treatment" and "full protection and security." The Tribunal noted that these provisions could reflect only the international minimum standard, as this was the understanding of the United States during the ratification process in the U.S. The Tribunal then referred to its analysis of Article 1105 and found no breach of such obligations.

[34] Pursuant to Art. 1131 para. 2 NAFTA, an interpretation of a NAFTA provision by the NAFTA Free Trade Commission consisting of the Trade Ministers of USA, Mexico and Canada is binding on a tribunal established under Chapter 11 NAFTA. On 31 July 2001, the FTC issued the 'Notes of Interpretation of Certain Chapter 11 Provisions,' pursuant to which the 'fair and equitable treatment' standard of Art. 1105 para. 1 "prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party," available at: http://www.dfaitmaeci.gc.ca/tna-nac/NAFTA-Interpr-e.asp. These Notes of Interpretation have been subject to considerable debate. In contrast to the ADF Tribunal, the *Pope & Talbot* Tribunal in its Damages Award of 31 May 2002 considered it rather an amendment than an interpretation, *cf.* para. 47 of the Award.

[35] *ADF Award* (note 24), para. 190: "We do not sit as a court with appellate jurisdiction with regard to U.S. measures."

D. Zhinvali Development Ltd. v. Republic of Georgia (Case No. ARB/00/1)

The case of *Zhinvali Development Ltd. v. The Republic of Georgia* did not arise on the basis of a bi- or multilateral investment treaty, but on the basis of the Georgian investment Law which provided for ICSID arbitration. The Tribunal consisted of *Davis R. Robinson* as President and Ambassador *Andrew Jacovides* and Professor *Seymour Rubin* as Members of the Tribunal. They rendered their award on 24 January 2003.[36]

I. The Dispute

This dispute arose out of the planned privatization of the Georgian Energy Industry, in particular the *Zhinvali* hydroelectric power plant near the city of Tbilisi. It revolves around certain pre-contractual expenditures incurred by the *Zhinvali Development Ltd.* (*ZDL*), an Irish company, and its three shareholders in connection with the proposed rehabilitation of the plant and its tailrace tunnel. The tailrace tunnel was built for the water outflow downstream from the Plant's turbine generators and was the main source of water for Tbilisi.

The shareholders of *ZDL* became interested in the project in 1997 and *ZDL*, as a joint venture, was incorporated in March 1998. Negotiations with *ZDL* and Georgia to conclude a definitive set of agreements to finance and implement the rehabilitation of the plant and the tailrace tunnel spread over a three-year period. During that period, *ZDL* alleged that it had spent approx. US-$ 3.6 million for feasibility studies, consultancy costs and legal fees for various reasons, *inter alia,* the influence of the World Bank wishing to have a competitive bidding process for the project, no agreements were concluded. *ZDL* submitted its Notice of Arbitration on 3 December 1999, claiming damages not only in its own name, but also on behalf of its shareholders.

II. The Decision

The key issue to be decided by the Tribunal was whether it had jurisdiction. Article 25 of the ICSID convention provides that the "jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment [...] which the parties to the dispute consent in writing to submit to the Centre." No direct arbitration agreement existed between *ZDL* and Georgia, and *ZDL* relied on the Georgian investment law of 1996. The Tribunal considered that law to be a valid

[36] Hereinafter: *Zhinvali Award.* The Award is unpublished. The author wishes to express his gratitude to *Juliet Blanch* of Norton Rose for giving permission to include the Award in this report.

offer of ICSID jurisdiction which *ZDL* could accept by filing its Request for Arbitration.[37]

In determining whether the pre-contractual expenditures constituted an "investment," the Tribunal first considered the award in the case of *Mihaly v. Sri Lanka*.[38] In the *Mihaly* case, the Claimant had sought to recover development cost. The *Mihaly* Tribunal considered that it was up to the parties whether these development costs should be treated as an investment. No such agreement was found in the *Mihaly* case, and the *Zhinvali* Tribunal considered that it could only assert jurisdiction if Georgia had agreed to treat the *ZDL* development costs as an "investment."[39] No definition of "investment" is found in the ICSID convention itself, and no bilateral investment treaty with a respective definition was in force between Ireland and Georgia.[40] Since the parties did not expressly agree on treating the expenditures as an "investment," the Tribunal thus turned to consider Georgian investment law. It concluded that the development costs did not constitute an "investment" under the Georgian investment law or Article 25 ICSID Convention,[41] declined its jurisdiction and dismissed the claim.

The Tribunal rendered this Award only with a majority. The arbitrator appointed by *ZDL*, Ambassador *Jacovides*, submitted a separate opinion. He disagreed with the Tribunal's finding that there was no "investment" under the Georgian investment law. He then continued to analyze the liability of Georgia and the compensation claim of *ZDL*, arguing that while lost profits should not be awarded, *ZDL* should be awarded its development costs.

E. Société d'Exploitation des Mines d'Or de Sadiola S.A. v. Republic of Mali (Case No. ARB/01/5)

This is a classic ICSID case in that it is not based on a bilateral investment treaty or even a national investment law, but on a ICSID clause in a contract for the

[37] *Id.*, paras. 331–337. Usually, the consent of the parties is expressed in an direct arbitration agreement. If no such direct agreement exists, it is accepted in ICSID jurisprudence that the consent of the host State can be expressed through its domestic legislation or through a bilateral investment treaty concluded with the investor's home State. For adescription of the development and for further references, see *Schreuer* (note 3), Art. 25 marginal notes 257–285.

[38] *Mihaly International Corporation v. Sri Lanka*, Award of 15 March 2002 (*Sucharitkul/Rogers/Suratgar*), available at: http://www.worldbank.com/icsid/cases/awards.htm, also reprinted in: ILM, vol. 41, 2002, 867 *et seq.*

[39] *Zhinvali Award* (note 36), para. 349.

[40] Neither the Tribunal nor the parties referred to the applicable ECT (note 6), Art. 1 para. 6.

[41] *Zhinvali Award* (note 36), para. 415.

mining of gold and silver (Mining Convention) on the Sadiola Mining Site.[42] The Tribunal, consisting of *Bernardo Cremades* as President and Professor *Ibrahim Fadlallah* and *Robert Dossou* as Members, rendered its award on 25 February 2003.

I. The Dispute

The Mining Convention had been concluded in 1990 between a German company and the Republic of Mali (Mali). It served the implementation of a permit to prospect for gold, silver and platinum on the Sadiola mining site. The German company later was acquired by a Canadian and a South African company, which set up the *Societe d'Exploitation des Mines d'Or de Sadiola* (*Semos*), the Claimant in this case. The permit was transferred to *Semos* which subsequently became a party to the Mining Convention at the end of 1994.

The dispute revolved around the claim of *Semos* to be exempt from the payment of stamp duty introduced in 1999 on the export of gold. It arose at a time when various other disputes of a fiscal and customs nature were under discussion between *Semos* and Mali. The attempts for an amicable settlement with regard to this dispute failed, and *Semos* submitted a request for arbitration on the basis of an arbitration clause stipulated in the Mining Convention.

II. The Decision

As the Tribunal had to apply the domestic law of Mali, the only questions of international law related to Article 25 of the ICSID convention which regulates jurisdiction. The Tribunal noted that although *Semos* was incorporated under the laws of Mali, it could be considered as a national of a foreign State due to the majority foreign control.[43] It found that the dispute also directly arose out of an investment, as it pertained to the conditions "under which the main shareholders of *Semos* acting through this joint-venture, operate the Sadiola gold mine, in respect of which they have invested funds in Mali."[44]

[42] Hereinafter: *Semos Award*. The Award is unpublished. It has been included in this report with permission of one of *Semos'* shareholders.

[43] Art. 25 para. 1 ICSID requires a dispute between a Contracting State and a National of another Contracting State. Art. 25 para. 2 lit. b provides that a "National of another Contracting State" can also be a juridical person which has the nationality of the State Party to the proceedings, but which, due to its foreign control, the parties have agreed to treat as a "national of another Contracting State." As Professor *Schreuer* explains, the "practice of ICSID tribunals shows an increasing readiness to accept an implicit agreement to treat a juridical person as a foreign national because of foreign control," *cf.* *Schreuer* (note 3), Art. 25 marginal notes 507–521.

[44] *Semos Award* (note 42), 2.

With respect to the merits of the case, the Tribunal examined the development of the Mali tax code and found that *Semos* was exempt by virtue of the Mining Convention from the payment of stamp duty. It upheld *Semos'* claim and ordered Mali to pay back the collected stamp duty and the costs and expenses of the arbitration.

F. Técnicas Medioambientales Tecmed, S.A. v. United Mexican States (Case No. ARB (AF)/00/2

In the case of *Técnicas Medioambientales Tecmed, S.A.* (*Tecmed*) against the United Mexican States (Mexico), the Tribunal rendered its award on the merits on 29 May 2003.[45] The Tribunal consisted of Dr. *Horacio Grigera Naon* as President and Professor *Jose Fernandez Rozas* and Mr *Carlos Bernal Verea* as Members. The case arose on the basis of the Spanish-Mexican Bilateral Investment Treaty (BIT).

I. The Dispute

Tecmed is a Spanish company and the parent company of its Mexican subsidiary (*Tecmed Mexico*). *Tecmed Mexico* holds 99 % of the shares of the Mexican company *Cytrar, S.A. de C.V.* (*Cytrar*), the company through which the investment giving rise to the dispute was made.

In February 1996, *Tecmed Mexico* was the Awardee in a public auction relating to the sale of real property, building, facilities and other assets relating to a landfill of hazardous industrial waste (landfill). The auction had been instituted by a municipal agency of the nearby town of Hermosillo. The landfill had an authorization by the federal authorities (INE) to operate for an indefinite period of time, granted in 1994. In middle and late 1996, *Tecmed Mexico* applied to *INE* for the operating license of the landfill – still in the name of the previous operator – to be issued in the name of *Cytrar*. Such license was finally granted, but valid for only a year with the possibility to renew it every year.

During the following two years, a citizens movement which required the closing of the landfill gained considerable political support. The movement mainly criticized the operation of the landfill in close vicinity of Hermosillo, and the transport of certain types of hazardous waste from a plant in Baja California. In early 1998, *Cytrar* agreed to relocate the landfill, provided that, pending that relocation, it could continue to operate the landfill. With decision of 25 November 1998, however, INE rejected the application for the renewal of the license and requested *Cytrar* to submit

[45] Hereinafter: *Tecmed Award*. An unofficial English translation of the Award is available at: http://www.worldbank.org/icsid/cases/awards.htm.

a programme for the closing of the landfill. The decision was based on certain alleged breaches of the conditions of the license.

II. The Decision

1. Jurisdiction

The Tribunal first had to deal with a jurisdictional objection of Mexico. Among the conduct complained of by *Tecmed* was the alleged failure to transfer to *Cytrar* the existing license (which had an indefinite duration) or to issue to *Cytrar* an equivalent license. That conduct, however, had occurred prior the entry into force of the BIT on 18 December 1996. While the Tribunal observed that it could not consider acts or omissions taking place before the BIT entered into force,[46] it considered that those acts or omissions could be considered to be part of acts and omissions taking place after entry into force, and thus be taken into account by the Tribunal when examining those later acts.[47]

2. Merits

Tecmed had submitted four claims: that the non-renewal of the license constituted an expropriation of *Tecmed's* investment without compensation, that the conduct of the Mexican authorities was in breach of the obligation to provide fair and equitable treatment, to grant full security and protection to investments and to provide most-favored nation treatment.

Since *Tecmed* was not deprived of its legal title to the assets constituting the investment, no direct expropriation existed. The Tribunal thus had to determine whether the non-renewal of the license was a measure equivalent to an expropriation. It concluded that it was decisive to determine whether the "assets involved had lost their value or economic use for the holder."[48] Although it then found that the non-renewal could be treated as an expropriation, its analysis did not stop there. The decision not to renew the licence was a regulatory measure of the Mexican authori-

[46] *Id.*, para. 67.

[47] *Id.*, para. 68. *Cf.* also paras. 62 and 66, where the Tribunal, in reaching this conclusion, also took into account the ILC principles of State responsibility and the respective holding in the *Mondev v. USA* Award.

[48] *Id.*, paras. 115–116. The Tribunal, *inter alia*, relied on the jurisprudence of the European Court of Human Rights and the Interamerican Court of Human Rights to reach this conclusion.

ties.[49] The Tribunal, relying on the recent *Santa Elena* Award,[50] established that such measures were not to be excluded from the definition of expropriatory acts. The Tribunal then decided it needed to

> consider, in order to determine if they are to characterized as expropriatory, whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investment, taking into account that the significance of such impact has key role upon deciding the proportionality [...] There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure.[51]

Consequently, the Tribunal reviewed the reasons for the decision. Although the decision cited breaches of the conditions under which the license was issued, the Tribunal concluded that those breaches did not seem to compromise public health, impair ecological balance or the protection of the environment, or that they were the reason for a genuine social crisis.[52] Rather, evidence showed that the reasons "that prevailed in the decision to deny the renewal of the license were reasons related to the social or political circumstances and the pressure exerted on municipal and State authorities and even on INE itself created by such circumstances."[53] The events leading to that pressure – mainly the transportation of the toxic waste from the plant in Baja California – were not sufficient to give rise to a serious urgent situation, crisis, or social emergency that would permit the Tribunal reaching the conclusion that the decision did not amount to an expropriation.[54] The Tribunal thus concluded that the decision and its effects amounted to an expropriation of *Tecmed's* investment.[55]

The Tribunal then analyzed *Tecmed's* claim that Mexico had breached its obligation to guarantee for its investment fair and equitable treatment. The Tribunal started its analysis by considering that this obligation "in the light of the good faith principle established by international law, requires the Contracting Parties to provide to international investment treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment."[56] Part of these expectations, according to the Tribunal, is that the host State acts in a consistent, non-arbitrary and transparent manner so the investor can plan and adjust its conduct according to such regulations.[57] Reviewing the conduct of INE, the Tribunal found that the conduct was inconsistent, intransparent and contradictory. By not informing *Cytrar* about the intention to close down the landfill and the motives therefore until the date of the decision, six days before the expriation of the license, INE made it impossible for *Cytrar* to react and perhaps prevent the decision. This, the Tribunal concluded, conflicted with what a reasonable observer would consider fair and equitable, and thus constituted a breach of the BIT.[58]

The last two claims were rejected by the Tribunal. It found that Mexico was not in breach of its obligation to provide full protection and security since that guarantee was not absolute. It held that there was no evidence that Mexican authorities had not reacted reasonably to actions of the citizens movement against the landfill.[59] It also considered that the behavior of Mexican authorities was not in breach of the guarantees of national- or most-favored-nation treatment.[60]

As regards the damages to be paid to *Tecmed*, the Tribunal observed the considerable difference between the fair market value as calculated by *Tecmed's* experts – US-$ 52 million – and Mexico's experts – US-$ 2.1 million. Since *Tecmed* had paid only approx. US-$ 4 million at the initial public auction, it considered that the damages sought were "likely to be inconsistent with the legitimate and genuine estimates on return on the Claimant's investment at the time of making the investment."[61] Taking into account the community pressure and the commitment of

[49] It is quite disputed in international law whether and under what circumstances legitimate regulatory measures can amount to an expropriation. For a brief overview, *cf. Happ* (note 6), 342–344.

[50] *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, Award of 17 February 2000, ICSID Case No. ARB/96/1 (*Fortier/Sir Lauterpacht/Weil*), available at: http://www.worldbank.org/icsid/cases/santaelena_award.pdf.

[51] *Tecmed Award* (note 45), para. 122. Again, the Tribunal relied on the caselaw of the European Court of Human Rights.

[52] *Id.*, para. 124.

[53] *Id.*, para. 132.

[54] *Id.*, paras. 139–148.

[55] *Id.*, para. 151.

[56] *Id.*, para. 154.

[57] While a similar holding had been reached by the *Metalclad* Tribunal (note 16), that part of the award has later been set aside by the Supreme Court of British Columbia in its judgment of 2 May 2001, para. 70, available at: http://www.naftaclaims.com: "In the present case, however, the Tribunal did not simply interpret the wording of Art. 1105. Rather, it misstated the applicable law to include transparency obligations and it then made its decisions on the concept of transparency."

[58] *Tecmed Award* (note 45), para. 166. *Cf.* also para. 173: "Despite Cytrar's good faith expectation that the Permit's total or partial renewal would be granted to maintain Cytrar's operation of the Landfill effective until the relocation to a new site had been completed, INE did not consider Cytrar's proposals in that regard and not only did it deny the renewal of the Permit although the relocation had not yet taken place, but it also did so in the understanding that his would lead Cytrar to relocate."

[59] *Id.*, para. 177.

[60] *Id.*, paras. 180–181.

[61] *Id.*, para. 186.

Cytrar to relocate the landfill, the Tribunal calculated a market value of US-$ 5.5 million and awarded this sum.

G. The Loewen Group, Inc. and Raymond L. Loewen v. United States of America (Case No. ARB(AF)/98/3)

The *Loewen* Tribunal rendered its Award on the merits on 26 June 2003.[62] It consisted of *Sir Anthony Mason* as President of the Tribunal and Judge *Abner J. Mikva* and *Lord Mustill* as Members. The dispute was decided on the basis of Chapter 11 NAFTA.

I. The Dispute

The dispute arose out of litigation brought against the *Loewen Group, Inc.* and its principal United States subsidiary (collectively called *Loewen*) by a competitor (*O'Keefe*) in the funeral business. The litigation was brought in the Mississippi State Court and concerned three contracts between *O'Keefe* and *Loewen* worth approximately US-$ 980,000 and an exchange of two *O'Keefe* funeral homes said to be worth US-$ 2.5 million for a *Loewen* insurance company worth US-$ 4 million.

The litigation resulted in a judgment by a trial court in Mississippi in which the trial judge allowed *O'Keefe's* lawyers to make repeated prejudicial and irrelevant remarks concerning, *inter alia, Loewen's* foreign nationality and race. The Mississippi jury awarded *O'Keefe* US-$ 500 million damages, consisting of US-$ 75 million damages for emotional distress and US-$ 400 million punitive damages. *Loewen* sought to appeal the judgment. However, Mississippi law requires an appeal bond for 125 % of the judgment as a condition for staying execution of the judgment, unless there is good cause for a reduction or dispension of the bond.

Both the trial court and the Mississippi Supreme Court refused to reduce the appeal bond at all. *Loewen* was thus required to post a US-$ 625 million appeal bond within seven days or to face immediate execution of the judgment. The only legal options left available were to pursue extraordinary recourse to the U.S. Supreme Court or a U.S. Federal District Courts. Both options were unlikely to succeed and could result in immediate execution of the judgment. Filing for bankruptcy would have stayed execution, but have had a potentially catastrophic effect on the share value of the *Loewen* Group. Faced with immediate execution of the award, *Loewen* finally agreed on 29 January 1996 to settle the case for US-$ 175 million.

Loewen then sought compensation for the damage by filing a NAFTA claim, in 1998, arguing that the United States were responsible for the acts of the State of Mississippi during the course of the litigation and that this conduct was in breach of NAFTA Chapter 11. After the Tribunal had dismissed objections to jurisdiction filed by the United States in early 2001 and had started to hear the merits of the case, *Loewen* filed for bankruptcy under Chapter 11. In the ensuing reorganization, the *Loewen Group* ceased to exist and its business operations were reorganized as a United States corporation. All of the *Loewen Group's* interests in the pending claim were transferred to a newly created company (*Nafcanco*). The United States reacted to this reorganization by launching new jurisdictional objections on the grounds that, due to the reorganization of the Claimants' company under the U.S. Bankruptcy Code, the Claimants were now owned and controlled by a U.S. corporation and therefore lacked diversity of nationality required under NAFTA Chapter Eleven.

II. The Decision

The Award has an unusual structure: while it starts by considering the merits of the claim, it ends by dismissing the claims in their entirety due to a lack of jurisdiction. The reason for this structure lies in the procedural history: the Tribunal already had been in the process of considering the merits when the new objections were launched, and thus included in its final Award its reasons for dismissing *Loewen's* claims on the merits.

Loewen, inter alia, had claimed a violation of Article 1105 NAFTA which requires "fair and equitable treatment."[63] The Tribunal started its analysis by recounting in detail the conduct of the proceedings, coming to the conclusion "that the conduct of the trial by the judge was so flawed that it constituted a miscarriage of justice amounting a manifest injustice as that expression is understood in international law."[64] It summarized its evaluation as follows:

> By any standard of measurement, the trial involving O'Keefe and Loewen was a disgrace. By any standard of review, the tactics of O'Keefe's lawyers, particularly Mr Gary, were impermissible. By any standard of evaluation, the trial judge failed to afford Loewen the process that was due.[65]

[62] Hereinafter: *Loewen Award.* The text of the Award and of the preceding decision on objections to jurisdiction is available at: http://www.state.gov/s/l/c3755.htm and reprinted in: ILM, vol. 42, 2003, 811 *et seq.* After the final Award had been dispatched, the United States on 11 August 2003 requested a supplementary decision as the Award did not make clear that *Raymond Loewen's* claim had also been dismissed. *Raymond Loewen* welcomed this request and, in his response of 19 September 2003, asked the Tribunal to return to the merits and decide his claim. Both documents are available at: http://www.state.gov/s/l/c3755.htm.

[63] As to the content of this obligation, see *supra,* the discussion of the *ADF Award.*

[64] *Loewen Award* (note 62), para. 54.

[65] *Id.*, para. 119.

While the Tribunal also found that the proceedings "cannot be squared with minimum standards of international law and fair and equitable treatment," it nevertheless continued to consider whether the trial proceedings by themselves were "a measure adopted or maintained by a Party" to NAFTA. The United States had objected to the jurisdiction by arguing that state responsibility would only arise if there was final action by the state's judicial system as a whole. The Tribunal analyzed the local remedies rule and considered that a judicial decision could not constitute a substantive violation of international law unless it was a final decision:

> The purpose and the requirement that a decision of a lower court be challenged through the judicial process before the State is responsible for a breach of international law constituted by judicial decision is to afford the State the opportunity of redressing through its legal system the inchoate breach of international law occasioned by the lower court decision.[66]

The Tribunal considered the local remedies rule as an obligation to exhaust only effective and adequate remedies which are reasonably available.[67] It then turned to the facts and examined whether *Loewen* had exhausted all effective, adequate and reasonably available remedies.[68] It acknowledged that an appeal at the risk of immediate execution of the judgment was not a reasonable available remedy. Examining the few legal options available to *Loewen*, the Tribunal noted that although the chances of success were uncertain, "Loewen failed to present evidence disclosing its reasons for entering into the settlement agreement in preference to pursuing other options, in particular the Supreme Court option which it had under active consideration and preparation until the settlement agreement was reached."[69] Accordingly, it concluded that *Loewen* failed to pursue its domestic remedies and that *Loewen* had not shown a violation of international law for which the United States were responsible.[70]

Having found no breach of international law, the Tribunal turned to analyze the effects of *Loewen*'s reorganization on its jurisdiction. It held that international law required continuous national identity from the date of the events giving rise of the claim through the date of the resolution of the claim.[71] Since the new corporation had United States nationality, there no longer was a diversity of nationality between Claimant and Respondent, and no "dispute" for the Tribunal to decide: "All of the benefits of any award would clearly inure to the American corporation. Such a naked entity as Nafcanco, even with its catchy name, cannot qualify as a continu-

[66] *Id.*, para. 156.

[67] *Id.*, para. 156.

[68] *Cf.* especially paras. 207–217.

[69] *Id.*, para. 215.

[70] *Id.*, para. 217.

[71] *Id.*, paras. 225–230.

ing national for the purpose of this proceeding."[72] Thus, it decided that it lacked jurisdiction to decide the claims submitted and dismissed them in their entirety.

H. CMS Gas Transition Company v. Republic of Argentina (Case No. ARB/01/8)

The Decision of the Tribunal on the objections by Argentina to its jurisdiction of 17 July 2003 was rendered by Professor *Franciso Orrego Vicuna* as President and Mr *Marc Lalonde* and Judge *Francisco Rezek* as Members of the Tribunal.[73] It is the first decision on an ICSID tribunal in the approx. 26 cases filed against Argentina due to the effects of the Argentine currency crisis.

I. The Dispute

In 1995, *CMS Gas Transition Company* (*CMS*) had purchased 25 % shares of the Argentine company *Transportadora de Gas del Norte* (*TGN*) under the framework of Argentina's privatization program for the gas sector. TGN had a license for the transportation of gas. *CMS* later acquired further 4.42 % of the shares, thus having a share of 29.42 % of *TGN*. The license provides that certain disputes are to be settled before the Federal Courts of Buenos Aires on Contentious Administrative Matters.

Under the terms of the privatization program, tariffs were to be calculated in U.S. Dollars and expressed in Pesos at the exchange rate at the time of billing. They were also to be adjusted semi-annually in accordance with the United States Producer Price Index. At that time, the Peso was freely convertible and on a 1:1 basis pegged to the U.S. Dollar. Following Argentina's economic and financial crisis in 1999, Argentina introduced emergency legislation that brought an end to the convertibility and parity of the Peso with the Dollar. It also mandated the restructuring and renegotiation of public and private contracts made in foreign currency, extinguished the right of the licensees in the regulated public sector to link tariffs to U.S. price indices and redenominated rates and tariffs into Pesos at the exchange rate of one Peso per Dollar (pesification).

II. The Decision

The Tribunal first noted that it did not have jurisdiction over measures of general economic policy adopted by Argentina, and could not pass judgment on

[72] *Id.*, para. 237.

[73] Hereinafter: *CMS Gas (Jurisdiction)*. The Decision has been reprinted in: ILM, vol. 42, 2003, 788 *et seq.*

whether they were right or wrong. Its jurisdiction was limited to examine whether acts of Argentina were in breach of *CMS*'s rights under the U.S.-Argentine bilateral investment treaty (the BIT).[74]

It then rejected Argentina's objection that *CMS,* being only a minority shareholder, lacked *jus standi.* The Tribunal examined the status of shareholder rights under international law and found no bar in "current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned, not even if those shareholders are minority or non-controlling shareholders."[75] It further concluded that neither under the ICSID convention nor under the BIT minority shareholders were excluded from bringing a claim.[76]

It also held that – in contrast to Argentina's submissions – the dispute arose directly out of an investment. The 29.42 % shares constituted an investment, and *CMS* could assert its rights as an investor independently from the rights of *TGN* under the license.[77] Relying on decisions of ICSID tribunals in *Lanco,*[78] *Vivendi Annulment*[79] and *Wena Annulment,*[80] it decided that the forum selection clause in the license was not a bar to its jurisdiction.[81] The Tribunal further concluded that *CMS* had not triggered the "fork in the road" provision in the BIT.[82] Although *TGN* had participated in proceedings before the Argentine Federal Supreme Court, *CMS* had not submitted a BIT claim to the local courts and thus was not barred from submitting a BIT claim to the Tribunal.[83] That a finding of jurisdiction might lead to a multiplicity of proceedings by investors of various nationalities also did not bar the Tribunal's jurisdiction, since that would be a result of the current state of international law and *res inter alios acta.*[84]

---

[74] *Id.,* 33.

[75] *Id.,* para. 48.

[76] *Id.,* paras. 56–65.

[77] *Id.,* para. 68.

[78] *Lanco International Inc. v. The Argentine Republic,* Preliminary Decision of 8 December 1998, ICSID Case No. ARB/97/6 (*Cremades/Alvarez/Baptista*), reprinted in: ILM, vol. 40, 2001, 457 *et seq.*

[79] See *supra,* note 10.

[80] *Wena Hotels Ltd. v. Arab Republic of Egypt,* Decision of 5 Februar 2002 (*Kerameus/Bucher/Vicuna*), reprinted in: ILM, vol. 41, 2002, 933 *et seq.*

[81] *CMS Gas (Jurisdiction)* (note 73), para. 76.

[82] "Fork in the road" clauses govern the relationship between the national court system and international arbitration. A typical clause provides that once the investor has submitted the dispute to the national courts, he can no longer submit it to international arbitration.

[83] *CMS Gas (Jurisdiction)* (note 73), para. 80.

[84] *Id.,* para. 86.

The Tribunal also rejected Argentina's further objections which related to the applicable law, whether the dispute submitted was identical with the original dispute and whether *CMS* had complied with all procedural requirements of the BIT. Consequently, it affirmed its jurisdiction and decided to continue with the proceedings.

J. Fireman's Fund Insurance Company v. The United Mexican States (Case No. ARB(AF)/02/01)

Also on 17 July 2003, the Tribunal in the *Fireman's Fund* case gave its "Decision on the preliminary question," ruling on the challenge to its competence brought forward by the United Mexican States. The Tribunal consisted of Professor *Albert Jan van den Berg* as President and Professor *Andreas Loewenfeld* and Mr *Francisco Gamboa* as Members of the Tribunal.

I. The Dispute

Fireman's Fund Insurance Company (*Fireman's Fund*) is a U.S. corporation. The dispute arose out of Fireman's Fund 1995 purchase of US-$ 50 million in dollar-denominated debentures issued by the Mexican financial holding company *Grupo Financiero BanCrecer, S.A.* (*GF BanCrecer*). *GF BanCrecer* is the holding company of *BanCrecer, S.A.* (*Banco BanCrecer*). *GF BanCrecer* also issued similar debentures denominated in Mexican pesos, the value of which was equivalent to US-$ 50 million at the time.

Following the financial crisis in Mexico in 1997, *Banco BanCrecer* encountered financial difficulties. *Fireman's Fund* agreed to a rescue program devised by, *inter alia,* the Mexican Ministry of Finance and the Mexican Central Bank, according to which *Fireman's Fund* debentures would be redeemed and re-invested in the restructured *Banco BanCrecer. Fireman's Fund*'s alleges that without its knowledge, an alternative plan was devised – and supported by the Government – to pay the holders of the peso-denominated debentures the full cash value through a trust established by *Banco Ban Crecer. Fireman*'s *Fund* request to be treated equal to the holders of the Peso-debentures was finally denied by the Mexican Central Bank in August 1999. In November 1999, the shareholders of *GF BanCrecer* resolved that *Banco BanCrecer* would be taken over by Institute for the Protection of Bank Savings and that *GF BanCrecer* would be dissolved and liquidated.

Fireman's Fund had submitted its Notice of Arbitration in October 2001, claiming violations of NAFTA Articles 1102 (National Treatment), 1105 (Minimum Standard of Treatment), 1405 (National Treatment for Financial Services), and 1110 (Expropriation).

II. The Decision

Mexico had objected to the jurisdiction of the Tribunal *ratione materiae* to hear the claims relation to Articles 1102, 1105, and 1405 NAFTA. It argued that the measures in question were exclusively governed by Chapter 14 NAFTA relating to Financial Services. Mexico did not object the jurisdiction of the Tribunal to hear the Article 1110 claim, as that Article was applicable by virtue of Article 1401 para. 2 NAFTA.

The Tribunal accepted the arguments of Mexico. Analyzing the provisions of Chapter 14, it found that the dispute fell under the scope of those provisions and was thus to be decided under the State-to-State dispute settlement mechanism of Chapter 20 NAFTA. With the exception of Article 1110, the investment protection provisions of Chapter 11 had not been included in Chapter 14. Consequently, the Tribunal held that the claims brought under Articles 1102, 1105, and 1405 were not within its competence, but only the claim brought under Article 1110.

K. SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan (Case No. ARB/01/13)

The decision of the Tribunal on objections to jurisdiction of 6 August 2003[85] was rendered by Judge *Florentino P. Feliciano* as President and Mr *André Faurès* and Mr *Christopher Thomas Q.C.* as Members of the Tribunal.

I. The Dispute

The facts of the dispute relate to a contract entered into in 1994 by the Swiss company *SGS Société Générale de Survaillance S.A.* (*SGS*) and Pakistan, in which *SGS* agreed to provide "pre-shipment inspection" services with respect to goods to be exported from certain countries to Pakistan (PSI agreement). The objective of such inspection was to ensure that the goods were classified properly for duty purposes and to enable Pakistan to increase the efficiency of its custom revenues collection and thereby contribute to the national treasury. To fulfil its obligation to convey information to Pakistani customs authorities, *SGS* established two liaison offices in Karachi and in Lahore. The PSI agreement entered into force on 1 January 1995. It contained a dispute settlement clause that provided that any disputes which were not settled amicably were to be settled by arbitration in accordance with the Pakistan Arbitration Act, the place of arbitration being Islamabad. The PSI agreement also entitled Pakistan to terminate the agreement after the first appraisal of *SGS*'s work, by giving a three month's notice.

[85] Hereinafter: *SGS v. Pakistan (Jurisdiction)*. The award will be reprinted in: ILM, vol. 42, 2003.

On 12 December 1996, Pakistan notified *SGS* that the PSI agreement was terminated with effect of 11 March 1997. *SGS* considered the termination to be unlawful and in January 1998 initiated proceedings in the courts of Geneva for damages. That claim was rejected on the ground that the parties had agreed to arbitration. Both the Court of Appeal of Geneva and the Swiss Federal Tribunal upheld the judgment.

Already before the final judgment of the Swiss Federal Tribunal, Pakistan initiated arbitration proceedings under the PSI agreement (PSI arbitration). *SGS* objected against the jurisdiction, but also filed a counter-claim. Approximately eleven months after Pakistan initiated the PSI arbitration, *SGS* informed Pakistan that it claimed the violation of the Swiss-Pakistani BIT and that it would seek resolution of that dispute according to Article 9 para. 2 of the BIT by giving its consent to submit the dispute to ICSID. With a letter of 12 October 2001, *SGS* sent a Request for Arbitration to ICSID. Both parties subsequently tried to oppose the arbitration proceedings initated by their counterpart. These court proceedings ended with a decision of the Supreme Court of Pakistan with which it dismissed *SGS*' application and granted Pakistan's request to proceed with the PSI arbitration and to restrain *SGS* from continuing the ICSID arbitration.[86] The sole arbitrator in the PSI arbitration nevertheless agreed to stay the proceedings until the ICSID has determined whether it had jurisdiction.

II. The Decision

Pakistan had objected to the jurisdiction of the ICSID Tribunal on the ground that *SGS*' claims, irrespective of their label, were entirely contractual in nature. It relied on the recent decision of the *ad hoc* Annulment Committee in the *Vivendi* Case,[87] where the committee stated:

> In a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract.[88]

Pakistan further submitted that there was no investment "in the territory" of Pakistan as required by the BIT, that *SGS* had waived its right to submit a claim under the BIT by initiating proceedings in Geneva, and that it had submitted its BIT-claim without adhering to the required 12 month consultation period.

[86] *Cf. Martin Lau*, Société Générale de Surveillance SA v. Pakistan, Arbitration International, vol. 19, 2003, 179 *et seq.*

[87] See *Vivendi Annulment* (note 10).

[88] *Id.*, para. 98.

The Tribunal analyzed these objections and identified seven legal issues to be resolved. It first addressed the question whether *SGS* had made an investment in the territory of Pakistan.[89] It concluded that the PSI agreement fell within the scope of the BIT definition of investment and that *SGS* also had made – albeit small – expenditures in the territory of Pakistan by leasing and equipping the liaison offices. It rejected Pakistan's assertion that those expenditures were "pre-contractual expenditures" which, pursuant to the *Mihaly* Award, were not to be treated as investments, since the PSI agreement had finally been concluded between the parties and had entered into force.

It then analyzed what it considered a threshold point: which effect should be given by it to *SGS*' characterization of its claims as alleged breaches of the BIT. Pakistan had asked the Tribunal to scrutinize those claims to a certain extent, arguing that they were entirely contractual in nature. *SGS* argued that the claims must be accepted as they were formulated by *SGS*, whether there truly have been breaches of the BIT should be decided in the merits phase. The Tribunal chose a middle path: it considered that if the facts are capable as being regarded as breaches of the BIT, those claims should be considered on their merits. Nevertheless, it would not exclude that that situations might arise where tribunals needed to "look behind the claimant's factual claims."[90]

The third issue identified by the Tribunal was whether it had jurisdiction to determine the BIT claims or whether the PSI arbitrator had respective jurisdiction.[91] It started by analyzing the relationship between BIT claims and contract claims, reciting the extensive discussion by the committee in the *Vivendi Annulment* decision. While BIT claims and contract claims were reasonably distinct in principle, the Tribunal observed that complexities arise where each party claims that one tribunal had jurisdiction over both types of claims. Looking at the BIT dispute settlement clause (Article 9 BIT), it found that ICSID arbitration was the exclusive forum provided for. Since the PSI agreement also had been concluded before the BIT had been signed by Switzerland and Pakistan, the Tribunal finally concluded that its jurisdiction over BIT claims was not shared by the PSI arbitrator.[92]

The next issue was whether the Tribunal also had jurisdiction to determine the purely contractual claims of *SGS*. It analyzed Article 9 of the BIT and found no implication that "the Article 9 dispute settlement mechanism would supersede and set at naught all otherwise valid non-ICSID forum selection clauses in all earlier agreements between Swiss investors and the Respondent."[93] Since it considered the arbitration clause in the PSI agreement to contain a valid forum selection clause, it concluded that it had no jurisdiction with respect to contractual claims which do not also amount to breaches of the BIT.

Having denied jurisdiction over purely contractual claims, the Tribunal then analyzed whether, as *SGS* had submitted, the 'umbrella clause' of the BIT transformed purely contractual claims into BIT claims.[94] Article 11 of the BIT reads as following:

> Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party.

The Tribunal started its analysis be recalling the established principles of interpretation in international law. It began the interpretation by observing that the language of Article 11 did not support the interpretation put forward by *SGS*. The meaning of 'commitments' was not limited to contractual commitments, but extended to domestic administrative, legislative or other acts of Pakistan. It further considered that the obligation to 'guarantee the observance' was not clear enough to "signal the creation and acceptance of a new international law obligation on the part of a Contracting Party, where clearly there was none before."[95] As under general international law a breach of a contract entered into by a state with an alien does not constitute a breach of international law, the Tribunal held that the interpretation submitted by *SGS* required 'clear and convincing evidence' that such was the intent of Switzerland and Pakistan when concluding the BIT. No such evidence, the Tribunal noted, could be found in Article 11 nor somewhere else. Additionally, the Tribunal brought a threefold *e-contrario* argument: the interpretation submitted by *SGS* would not only make the breach of an unlimited number of 'commitments' breaches of the BIT, it would also make the other substantive treaty provisions superfluous. For if every violation of a municipal statute applicable to the investment amounted to a breach of the BIT, these other substantive provisions would not be necessary. Such an interpretation would also allow an investor to nullify a freely negotiated dispute settlement procedure in a contract. The Tribunal then confirmed that the structure and sequence of the BIT confirmed the textual analysis and concluded that there was no evidence of the necessary level of specifity and explicitness of the text required for the expansive interpretation submitted by *SGS*.

The Tribunal further found that the participation of *SGS* in the Swiss proceedings and the PSI agreement did not give rise to an estoppel, since the BIT lacked a "fork in the road" provision which would preclude BIT arbitration once the

[89] *SGS v. Pakistan (Jurisdiction)* (note 85), paras. 133 *et seq.*

[90] *Id.*, para. 145.

[91] *Id.*, paras. 146 *et seq.*

[92] *Id.*, para. 155.

[93] *Id.*, para. 161.

[94] *Id.*, paras. 163 *et seq.*

[95] *Id.*, para. 166.

dispute was submitted to other fora.[96] Since *SGS* had also objected to the PSI arbitration, its participation did not amount to a waiver of its rights under the BIT.[97] As the claims submitted to the PSI arbitration were different from the claims submitted to this ICSID arbitration, the Tribunal also rejected Pakistan's argument that the doctrine of *lis pendens* precluded Claimant from pursuing its claims before the Tribunal.[98] That *SGS* had not followed the 12 months consultation period required by the BIT was not detrimental to its claim, as the Tribunal regarded this period not as a mandatory requirement for jurisdiction. As the PSI arbitration had to determine merely contractual claims, while the Tribunal had to determine BIT claims, it decided not to stay the proceedings until the PSI arbitrator had made its finding. However, *SGS* would have to make "a clear showing of conduct which is, in the circumstances, contrary to the relevant BIT standard."[99]

Accordingly, the Tribunal concluded it had jurisdiction and decided to proceed to the merits phase of the proceeding.

L. Concluding Remarks

2003 has been an interesting year. *SGS v. Pakistan (Jurisdiction)*, *Feldman Karpa*, *Tecmed*, and *Loewen* without doubt will be cited by parties in the 66 currently pending proceedings. The analysis of the *Tecmed* Tribunal of the differentiation between regulation and expropriation is interesting and merits further discussion. The same holds true for the continuous nationality rule which the *Loewen* Tribunal relied upon. However, one should bear in mind that these decisions have no binding precedential status. Pursuant to Article 53 para. 1 of the ICSID Convention, the awards are binding on the parties to the proceeding. As Professor *Schreuer* observes, nothing "in the Convention's *travaux préparatoires* suggests that the doctrine of *stare decisis* should be applied to ICSID arbitration."[100] While the reasoning of the tribunals has a certain authoritative value which is derived from the eminence of the arbitrators, one should be careful not to rip statements and conclusions out of their context. *SGS v. Pakistan (Jurisdiction)* is a good example. Its interpretation of the umbrella clause is novel and ensures that it will be relied upon in other disputes. However, this interpretation has been based on the very specific wording of the clause in the Swiss-Pakistani BIT, and clauses in other BIT may warrant a different interpretation.

[96] *Id.*, paras. 175–177.

[97] *Id.*, paras. 178–181.

[98] *Id.*, para. 182.

[99] *Id.*, para. 188.

[100] *Schreuer* (note 3), Art. 53 marginal note 15.

Furthermore, different tribunals might reach contradicting conclusions. *Tecmed* and *Feldman Karpa*, for example, seem to contradict each other on the question whether intransparent behavior of states in itself can rise to the violation of international law. Thus, the precedential value of the awards and decisions reported should be examined with care.

Surya P. Subedi: The Legal Regime Concerning the Utilization of the Water Resources of the River Ganges Basin ... 452

Alexander Behnsen: The Status of Mercenaries and Other Illegal Combatants Under International Humanitarian Law ... 494

Vanessa Klingberg: (Former) Heads of State Before International(ized) Criminal Courts: the Case of *Charles Taylor* Before the Special Court for Sierra Leone ... 537

Reports

Jan Martin Lemnitzer und *Philipp Wendel:* Die Rechtsprechung des Internationalen Gerichtshofes im Jahre 2003 ... 565

Moritz Goedecke: Die Rechtsprechung des Europäischen Gerichtshofes für Menschenrechte im Jahre 2003 ... 606

Sara Jötten und *Julia Schütze:* Die Rechtsprechung des Internationalen Strafgerichtshofes für das ehemalige Jugoslawien im Jahre 2003 ... 635

Alexander Szodruch und *Carl-Sebastian Zoellner:* Die Rechtsprechung des WTO-Streitbeilegungsgremiums im Jahre 2003 ... 675

Richard Happ: Awards and Decisions of ICSID Tribunals in 2003 ... 711

Björn Elberling: Die Tätigkeit der International Law Commission im Jahre 2003 ... 740

Book Reviews

Mashood A. Baderin: International Human Rights and Islamic Law (*Scheel*) ... 768

Jürgen F. Baur/Stephan Hobe (Hrsg.): Rechtsprobleme von Auslandsinvestitionen Konzessionen, Vertragsanpassung, Vergabeverfahren (*Happ*) ... 769

Natalie Bernard-Maugiron/Baudouin Dupret: Egypt and Its Laws (*Scheel*) ... 771

Antonio Cassese: International Criminal Law (*Orakhelashvili*) ... 772

Knut Dörmann (with contributions by *Louise Doswald-Beck* and *Robert Kolb*): Elements of War Crimes under the Rome Statute of the International Criminal Court; and *Roy S. Lee* (ed.): The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence (*Zimmermann*) ... 775

Dirk Ehlers (Hrsg.): Europäische Grundrechte und Grundfreiheiten (*Schwind*) ... 776

Hale Enayati: Die Garantie der individuellen Religionsfreiheit im Völkerrecht unter besonderer Berücksichtigung der Stellung der Baha'i (*Scheel*) ... 780

Jochen Abr. Frowein/Klaus Scharioth/Ingo Winkelmann/Rüdiger Wolfrum (Hrsg.): Verhandeln für den Frieden – Negotiating for Peace, Liber Amicorum Tono Eitel (*Tietje*) ... 781

Christoph Grabenwarter: Europäische Menschenrechtskonvention (*Behnsen*) 784

Martti Koskenniemi: The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870–1960 (*Tams*) 787

G. Gregory Letterman: Basics of Multilateral Institutions and Multinational Organizations: Economics and Commerce (*Gerdung*) 789

Ernst-Joachim Mestmäcker: Wirtschaft und Verfassung in der Europäischen Union (*Schwind*) 794

Jürgen Meyer (ed.): Kommentar zur Charta der Grundrechte der Europäischen Union, (*Martins*) 797

Jens Meyer-Ladewig: EMRK Handkommentar (*Kühler*) 799

Lindsay Moir: The Law of Internal Armed Conflict (*Kessler*) 802

Anne Peters: Einführung in die Europäische Menschenrechtskonvention (*Behnsen*) .. 805

Dieter H. Scheuing (Hrsg.): Europäische Verfassungsordnung (*Schwind*) 808

Sabine von Schorlemer (Hrsg.): Praxis-Handbuch UNO. Die Vereinten Nationen im Lichte globaler Herausforderungen (*Winkelmann*) 810

Frank Selbmann: Der Tatbestand des Genozids im Völkerstrafrecht; and *Hans Vest:* Genozid durch organisatorische Machtapparate. – An der Grenze von individueller und kollektiver Verantwortlichkeit (*Mennecke*) 812

Rudolf Streinz (Hrsg.): EUV/EGV, Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft (*Zimmermann*) 816

UNCTAD (ed.): International Investment Instruments: A Compendium (*Wardin*) 817

Wolfgang Graf Vitzthum/Ingo Winkelmann (Hrsg.): Bosnien-Herzegowina im Horizont Europas. Demokratische und föderale Elemente der Staatswerdung in Südosteuropa (*Steinberger*) 819

Gerhard Werle (unter Mitarbeit von *Florian Jeßberger, Wulf Burchards, Barbara Lüders, Stephan Meseke* und *Volker Nerlich*): Völkerstrafrecht (*Mennecke*) 825

Salvatore Zappalà: Human Rights in International Criminal Proceedings (*Orakhelashvili*) 827

Books Received 830

List of Contributors 833