Sonderdruck aus:

GERMAN YEARBOOK OF INTERNATIONAL LAW

JAHRBUCH FÜR INTERNATIONALES RECHT

Volume 47 · 2004

DUNCKER & HUMBLOT / BERLIN 2005

Contents

Forum

Focus Section
Africa and International Law

General Articles

Reports

Book Reviews

Awards and Decisions of ICSID Tribunals in 2004

By Richard Happ* and Noah Rubins**

A. Introduction

This report covers publicly available awards and decisions of arbitral tribunals of the International Centre for the Settlement of Investment Disputes (ICSID) rendered or dispatched to the parties between December 2003 and November 2004. It is a direct follow-up to the report published in this yearbook last year.[1]

2004 has been nearly as busy a year for ICSID as was 2003. 20 new cases have been filed with ICSID, and six more with ICSID's Additional Facility, bringing the total number of registered disputes to 85. Eight of the new cases have been filed against Argentina and four against Mexico. The remaining cases were filed against Ukraine, Estonia, Poland, Hungary, Slovenia, Indonesia, Tunisia, Egypt, Congo, Gabon, Chile, Ecuador, Venezuela and Mongolia. It is likely that nearly all of this year's cases have been filed on the basis of bilateral and multilateral investment treaties. The claim in *Alstom Power Italia SpA and Alstom SpA v. Republic of Mongolia* arises out of alleged violations of the Energy Charter Treaty (ECT), with arbitral jurisdiction founded on the dispute resolution provisions of the ECT's Article 26.[2]

---

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

** Attorney (New York, District of Columbia, Texas), International Arbitration and Public International Law practice groups, Freshfields Bruckhaus Deringer, Paris.

[1] *Richard Happ*, Awards and Decisions of ICSID Tribunals in 2003, German Yearbook of International Law (GYIL), vol. 46, 2003, 711.

[2] The Energy Charter Treaty, 17 December 1994, reprinted in: ILM, vol. 34, 360, is a multilateral treaty with 46 Contracting Parties 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, GYIL, vol. 45, 2002, 331–362.

This report covers thirteen awards and decisions. Four more cases were settled by the parties, including the case of *SGS v. Pakistan.*[3] The following nine decisions on objections to jurisdiction and four awards are described below: *Azurix v. Argentina* (B.), *Enron Corporation and Ponderosa Assets* (C.), *SGS v. Philippines* (D.), *CDC Group v. Seychelles* (E.), *Tokios Tokeles v. Ukraine* (F.), *LG&E Energy Corp. and others v. Argentine Republic* (G.), *Waste Management v. United Mexican States* (H.), *MTD v. Chile* (J.), *Soufraki v. United Arab Emirates* (K.), *PSEG Global Inc. et al. v. Turkey* (L.), *Siemens v. Argentina* (M.), *Joy Mining v. Egypt* (N.) and *Salini Construttori S.p.A. and Italstrade S.p.A. v. Jordan* (O.).

B. Azurix Corp. *v.* The Argentine Republic (Case No. ARB/01/12)

The Tribunal in *Azurix Corp. v. The Argentine Republic* rendered its decision on jurisdiction on 8 December 2003.[4] While not in fact rendered in 2004, the *Azurix* award became publicly available only after the end of 2003 and was therefore not included in last year's summary of ICSID decisions. The Tribunal consisted of Dr. *Andrés Rigo Sureda* as President and *Sir Elihu Lauterpacht* and Dr. *Daniel H. Martins* as Members of the Tribunal.

I. The Dispute

In 1996, the US company *Azurix Corp.* participated in the privatization of the water supply service for the Province of Buenos Aires. It ultimately acquired the concession to operate the drinking and sewage water supply in the Province for a bid of nearly US$ 440 million. To carry out its concession in compliance with local regulations, *Azurix* set up two Argentine operating companies, *OBA* and *AAS Azurix* owned *OBA* indirectly through two tiers of Cayman Islands subsidiaries, while it owned *AAS* indirectly through another US subsidiary.

---

[3] For a summary see *Happ* (note 1), 734–738.

[4] *Azurix Corp. v. The Argentine Republic,* ARB/01/12, Decision on Jurisdiction of 8 December 2003, available at: http://www.asil.org/ilib/azurix.pdf (*Azurix Decision*).

In 2000 and 2001, *Azurix* apparently experienced certain difficulties in maintaining necessary water pressure and quality.[5] *Azurix* complained that Argentina had prevented *Azurix* from charging rates for water service according to the tariff specified in its concession, and further that it had failed to deliver necessary infrastructure. These two factors, the company contended, affected its ability to raise financing and to serve its customers. In September 2001, *Azurix* filed a claim against Argentina under the United States-Argentina Bilateral Investment Treaty (BIT),[6] claiming the violation of a number of the treaty's substantive protections.

II. The Decision

Argentina objected to the Tribunal's jurisdiction on a number of grounds. First, it argued that through the forum-selection clauses in contractual documents related to *OBA*'s concession, *Azurix* had waived its right to bring an ICSID claim based upon its investment in *OBA*, and had agreed to litigate any disputes in the Argentine courts. In particular, Argentina pointed to explicit waivers of jurisdiction which it alleged had been included in light of ICSID awards in the *Lanco* and *Vivendi I* cases. Second, the Respondent pointed to a "fork-in-the-road" provision of the US-Argentina BIT. It argued that this clause barred *Azurix*'s ICSID claim, since a number of administrative appeals had been submitted in connection with the *OBA* concession. Finally, Argentina argued that *Azurix* lacked *ius standi*, because it was a mere shareholder of *OBA*, and could not directly maintain a claim for harm to *OBA*'s investment.

The first issue addressed in the decision was that of *Azurix*'s standing to bring a claim in light of its status as an indirect investor in Argentina. It was clear to the Tribunal from the definitions section of the applicable BIT that *OBA*'s concession contract was an investment controlled by *Azurix* and therefore the proper subject of a claim brought by *Azurix*.[7] More generally, the Tribunal held

---

[5] The *Azurix Decision* provides almost no details of the merits of the dispute. The facts presented here can be found at http://www.watertechonline.com/news.asp?mode=4&N_ID=19637.

[6] Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, 14 November 1991, available at the UNCTAD homepage at: http://www.unctadxi.org/templates/DocSearch____779.aspx.

[7] *Azurix Decision* (note 4), para. 62.

that "[p]rovided the direct or indirect ownership or control is established, rights under a contract held by a local company constitute an investment protected by the BIT."[8] The protection of indirect investments made through local subsidiaries is an essential part of BIT coverage. The arbitrators reasoned: "The objective of the definition of investment in the BIT is precisely to include this type of structure established for the exclusive purpose of the investment in order to protect the real party in interest."[9] In finding that *Azurix* had standing to pursue claims for damage to its indirectly-held investments, the Tribunal rejected the precedential value of the ICJ judgment in *Barcelona Traction.*[10] Not only had commentators "criticized [the decision] as being an incorrect statement of customary international law,"[11] but the case was inapposite: "The issues before this Tribunal concern not diplomatic protection under customary international law but the rights of investors, including shareholders, as determined by treaty, namely, under the BIT."[12]

The Tribunal next turned to the effect of forum selection clauses in a range of documents connected to *OBA*'s water concession. The arbitrators noted the unusual language of the waivers that accompanied each of at least three forum selection clauses in favor of the courts of the city of La Plata: in addition to agreeing to that body's "exclusive jurisdiction [...] for all disputes that may arise," the operating companies "waiv[ed] any other forum, jurisdiction or immunity that may correspond."[13] Argentina contended that this waiver distinguished this case from a series of ICSID decisions finding contractual forum selection clauses ineffective to bar an arbitration claim based on BIT violations.[14]

---

[8] *Id.*, para. 63. See also *CMS v. Argentina,* ARB/01/8, Decision on Objections to Jurisdiction of 17 July 2003, ILM, vol. 42, 2003, 800 *et seq.*, para. 51.

[9] *Azurix Decision* (note 4), para. 64.

[10] ICJ, *Barcelona Traction, Light and Power Company, Limited* (Belgium *v.* Spain), Judgment of 5 February 1970, ICJ Reports 1970, 3.

[11] *Azurix Decision* (note 4), para. 71.

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

[13] *Id.*, para. 26.

[14] See *Compania de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic,* ARB/97/3, Award of 21 November 2000, available at: http://www.worldbank.org/icsid/cases/ada_AwardoftheTribunal.pdf (*Vivendi I*); *Salini Construttori S.p.A. et Italstrade S.p.A. v. Kingdom of Morocco,* ARB/00/4, Decision on Jurisdiction of 23 July 2001, Journal du Droit International, vol. 129, 2002, 196 (*Salini v. Morocco*); *Lanco Int'l Inc. v. Argentine Republic,* ARB/97/6, Preliminary Decision on Jurisdiction of 8 December 1998, ILM, vol. 40, 2001, 457 (*Lanco*).

The Tribunal disagreed, holding that "[t]he scope of the jurisdiction and waiver of any other forum clauses [...] indicates that such clauses relate to disputes under the terms of the document concerned and between the parties to that particular document."[15] Since *Azurix* had not asserted any ICSID claim against the Province or any other party to the concession contracts, the forum selection clause was ruled inapplicable. With regard to the additional waiver language, the Tribunal cited a number of early 20th-century arbitration cases[16] for the proposition that such waivers could only affect contractual claims. Since the *Azurix* claim was international in nature and derived from state-to-state treaty commitments, it could not affect Claimant's right to invoke the BIT against Argentina.[17]

Finally, the arbitrators tackled the issue of the "fork-in-the-road" clause contained in the US-Argentina BIT. Here, the Tribunal relied on *Benvenuti* and *CMS* in adopting a rule that the present claim could be said to have been submitted to "the courts or administrative tribunals" of Argentina within the meaning of Article VII para. 2 lit. a of the treaty only "where there was identity of the parties, object and cause of action in the proceedings pending before both tribunals."[18] The Tribunal noted that "contractual claims" submitted in Argentina "are different from treaty claims" at issue in the ICSID dispute,[19] and that neither of the parties was a party to any local court proceedings in Argentina,[20] and found that the "fork-in-the-road" provision had not been triggered.

Having rejected all three of Argentina's jurisdictional objections, the Tribunal concluded that Claimant "has shown that, *prima facie,* it has a claim against Argentina for breach of obligations owed by Argentina under the BIT," that Azurix had *ius standi* and that the dispute fell within the scope of ICSID jurisdiction.[21]

---

[15] *Azurix Decision* (note 4), para. 77.

[16] *Woodruff v. Venezuela,* R.I.A.A., vol. 9, 1903, 213; *North American Dredging Company of Texas v. United Mexican States,* R.I.A.A., vol. 4, 1926, 26.

[17] *Azurix Decision* (note 4), para. 85.

[18] *Id.*, para. 88 (citing *S.A.R.L. Benvenuti and Bonfant v. People's Republic of Congo,* ARB/77/2, Award of 8 August 1980, ICSID Reports, vol. 1, 1993, 340).

[19] *Azurix Decision* (note 4), para. 89 (citing *CMS v. Argentina* (note 7)).

[20] *Azurix Decision* (note 4), para. 90.

[21] *Id.*, para. 102.

C. Enron Corporation and Ponderosa Assets, L.P. *v.* The Argentine Republic (Case No. ARB/01/3)

Enron v. Argentina involves two claims. The Tribunal issued its Decision on Jurisdiction in the Claimants' favor on 14 January 2004.[22] A second Decision on Jurisdiction, with regard to the Claimants' ancillary claim, was rendered on 2 August 2004.[23] The Tribunal consisted of *Francisco Orrego Vicuña* as President, *Héctor Gros Espiell* and *Pierre-Yves Tschanz* as Arbitrators.

I. The Dispute

American companies *Enron Corporation* and *Ponderosa Assets, L. P.* made investments in the gas industry in Argentina, participating in the privatization program that the Government of the Argentine Republic undertook after 1989. *Enron*'s participation particularly concerned the privatization of *Transportadora de Gas del Sur* (*TGS*), which owns one of the country's largest networks for the transportation and distribution of gas produced in the provinces of southern Argentina. *Enron* acquired a total of 35.263 % of *TGS* through a chain of locally incorporated companies, which in turn invested in *TGS*.

Enron's claims were founded on the alleged violation of the US-Argentina BIT.[24] The primary claim concerned a Stamp Tax assessment imposed by certain Argentine provinces. The ancillary claim, which was the subject of the 2004 Decision, involved Argentina's freezing of gas transport tariffs and the "pesification" of gas transport contracts.

II. The Decision

In connection with *Enron*'s ancillary claim, the Argentine Republic raised a number of objections to the jurisdiction of the Centre and the competence of the

---

[22] *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic*, ARB/01/3, Decision on Jurisdiction of 14 January 2004, available at: http://www.asil.org/ilib/Enron.pdf (*Enron Decision I*).

[23] *Id.*, Decision on Jurisdiction of 2 August 2004, available at: http://ita.law.uvic.ca/documents/Enron-DecisiononJurisdiction-FINAL-English.pdf (*Enron Decision II*).

[24] See, *supra*, note 6.

Tribunal. These objections were the same as those raised and rejected in *Enron Decision I.*

The first objection was based on Claimants' lack of *ius standi.* The Argentine Republic claimed that the measures directly affected only *TGS* as a separate legal entity, while *Enron* was not directly affected as a minority indirect shareholder.[25] *Enron* argued that their claims were direct, as they were made in its own right as a United States investor, and not on behalf of *TGS.*[26] After consideration, the Tribunal referred to its conclusions in *Enron Decision I,* and held that neither international law nor the ICSID Convention[27] prevent shareholders from maintaining claims independently from the investment vehicle, even if the shareholders have neither a majority stake nor control.[28]

As in the *Enron Decision I,* the Tribunal recognized the danger of allowing an endless chain of parent corporations in bringing ICSID claims. In the earlier decision, the arbitrators had noted that there is a cut-off point at which claims are simply too remotely related to the investment.[29] Here, however, Claimants had been specifically invited by the Government of Argentina to participate in the privatization of *TGS,* and had decision-making authority in *TGS*'s management. Therefore, the Tribunal found that Claimants fell within the scope of Argentina's consent to arbitration.[30]

In the *Enron Decision II,* the Tribunal reiterated that "successive claims by minority shareholders that invest in companies that in turn invest in other companies" could result in "claims that are only remotely connected with the measure questioned." However, "there is a clear limit to this chain in so far as the consent to the arbitration clause is only related to specific investors."[31] In the case at hand, the Tribunal found that Argentina had given its consent. The treaty language and the parties' intent were held to be sufficiently specific to extend protection to minority and indirect shareholders.[32] In particular, the Tribunal

---

[25] *Id.*, para. 17.

[26] *Id.*, para. 18.

[27] Convention on the Settlement of Investment Disputes, 14 October 1966, UNTS, vol. 575, 159 (ICSID Convention or Washington Convention).

[28] *Enron Decision II* (note 23), paras. 19–20; *Enron Decision I* (note 22), para. 39.

[29] *Enron Decision I* (note 22), para. 52.

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

[31] *Enron Decision II* (note 23), para. 20.

[32] *Id.*, para. 29.

took care to distinguish the *Mondev* decision, which in fact upheld Claimant's North American Free Trade Agreement (NAFTA) action on condition that Claimant demonstrate that it had in fact suffered direct loss in connection with its investment.[33] The *Vacuum Salt* case was also ruled inapposite. There, Claimant was a local corporation, with only a minority Greek shareholder in the investment vehicle. The *Enron* situation was found to be entirely different. "There are specific foreign investors, who were invited by the Argentine Government to participate in the privatization process and required to organize locally incorporated companies to channel their investments. At all times this was a foreign investment operation."[34]

Argentina also objected that the parties' dispute should be considered to be purely contractual and that the contractual choice of forum provisions contained in *TGS*'s concession documents should apply to exclude ICSID jurisdiction. Claimants argued that the dispute related to the violation of the investors' rights under the BIT. The Tribunal considered that a treaty claim and contract claim could be considered the same only where there is identity of the parties, object and cause of action.[35] The arbitrators rejected Argentina's argument, since "although there are no doubt questions concerning the Contract between the parties, the essence of the claims [...] relates to alleged violations of the Treaty rights."[36]

The Tribunal concluded by rejecting all of Argentina's objections and affirming its jurisdiction over the ancillary claim.[37]

D. SGS Société Générale de Surveillance S.A. *v.* Republic of the Philippines (Case No. ARB/02/06)

Of particular interest is the Decision on objections to jurisdiction in the case of *SGS v. Philippines* of 29 January 2004.[38] Last year's award in the *SGS v. Pa-*

---

[33] *Id.*, paras. 33–35; *Mondev International v. United States of America*, ARB(AF)/99/2, Decision on Jurisdiction of 11 October 2002.

[34] *Enron Decision II* (note 23), paras. 43–44; *Vacuum Salt Products Ltd. v. Republic of Ghana*, ARB/92/1, Decision on Jurisdiction of 16 February 1994.

[35] *Enron Decision II* (note 23), para. 49–50.

[36] *Id.*, para. 51.

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

[38] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ARB/02/6, Decision on Objections to Jurisdiction of 29 January 2004 (*SGS v. Philippines Ju-*

kistan case, which was based on a comparable dispute, reached a different result. The Tribunal in this case consisted of Dr. *Ahmed El-Kosheri* as President and Professors *James Crawford* and *Antonio Crivellaro* as Members of the Tribunal.

I. The Dispute

The facts of the dispute relate to an agreement entered into in 1991 by the Swiss company *SGS Société Générale de Surveillance S.A.* and the Republic of the Philippines. Pursuant to that agreement, *SGS* had to provide comprehensive import supervision services (CISS), including verification of the quality, quantity and price of imported goods prior to shipment to the Philippines. *SGS* was required to maintain a liaison office in the Philippines and to provide certain assistance, *inter alia* training courses for various Philippine agencies. The government of the Philippines was to pay *SGS* a certain fee depending on the value of the goods. The CISS contract contained the following dispute settlement clause:

> The provisions of this Agreement shall be governed in all respects by and construed in accordance with the laws of the Philippines. All actions concerning disputes in connections with the obligations of either party to this Agreement shall be filed at the Regional Trial Courts of Makati or Manila.

After two extensions, the agreement ended on 31 March 2000. *SGS* submitted a claim for allegedly outstanding fees in the amount of approximately US$ 140 million. The claim was initially disputed by the Philippines, but then reviewed by a team consisting of *SGS* and the Philippine Bureau of Customs. The report of that team concluded that approximately 95 % of this sum was in fact due. On 14 December 2001, the Philippine Department of Finance issued a press statement accepting the report and expressing an intent to negotiate with *SGS* to spread out the payments over time due to the tight budgetary situation. With the exception of a small payment of about US$ 20,000, no payments were ever made.

On 26 April 2002, *SGS* submitted its request for arbitration to the ICSID, based on the 1997 BIT between the Swiss Confederation and the Philippines. It

---

risdiction). The text of the decision (and of many others) is available via the ICSID homepage at: http://www.worldbank.org/icsid/cases/awards.htm.

alleged that the government's failure to pay violated certain provisions of the Swiss-Philippines BIT.[39]

II. The Decision

The Philippines raised several objections to the jurisdiction of the Tribunal. Firstly, it argued that the dispute was purely contractual and therefore governed by the choice of forum clause in the CISS agreement.[40] In the opinion of the Philippines, *SGS* had not complained of any genuine breaches of the BIT. The Philippines further submitted that the dispute was not related to an 'investment' within the territory of the Philippines, as the main service was performed outside its territory and constituted only the performance of a service in exchange for a fee.[41] Lastly, the Philippines argued that any jurisdiction could only extend to breaches that occurred after the BIT entered into force on 23 April 1999.[42]

Having analyzed these objections and *SGS*'s response, the Tribunal identified five main issues to be resolved.[43] It briefly recapitulated the decision of the Tribunal in *SGS v. Pakistan,*[44] as each of the salient issues was also discussed there. It noted that it could not "in all respects agree with the conclusions reached by the *SGS v. Pakistan* Tribunal on issues of the interpretation of arguably similar language in the Swiss-Philippines BIT." However, it further noted that the binding force of ICSID awards is limited to the parties to the particular dispute and that in international law there is neither a doctrine of precedent nor any hierarchy of tribunals.[45] Consequently, it turned to the analysis of those five issues.

---

[39] *Id.*, para. 44, referring to Accord entre la Confédération suisse et la République des Philippines concernant la promotion et la protection réciproque des investissements, 31 March 1997, available at UNCTAD homepage (note 6).

[40] *Id.*, para. 51.

[41] *Id.*, paras. 57–59.

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

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

[44] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan,* ARB/01/13, Decision on Objections to Jurisdiction of 6 August 2003, summarized in: *Happ* (note 1), 734–738 (*SGS v. Pakistan*).

[45] *SGS v. Philippines Jurisdiction* (note 38), para. 97.

The Tribunal first addressed the question whether the CISS agreement constituted an investment.[46] The focal point was the provision of a reliable inspection certificate. These certificates were issued in the Manila Liaison office of *SGS*. In the opinion of the Tribunal, this was sufficient to amount to an investment. The Tribunal held irrelevant the fact that for tax purposes *SGS*'s services were treated as performed outside of the Philippines, since local tax law was a regime distinct from the BIT. The Tribunal reviewed earlier ICSID decisions on the question whether an investment was made "in the territory" of the host state, but rejected *Gruslin, Fedax* and *CSOB* as inapposite. Instead, the arbitrators agreed with the reasoning of the *SGS v. Pakistan* Tribunal and concluded that *SGS* had made an investment "in the territory" of the Philippines.

The second issue identified by the Tribunal was whether the so-called 'umbrella clause' in Article X para. 2 of the BIT gave it jurisdiction over purely contractual claims. It had been *SGS*'s principal jurisdictional submission that by not paying fees allegedly due under the CISS agreement, the Philippines had breached Article X para. 2 of the BIT. That provision reads as follows: "Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party." In the Tribunal's view, the wording of this obligation was clear: "[E]ach Contracting Party shall observe any legal obligation it has assumed, or will in the future assume, with regard to specific investments covered by the BIT."[47] It further held that the object and purpose of the BIT supported an effective interpretation: "It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments."[48] It rejected the argument of the Philippines that the umbrella clause should be limited in scope to obligations under other international law instruments, since "such a limitation could readily have been expressed."[49]

The Tribunal noted that its provisional conclusion was directly contradicted by the decision of the Tribunal in *SGS v. Pakistan*. Reviewing the reasons given by that Tribunal, it found them unconvincing when applied to the case at hand.[50] In contrast to the broad and somewhat vague formulation of the Swiss-Pakistani

---

[46] *Id.*, paras. 99–112.

[47] *Id.*, para. 115.

[48] *Id.*, para. 116.

[49] *Id.*, para. 118.

[50] *Id.*, paras. 120–126.

BIT, which in the opinion of the *SGS v. Pakistan* Tribunal was "susceptible of almost indefinite expansion" to cover even legislative commitments, Article X para. 2 was limited to obligations assumed with regard to *specific* investments. Secondly, the *SGS v. Pakistan* Tribunal had relied on the general principle of international law that a breach of contract by the state is not in itself a breach of international law. On that basis, it had argued that there was no clear intent of the parties to the BIT to create an obligation "where clearly there was none before."[51] The *Philippines* Tribunal simply considered that a treaty clause might require a state to observe provisions of internal law and that this was a mere question of interpretation of a BIT "not determined by any presumption."[52] While the Tribunal shared the concern that a BIT should not override dispute settlement clauses negotiated in particular contracts, it did not accept that this followed from a wide interpretation. After rejecting the *Pakistan* Tribunal's structural argument, the Tribunal further held that the previous panel's interpretation of the umbrella clause was far from clear.

The Tribunal explained its understanding of umbrella clauses as follows:

> It does not convert non-binding domestic blandishments into binding international obligations. It does not convert questions of contract law into questions of treaty law. In particular it does not change the proper law of the CISS Agreement from the law of the Philippines to international law. Article X (2) addresses not the *scope* of the commitments entered into with regard to specific investments but the *performance* of these obligations, once they are ascertained.[53]

As the Tribunal further explained, "this obligation does not mean that the determination of how much money the Philippines is obliged to pay becomes a treaty matter. The extent of the obligation is still governed by the contract, and it can only be determined by reference to the terms of the contract."[54] The issue of how much was payable to *SGS* thus needed to be determined by the proper law of the CISS agreement, *i.e.* the law of the Philippines. The Tribunal affirmed its authority to apply national law under Article 42 para. 1 of the ICSID Convention. Whether it should actually do so, however, was ruled to be dependent on the meaning given to the exclusive jurisdiction clause.

Before turning to address that question, the arbitrators reviewed a third issue: whether the Tribunal also had jurisdiction over purely contractual claims, irre-

---

[51] *SGS v. Pakistan* (note 44), para. 166.

[52] *SGS v. Philippines Jurisdiction* (note 38), para. 122.

[53] *Id.*, para. 126 (emphasis added).

[54] *Id.*, para. 127.

spective of any breach of the BIT. It considered the answer to be potentially relevant for the application of the BIT to claims arising before its entry into force.[55] Looking at the wording of the dispute settlement provision, "disputes with respect to investments," the Tribunal found the answer to be clearly affirmative. It did not concur with the interpretation to the contrary put forward by the *SGS v. Pakistan* Tribunal.[56]

Only then did the Tribunal turn to analyze whether the exclusive jurisdiction clause in the CISS agreement was overridden by the BIT or by the ICSID Convention.[57] The arbitrators determined that it was not, considering that the BIT as a general framework treaty should not trump specific jurisdiction clauses negotiated between the state and a foreign investor.[58] It rejected *SGS*'s argument that Article 26 of the ICSID Convention had an overriding effect and proceeded to analyze the effect given to exclusive jurisdiction clauses in arbitral practice, examining, *inter alia, Woodruff*,[59] *North American Dredging Company of Texas*[60] and *Vivendi Annulment*.[61] The Tribunal concluded that the exclusive jurisdiction clause did affect the admissibility of *SGS*'s claim:

> But the Tribunal should not exercise its jurisdiction over a contractual claim when the parties have already agreed on how such a claim is to be resolved, and have done so exclusively. [...] Until the question of the scope or extent of the Respondent's obligation to pay is clarified – whether by agreement between the parties or by proceedings in the Philippine courts as provided for in Article 12 of the CISS Agreement – a decision by this Tribunal on SGS's claim to payment would be premature.[62]

Since it found that the "present dispute is on its face about the amount of money owed under a contract" and *SGS* had not raised a BIT claim which could be decided independently of the contract claim, the Tribunal concluded that *SGS*'s claims were temporarily inadmissible.[63] The Tribunal decided not to dismiss the

---

[55] *Id.*, para. 129.

[56] *Id.*, para. 134.

[57] *Id.*, paras. 136 *et seq.*

[58] *Id.*, para. 141.

[59] *Woodruff v. Venezuela* (note 16).

[60] *North American Dredging Company of Texas v. United Mexican States* (note 16).

[61] *Compania des Aguas de Aconquija S.A. and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentina*, ARB/97/3, Decision on Annulment of 3 July 2002, ILM, vol. 41, 2002, 1135 *et seq.*, paras. 97–102 (*Vivendi Annulment*).

[62] *SGS v. Philippines Jurisdiction* (note 38), para. 155.

[63] *Id.*, paras. 156–164.

claim, but to stay the proceedings pending a decision as to the amount due but unpaid.

E. CDC Group plc. *v.* Republic of the Seychelles (Case No. ARB/02/14)

The dispute between *CDC Group plc.* and the Republic of the Seychelles is a "classical" ICSID case, as it did not arise out of a bilateral investment treaty. Rather, the parties had included an ICSID arbitration clause in their contract. The sole Arbitrator *Sir Anthony Mason* rendered his award on 17 December 2003.[64]

I. The Dispute

The dispute arose out of two guarantee agreements which the Republic had concluded with *CDC*. The Republic had guaranteed the punctual payment of all principal sums and interest due and payable under two loan agreements signed by the *Public Utilities Corporation* (*PUC*), a statutory corporation incorporated in the Republic of the Seychelles. *PUC* subsequently failed to meet its obligations and defaulted. When *CDC* demanded payment under the guarantees, the Republic refused to comply.

II. The Decision

From the viewpoint of international law, the *CDC* decision has little to offer the reader. During the course of the proceedings, the Republic withdrew its objections to jurisdiction. The guarantee agreements were subject to English law, and the sole arbitrator found that the defenses raised by the Republic were unconvincing. He ordered the Republic to pay to *CDC* the full amount outstanding under the guarantees, together with interest and costs.

On 30 April 2004, the Republic initiated annulment proceedings against the award. At the time of writing, the annulment proceedings were still pending.

---

[64] *CDC Group plc. v. Republic of the Seychelles*, ARB/02/14, Award of 17 December 2003, available at: http://ita.law.uvic.ca/documents/CDCvSeychellesAward_001.pdf.

F. Tokios Tokeles *v.* Ukraine (Case No. ARB/02/18)

The decision on jurisdiction of 29 April 2004[65] represents a rare instance in arbitral practice: It was signed only by the party-appointed arbitrators Professor *Piero Bernardini* and *Daniel M. Price*. The presiding arbitrator Professor *Prosper Weil* dissented and later resigned from the Tribunal.

I. The Dispute

The dispute arose on the basis of the BIT between Lithuania and Ukraine.[66] Claimant, *Tokios Tokeles,* is a business enterprise established under the laws of Lithuania. It is owned and controlled by Ukrainian nationals, which hold 99 % of the company's outstanding shares. In 1994, *Tokios Tokeles* created *Taki spravy,* a wholly owned subsidiary established under the laws of Ukraine. *Taki spravy* engages in advertising, publishing and printing, and related activities, in Ukraine and outside its borders.

Tokios Tokeles alleged that, beginning in February 2002, governmental authorities in Ukraine engaged in a series of actions with respect to *Taky spravy* that breached Ukraine's obligations under the BIT. It further alleged that the authorities took these actions in response to Claimant's publications in January 2002 of a book that favorably portrayed a leading Ukrainian opposition politician. After having tried unsuccessfully to settle the dispute through negotiations with the Ukrainian government, on 14 August 2002 *Tokios Tokeles* filed its request for arbitration with ICSID.

II. The Decision

Ukraine launched several objections to the jurisdiction of the Tribunal. None of them, however, was successful. The first objection concerned the nationality of Claimant.[67] Article 25 of the Washington Convention limits jurisdiction to

---

[65] *Tokios Tokeles v. Ukraine,* ARB/02/18, Decision on Jurisdiction of 29 April 2004, available at ICSID homepage (note 38) (*Tokios Tokeles Award*).

[66] Agreement between the Government of Ukraine and the Government of the Republic of Lithuania for the Promotion and Reciprocal Protection of Investments, 8 February 1994.

[67] *Id.*, paras. 21–71.

disputes between "a Contracting State [...] and a national of another Contracting State." Furthermore, the dispute settlement provision of the BIT also provided for arbitration only of disputes "between an investor of one Contracting Party and the other Contracting Party." Ukraine argued that *Tokios Tokeles* should not be considered a "genuine national" of Lithuania, since it was predominantly owned and controlled by Ukrainian nationals and also had no substantial business activities in Lithuania. To find jurisdiction, Ukraine argued, would be tantamount to allowing claims of nationals against their own governments and incompatible with the object and purpose of the ICSID convention.[68]

The Tribunal began its analysis by noting that the ICSID Convention did not regulate the matter of corporate nationality. The arbitrators therefore turned to the BIT, under which Claimant's incorporation in Lithuania was sufficient to qualify it as an "investor" of Lithuania. The Tribunal refused to apply a further "control" or "substantial business activity" test. It noted that some other BITs include an express "denial of benefits" provision and considered the lack of such a clause in the applicable treaty to be a deliberate choice of Ukraine and Lithuania. Accordingly, *Tokios Tokeles* was held to be an "investor" under the terms of the BIT.[69] The Tribunal then turned to Article 25 of the ICSID Convention.[70] Ukraine had asked the Tribunal to apply Article 25 para. 2 lit. b to create an exception to the state-of-incorporation rule of nationality. The Tribunal found no support in the text of the Convention for such an approach. It considered the object and purpose of Article 25 para. 2 lit. b to be expansion of jurisdiction, rather than limiting it.[71] The Tribunal also refused to apply the doctrine of 'piercing the corporate veil.' While it acknowledged that the doctrine formed part of customary international law and that *Barcelona Traction*[72] was the seminal case affirming that proposition, it noted that Ukraine had not demonstrated that the requirements for veil-piercing had been met.[73] The Tribunal then found that its conclusions were consistent with earlier ICSID awards and the views of ICSID scholars.[74]

---

[68] *Id.*, para. 22.

[69] *Id.*, para. 38.

[70] *Id.*, paras. 42–52.

[71] *Id.*, paras. 46–49.

[72] *Barcelona Traction, Light and Power Company, Limited* (note 10).

[73] *Tokios Tokeles Award* (note 65), paras. 53–56.

[74] *Id.*, paras. 58–70.

The second jurisdictional objection concerned the question whether Claimant had made an 'investment.' Ukraine argued that the invested capital fell outside the scope of both the BIT and the ICSID convention, as its source was not Lithuanian, but Ukrainian. The Tribunal noted that the ICSID convention did not define the contours of an 'investment.' It then found that Claimant clearly had made an 'investment' in Ukraine, and that nowhere was it stated that capital must be non-Ukrainian to be considered an 'investment.' The Tribunal affirmed that its conclusion harmonized with Article 25 of the ICSID Convention: "In our view, the ICSID Convention contains no inchoate requirement that the investment at issue in a dispute have an international character in which the origin of the capital is decisive."[75]

In its last jurisdictional objection, Ukraine argued that the dispute did not arise out of an investment. The Tribunal quickly rejected this objection, as well as the three further objections to the admissibility of the claim related to compliance with the BIT's six month "cooling off" period.[76] Consequently, the arbitrators decided by a 2-to-1 majority that the dispute was within the Tribunal's jurisdiction.

III. Dissenting Opinion[77]

The presiding arbitrator, Professor *Prosper Weil,* issued a stern dissenting opinion. He considered that the deference the Tribunal had given to the BIT's definitions ignored the limits of jurisdiction set by the ICSID Convention. He noted that "the approach taken by the Tribunal on the issue of principle raised in this case for the first time in ICSID's history is in my view at odds with the object and purpose of the ICSID Convention and might jeopardize the future of the institution."[78] Professor *Weil* criticized the majority's assumption that the origin of invested capital was not decisive, denouncing this approach as "flying in the face of the object and purpose of the ICSID Convention and system." Relying *inter alia* on the preamble of the Convention and the Report of the Executive Directors on the Convention, he noted that "[T]he ICSID mechanism and remedy are not meant for investments made in a State by its own citizens with

---

[75] *Id.*, para. 82.

[76] *Id.*, paras. 87–104.

[77] *Id.*, Dissenting Opinion of Professor *Prosper Weil* of 29 April 2004.

[78] *Id.*, para. 1.

domestic capital through the channel of a foreign entity, whether preexistent or created for that purpose."[79] Professor *Weil* concluded by noting that the majority decision "might dissuade Governments either from adhering to the Convention or, if they have already adhered, from providing for ICSID arbitration in their future BITs or investment contracts." Subsequently, he resigned from his post as presiding arbitrator and was replaced by *Michael Mustill.*

G. LG&E Energy Corp. and Others *v.* Argentine Republic (Case No. ARB/02/1)

The Tribunal in the case of *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic* rendered its decision on objections to jurisdiction on 30 April 2004.[80] The Tribunal consisted of *Tatiana B. de Maekelt* as President and *Franzisko Rezek* and *Albert Jan van den Berg* as Members of the Tribunal.

I. The Dispute

The three Claimants (*LG&E*) are U.S. companies which hold shares in three gas distribution companies in Argentina. The dispute is one of the many disputes which arose out of the Argentine financial crisis. In 2002, Argentina dismantled the post-privatization tariff regime pursuant to which energy tariffs were calculated in U.S. dollars before being converted into pesos, and also abolished the 1:1 relationship between the peso and the dollar. *LG&E* claimed that by these actions Argentina violated the U.S.-Argentina BIT.[81]

From the decision it is unclear whether *LG&E* entered into mandatory negotiations before resorting to arbitration. On 28 December 2001, ICSID received the request for arbitration, which was based on the BIT. *LG&E* claimed, *inter alia,* that it had been treated unfairly and inequitably, that it had suffered discrim-

---

[79] *Id.*, para. 19.

[80] *LG&E Energy Corp. and others v. Argentine Republic,* ARB/02/1, Decision on Objections to Jurisdiction of 30 April 2004, available at: http://ita.law.uvic.ca/documents/LGE-DecisiononJurisdiction-English.pdf (*LG&E Jurisdiction*).

[81] See, *supra,* note 6.

ination and that its investment had been indirectly expropriated. That request was supplemented by an Additional Request by letter of 24 January 2002.

II. The Decision

Argentina raised six objections to the jurisdiction of the Tribunal, most of which related to the fact that *LG&E* was only a shareholder in the Argentine operating companies.[82] Interestingly, the Tribunal chose not to deal with each objection separately in the order presented by Respondent, but only examined them to the extent that they related to the jurisdictional requirements of Article 25 of the ICSID Convention.

The first objection was that *LG&E,* as a minority shareholder, lacked *ius standi.* The Tribunal dismissed this objection. It considered the shares held by *LG&E* to be an investment protected by the BIT, which did not differentiate between majority and minority shareholders. The Tribunal discounted the fact that the gas transportation licenses provided for submission of all disputes to the administrative courts of Buenos Aires. Relying, *inter alia,* on the decisions in *CMS Gas Transmission,*[83] *Vivendi*[84] and *Lanco,*[85] it held that the contractual jurisdiction clause could not bar the jurisdiction of the Tribunal and that *LG&E* was a foreign investor for the purposes of the BIT and the ICSID Convention.[86]

The Tribunal noted that since *LG&E* had based its claim on alleged breaches of the BIT, there clearly was an investment dispute.[87] It had no difficulty finding that both Argentina and *LG&E* had consented to submit the dispute to ICSID. Argentina had given its consent in the BIT, and *LG&E* provided its consent by submitting its request for arbitration.[88] The Tribunal considered it irrelevant that no negotiations had taken place with respect to the Additional Request, since the six-month waiting period had elapsed before the Additional Request was filed.

---

[82] *Id.*, para. 29.

[83] *CMS v. Argentina* (note 8).

[84] *Vivendi I* (note 14).

[85] *Lanco* (note 14), 457 *et seq.*

[86] *LG&E Jurisdiction* (note 80), paras. 48–63.

[87] *Id.*, paras. 64–68.

[88] *Id.*, paras. 69–78.

The Tribunal thus held that the dispute fell within the scope of its jurisdiction, dismissed all objections to its jurisdiction and ordered that the proceedings should continue.

H. Waste Management *v.* United Mexican States (Case No. ARB(AF)/00/3)

In the case of *Waste Management, Inc. v. United Mexican States,* the award was dispatched to the parties on 30 April 2004.[89] The case arose on the basis of NAFTA Chapter 11, and the Tribunal consisted of Professor *James Crawford* as President and *Benjamin R. Civiletti* and *Eduardo Magallón Gómez* as arbitrators.

I. The Dispute

The dispute arose out of a concession for waste disposal services in the Mexican City of Acapulco. A concession agreement had been concluded in 1995 between the City of Acapulco and the Mexican company *Acaverde,* which was a wholly-owned subsidiary of Claimant, a Delaware corporation. Under the concession agreement, *Acaverde* undertook to provide – on an exclusive basis – waste disposal and street cleaning services in the concession area, a part of Acapulco. The City undertook to enact any regulations necessary to prevent others from providing such services in the concession area. An ordinance to that effect was passed.

In August 1995, *Acaverde* began providing services under the concession agreement. However, the exclusivity arrangements were not honored and the respective ordinance was not strictly enforced. *Acaverde* also complained that the City failed to provide the land to be used as a landfill, contrary to its promise under the agreement. Furthermore, the City did not fulfil its obligation to pay the invoices *Acaverde* presented to it, such that about 80 % of the invoices remained unpaid. Although the Mexican public development bank *Banobras* had issued a guarantee for the payment obligations, for various reasons it had paid only a few of the invoices. The City, on the other hand, complained that *Aca-*

[89] *Waste Management, Inc. v. United Mexican States,* ARB(AF)/00/3, Award of 30 April 2004, available at: http://ita.law.uvic.ca/documents/laudo_ingles.pdf (*Waste Management II*).

verde had failed to keep the streets of the concession area consistently clean. *Acaverde* brought Mexican federal court proceedings against *Banobras* for non-payment under the bank guarantee. These claims were dismissed. The company also commenced contractual arbitration under the concession agreement against the City of Acapulco, but later discontinued these proceedings.

Waste Management commenced its first NAFTA Chapter 11 arbitration while legal proceedings between *Acaverde* and the City of Acapulco were still pending in Mexico. The first NAFTA Tribunal dismissed *Waste Management*'s claim because it had failed to formally abandon the Mexican domestic proceedings as required by NAFTA. After *Acaverde*'s claims in Mexican courts had been dismissed, Waste Management re-submitted its NAFTA claims before ICSID.

II. The Decision

1. Jurisdiction

The Tribunal first dealt with Mexico's jurisdictional objection.[90] Mexico denied that Claimant had the status of an investor for purposes of NAFTA, since *Acaverde*'s direct holding company was registered in the Cayman Islands. It was only at the time of the conclusion of the concession contract that the holding company was acquired by an U.S. investor, which later merged with another company to become Claimant.

The Tribunal considered that NAFTA Chapter 11 allowed for claims where the investment was controlled only indirectly, *i.e.* through an intermediate holding company, and that the nationality of that holding company was irrelevant. The extent of the damage suffered by the investor was a matter of quantum, not of merits. It thus rejected Mexico's jurisdictional objection.[91]

2. Merits

Waste Management submitted two claims: that Mexico had breached its obligation under Article 1110 of NAFTA (expropriation) or, in the alternative, under Article 1105 para. 1 NAFTA (fair and equitable treatment).

---

[90] *Id.*, paras. 77–85.

[91] *Id.*, para. 85.

As a preliminary consideration, the Tribunal observed that NAFTA Chapter 11 did not give jurisdiction over mere contractual breaches and that NAFTA lacked an 'umbrella clause,'[92] so that it would not be sufficient to prove that Acapulco had breached the concession agreement. It furthermore considered whether the conduct of *Banobras* as a majority-state-owned development bank was attributable to the state. The mere fact that a separate entity was owned or controlled by the state would not make it *ipso facto* an organ of the state. The Tribunal finally concluded, however, that the actions of *Banobras* were attributable to the state.[93]

a) Fair and Equitable Treatment

The Tribunal first examined the meaning which should be given to Article 1105. It reviewed in detail the holdings of prior tribunals, including *ADF* and *Loewen,* and summarized their conclusions.[94] On the basis of this review, the Tribunal rejected the Article 1105 claims in their entirety.[95] Neither the actions of *Banobras* nor those of the Mexican federal state had breached the standard identified by the Tribunal. As for the conduct of Acapulco, the Tribunal came to the conclusion that, by not paying the invoices, the City might have been in breach of the contract. However, such non-payment could not constitute unfair or inequitable treatment as long as the respective obligation was not repudiated outright and as long as some remedy remained open to the investor.[96] Turning to the Mexican legal proceedings *Acaverde* had initiated, the arbitrators

[92] On the Umbrella Clause, see *Anthony C. Sinclair,* The Origins of the Umbrella Clause in the International Law of Investment Protection, Arbitration International, vol. 20, 2004, 711–734; *Thomas Wälde,* The Umbrella (or Sanctity of Contract/Pacta sunt Servanda) Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases, Transnational Dispute Management, vol. 1, October 2004, available at: http://www.transnational-dispute-management.com/.

[93] *Waste Management II* (note 89), para. 75.

[94] *Id.*, para. 98: "[T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process."

[95] *Id.*, paras. 100–140.

[96] *Id.*, paras. 115–116.

noted that neither the arbitration proceedings nor the legal proceedings against *Banobras* (which the City had joined on the side of *Banobras*) constituted a denial of justice. The Tribunal did not consider relevant the fact that the City had used obstructive litigation tactics: "The point is that a litigant cannot commit a denial of justice unless its improper strategies are endorsed and acted on by the court, or unless the law gives it some extraordinary privilege which leads to a lack of due process."[97]

b) Expropriation

The Tribunal then considered the claim that *Acaverde*'s enterprise in Acapulco had been expropriated.[98] As before, it first reviewed the standard implied in Article 1110 of NAFTA and the previous NAFTA awards upon which Claimant relied. The Tribunal noted that none of *Acaverde*'s physical assets had been taken, nor had there been any direct or indirect expropriation of the enterprise as such: "*Acaverde* at all times had control and use of its property. It was able to service its customers and to collect fees from them."[99] The City's breach of the contract in failing to pay *Acaverde*'s invoices did not amount to an expropriation, since the City had never unilaterally repudiated or tried to terminate the contract by exercising legislative authority.[100]

Next, the Tribunal analyzed whether the persistent and serious breach of contract by the city might constitute at least an expropriation of *Acaverde*'s contractual rights.[101] Reviewing several precedents, it concluded: "Non-compliance by a government with contractual obligations is not the same thing as, or equivalent or tantamount to, an expropriation." Breach of contract might only amount to an expropriation if the breach was committed in the exercise of governmental power or if it was accompanied by a foreclosure of the right of the investor to seek remedy with the courts.[102] These requirements had not been fulfilled, and the Tribunal concluded that no expropriation had taken place. The Tribunal thus dismissed *Waste Management*'s claims in their entirety.

---

[97] *Id.*, para. 131.

[98] *Id.*, paras. 141–178.

[99] *Id.*, para. 159.

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

[101] *Id.*, paras. 163–178.

[102] *Id.*, paras. 174–175.

J. MTD Equity Sdn. Bhd. and MTD Chile SA *v.* Republic of Chile (Case No. ARB/01/7)

The *MTD* Tribunal rendered its award on 25 May 2004.[103] The Tribunal consisted of *Andrés Rigo Sureda* as President and *Marc Lalonde* and *Rodrigo Blanco* as Members of the Tribunal. It is noteworthy that this was the second Tribunal composed in this case: The first Tribunal, composed of *James Carter Jr.*, Professor *Michael Reisman* and *Guillermo Aguilar Alvarez*, resigned when the parties did not accept their proposed rate of fees.

I. The Dispute

The dispute arose out of the pre-investment conduct of Chilean state authorities. The Malaysian company *MTD Equity Sdn. Bhd.* undertook the first steps to invest in Chile in 1996. The idea was to develop land in the town of Pique as a residential community. Although the land was zoned for agricultural use, the landowner suggested to *MTD* that the land could easily be re-zoned. However, *MTD* did not apply due diligence in this regard.

After *MTD* and the landowner had signed the contract, the Chilean Foreign Investment Commission (FIC) approved the planned investment of US$ 17.136 million. The FIC was composed, *inter alia*, of the Minister of Economy and the Undersecretaries of Finance, Planning and Cooperation. A respective Foreign Investment Contract was signed on 18 March 1997. Subsequently, *MTD* initiated the investment and submitted an application for the necessary zoning changes in March 1997. After nearly one and a half years of negotiations with the competent ministry, *MTD* was informed in October 1998 that the project violated the government's development policy for the Santiago area and that the project would not be approved. The Minister for Housing and Urban Development formally rejected the project on 4 November 1998.

---

[103] *MTD Equity Sdn. Bhd. and MTD Chile SA v. Republic of Chile*, ARB/01/7, Award of 25 May 2004, available at: http://www.asil.org/ilib/MTDvChile.pdf (*MTD Award*).

On 2 June 1999, *MTD* notified Chile that an investment dispute existed under the Malaysia-Chile BIT.[104] Although the parties agreed to prolong the three-month negotiation period by 30 days, they did not reach a settlement.

II. The Decision

The Tribunal had no difficulty affirming its jurisdiction. Concerning the merits of the case, it found that Chile had breached its obligation to provide *MTD* fair and equitable treatment. It rejected all of *MTD*'s further claims and awarded only a portion of the damages requested.

In defining the standard of 'fair and equitable treatment' under the BIT, the Tribunal relied primarily upon the description of the concept in *Tecmed v. Mexico:* "[T]o provide an international investments treatment that does not affect the basic expectation that were taken into account by the foreign investor to make to investment."[105] The Tribunal concluded that the FIC's approval of an investment that was against the Government's urban policy constituted a breach of the obligation to treat investors fairly and equitably.[106] The arbitrators held that the conduct of the FIC and of the ministry in rejecting the project could be attributed to the Chilean state, and found the state's behavior to be contradictory. While it agreed that *MTD* should have found out by itself what the Chilean policies were, it held that "Chile also has an obligation to act coherently and apply its policies consistently, independently of how diligent an investor is. Under international law (the law this Tribunal has to apply to a dispute under the BIT), the State of Chile needs to be considered by the Tribunal as a unit."[107] However, the Tribunal observed that *MTD* had acted without due diligence, and that BITs were not an insurance policy against business risk.

The Tribunal rejected *MTD*'s additional claim that Chile had violated the BIT by breaching foreign investment contracts. It found that Chile was not obliged under these contracts to grant necessary permits for the project and that they

---

[104] Convenio entre el Gobierno de Malasia y el Gobierno de la Republica de Chile sobre la Promocion y Proteccion de las Inversiones, 11 November 1992, available at: http://www.foreigninvestment.cl/Bilateral_Investment/bits.asp.

[105] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States,* ARB (AF)/00/2, Award of 29 May 2003, para. 154. *Cf.* summary in *Happ* (note 1), 724–728.

[106] *MTD Award* (note 103), para. 166.

[107] *Id.*, para. 165.

were only the "initiation of a process to obtain the necessary permits."[108] It also held that the refusal to re-zone the Pique area had not been discriminatory.[109] Another of *MTD*'s claims was based – by way of the most-favored-nation (MFN) clause – on the Chile-Croatia BIT.[110] Pursuant to Article 3 para. 2 of that BIT, once Chile admitted investment to its territory, it was obliged to grant any necessary permits in accordance with its laws and regulations. The Tribunal considered that "said provision does not entitle an investor to a change of the normative framework of the country where it invests. All that an investor may expect is that the law be applied."[111] Since granting the permits for the project would have required re-zoning, the Tribunal rejected *MTD*'s claim. It also rejected *MTD*'s claim that its investment had been expropriated by the refusal to re-zone the project, since *MTD* had no right to make Chile change its laws.[112]

As regards the damages to be paid to *MTD*, the Tribunal held that the *Chorzów Factory* standard should be applied.[113] Since *MTD* had acted without due diligence, the Tribunal considered that it should bear part of the damages suffered and estimated that share to be 50 % after deducting the residual value of the investment. That residual value was expressed in an offer that the land owner had made for the shares of *MTD* in the joint venture. The Tribunal further considered that the LIBOR interest rate would be appropriate and that each party should bear its own expenses and fees, as well as 50 % of the costs of ICSID and the Tribunal.

---

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

[109] *Id.*, para. 196.

[110] Agreement between the Government of the Republic of Chile and the Government of the Republic of Croatia on the Reciprocal Promotion and Protection of Investments, 28 November 1994, available at UNCTAD homepage (note 6).

[111] *Id.*, para. 205.

[112] *Id.*, para. 214.

[113] *Id.*, para. 238. In *Case concerning the Factory at Chorzów*, Judgment of 13 September 1928, Series A, No. 17, 47, the Permanent Court of International Justice held that compensation should "wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that had not been committed." This is also the standard under ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/10 (2001), 43, 51, Art. 31.

K. Hussein Nuaman Soufraki *v.* United Arab Emirates (Case No. ARB/02/7)

The award[114] in the case of *Hussein Nuaman Soufraki v. The United Arab Emirates* was rendered on 7 July 2004. The Tribunal consisted of *L. Yves Fortier* as President and Judge *Stephen Schwebel* and Dr. *Aktham El Kholy* as Members of the Tribunal.

I. The Dispute

The case arose on the basis of the BIT between Italy and the United Arab Emirates[115] (UAE). At the heart of the dispute was a Concession Agreement between the Dubai Department of Ports and Customs and Claimant, dated 21 October 2000. The Concession Agreement awarded Claimant a concession for a period of 30 years for the purpose of developing, managing and operating the Port of Al Hamriya and its surrounding area, after which the facility was to revert to the Dubai Department of Ports and Customs. The exact cause of the dispute is unclear, but on 16 May 2002 Claimant filed a request for arbitration with ICSID, claiming that the UAE had breached its obligations under the BIT.

II. The Decision

The respondent challenged the jurisdiction of the Tribunal, arguing that Claimant was not a national of Italy under Italian law and, in the alternative, that he did not possess effective Italian nationality under international law so as to entitle him to invoke the BIT.

Both parties agreed that Claimant was an Italian national prior to 1991. In 1991, however, he had taken up residence in Canada and acquired Canadian nationality. As a consequence, *Soufraki* automatically lost his Italian nationality. The decisive question for the Tribunal was whether he had reacquired Italian nationality afterwards.

---

[114] *Hussein Nuaman Soufraki v. United Arab Emirates*, ARB/02/7, Award of 7 July 2004, available at: http://ita.law.uvic.ca/documents/Soufraki.pdf (*Soufraki Award*).

[115] Tra il Governo della Repubblica Italiana e il Governo degli Emirati Arabi Uniti sulla Promozione e Protezione degli Investimenti, 22 January 1995, available at UNCTAD homepage (note 6).

The Tribunal first had to decide whether the documents submitted by Claimant constituted conclusive proof that he was an Italian national.[116] As proof of Italian nationality, Claimant had submitted Certificates of Nationality issued by the Italian authorities, his passports, and a letter from the Italian foreign ministry. The Tribunal considered itself not bound by these documents. It noted that under international law an international tribunal faced with a challenge to a person's nationality was authorized to decide for itself whether that person was a national of that state.[117] While it agreed with Professor *Schreuer* that certificates of nationality should be given appropriate weight, it noted that such documents did not preclude a contrary decision by the Tribunal.[118] Analyzing the submitted documents in detail, the Tribunal found no evidence that the Italian officials who issued the certificates were aware that Claimant had lost his Italian nationality. In cross-examination, Claimant also had to admit that he had not informed any Italian official of his loss of nationality, since he himself did not believe that he had lost it. Consequently, the Tribunal held that Claimant could not rely on any of these certificates or on the letter of the Italian foreign ministry.[119]

The Tribunal was therefore compelled to determine for itself whether Claimant reacquired Italian nationality after 1991. Italian law provided for that possibility, requiring only the taking up of residence in Italy for a period of not less than a year. Reviewing the evidence submitted, it found that Claimant could not prove that he had fulfilled this requirement and thus concluded that he was not an Italian national.[120] As a result, the Tribunal decided that the dispute was outside its jurisdiction.

L. PSEG Global Inc., The North American Coal Corporation, and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi *v.* Republic of Turkey (Case No. ARB/02/5)

The Tribunal in *PSEG Global Inc., The North American Coal Corporation, and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*

---

[116] *Id.*, paras. 53–68.

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

[118] *Id.*, para. 63.

[119] *Id.*, paras. 66–68.

[120] *Id.*, para. 81.

rendered its decision on jurisdiction on 4 June 2004.[121] The Tribunal consisted of Professor *Francisco Orrego Vicuña* as President and *L. Yves Fortier* and Professor *Gabrielle Kaufmann-Kohler* as Members of the Tribunal.

I. The Dispute

The dispute in *PSEG* arose out of a project to build a coal-fired electric energy production facility in the Turkish province of Konya. After initial approval of the project contracts, additional analysis revealed that costs would be significantly higher than previously estimated. As a result, *PSEG* sought revision of the project to change certain fundamental terms. Most important in this regard was the capacity of the plant, which *PSEG* insisted had to be increased in order to recoup the additional expenses it would incur in construction.

II. The Decision

Turkey raised four jurisdictional objections. First, it insisted that there had been no 'investment' within the meaning of the US-Turkey BIT,[122] since the parties to the concession contract had never reached accord on fundamental commercial terms, and there had not been any "meeting of the minds" as necessary to create a binding contract.[123] The Tribunal disagreed, distinguishing *Mihaly v. Sri Lanka* and *Zhinvali v. Georgia* as cases where far less progress had been made towards the conclusion of an investment contract.[124] The Tribunal found that the concession contract itself provided for the revision of commercial terms and therefore could not be said to be incomplete merely as a result

---

[121] *PSEG Global Inc., The North American Coal Corporation, and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey,* ARB/02/5, Decision on Jurisdiction of 4 June 2004, available at: http://www.asil.org/ilib/psegdecision.pdf (*PSEG Decision*).

[122] Treaty between the United States of America and the Republic of Turkey concerning the Reciprocal Encouragement and Protection of Investments, 3 December 1985, available at UNCTAD homepage (note 6).

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

[124] *Id.*, para. 103; *Mihaly International Corp. v. Democratic Socialist Republic of Sri Lanka,* ARB/00/2, Award of 15 March 2002, available at ICSD homepage (note 38); *Zhinvali Development Ltd. v. Republic of Georgia,* ARB/00/1, Award of 24 January 2003, summarized in *Happ* (note 1), 721–722.

of the disagreement over plant capacity and other elements.[125] The arbitrators concluded with the rhetorical question, "if the parties did not intend to bind themselves by means of a Contract, why would they then have signed, submitted for approval and executed a Contract?"[126] The Tribunal dismissed the objection, stating pointedly: "A contract is a contract."[127]

Turkey next objected that the dispute did not arise "directly out of an investment" as required by the BIT and Washington Convention. The Respondent contended that since there was no "investment agreement" or authorization, there could be no treaty rights associated with an investment.[128] The Tribunal quickly disposed of this objection. Since it had held that the concession contract was valid and binding, it constituted an "investment agreement" and the permits *PSEG* had acquired were likewise investment authorizations.[129] The Tribunal concluded that "the dispute concerned arises directly out of an investment in terms of the interpretation and application of the Contract and the investment authorization, as well as in terms of Treaty rights connected to this investment that could have been compromised."[130]

Turkey's third objection related to its notification pursuant to Article 25 para. 4 of the Washington Convention. Turkey had notified ICSID in 1989 that "only the disputes arising directly out of investment activities which have obtained necessary permission in conformity with the relevant legislation of the Republic of Turkey on foreign capital and that have effectively started shall be subject to the jurisdiction of the Centre."[131] Turkey argued that this qualification represented a narrowing of ICSID jurisdiction applicable to all of the country's investment treaties and that, since construction of the plant had never actually begun, there could be no valid ICSID claim.[132] *PSEG* countered that notifications under Article 25 para. 4 are for information purposes only and cannot alter the scope of jurisdiction under the Washington Convention or the terms of consent contained in a BIT. The Tribunal agreed with Claimants, concluding that

---

[125] *PSEG Decision* (note 121), paras. 94–96.

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

[127] *Id.*, para. 104.

[128] *Id.*, para. 107.

[129] *Id.*, paras. 114–123.

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

[131] *Id.*, para. 125.

[132] *Id.*, para. 126.

"notifications under Article 25 (4) do not have a life of their own and are wholly dependent on the consent mechanism."[133]

Next, the Tribunal examined Turkey's objection that the applicable BIT required Claimants to exhaust any previously agreed dispute settlement procedures before resort to international arbitration.[134] Turkey alleged that an ICSID arbitration clause was deleted from the final version of the concession contract and that this was done on the understanding that Turkey's administrative court – the *Danistay* – had exclusive jurisdiction over disputes concerning Concession Contracts under Turkish law.[135] The Tribunal found that the deletion of an ICSID clause from the contract did not constitute an agreement to the *Danistay*'s exclusive jurisdiction. "Otherwise treaties would be subject to unilateral derogation by one party."[136] The Tribunal also briefly discussed the distinction between treaty claims and contract claims, noting that even had there been a forum selection clause, it was not clear that BIT claims would have been excluded as a result.[137]

Finally, the Tribunal addressed the question of Claimants' *ius standi*. Turkey argued that the *North American Coal Corporation* (*NACC*) and the Turkish operating company lacked standing. *NACC* was not a signatory to the concession contract, and its rights arose out of a related but ancillary transaction to operate the coal mine that would fuel that power plant.[138] According to Turkey, the operating company, meanwhile, was not a U.S. company as required by the BIT. Under the treaty, a company incorporated in Turkey must have existed before the events giving rise to the dispute for it to be considered a national of the United States. The operating company had been formed two years after the disputed events occurred.[139] Claimants countered that *NACC* owned a 25 % interest in the operating company and all of its assets, including the concession contract. As to the operating company, Claimants insisted that it was formed after long

---

[133] *Id.*, para. 139.

[134] *Id.*, para. 149; US-Turkey BIT (note 122), Art. VI para. 2 ("dispute shall be submitted for settlement in accordance with any previously agreed, applicable dispute settlement procedures").

[135] *PSEG Decision* (note 121), para. 151.

[136] *Id.*, para. 164.

[137] *Id.*, paras. 169–173.

[138] *Id.*, paras. 175–176.

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

negotiations with Turkish officials and that many of the events in question occurred after incorporation.[140]

With regard to the Turkish project company, the Tribunal noted that it was long intended to be the government's interlocutor and that incorporation was delayed due to disagreements as to the proper corporate form.[141] In its previous form as a branch office, the local company was closely linked to the transaction, and "whatever rights or interests the branch office had were transferred to the new company as its successor in law and business."[142]

However, the Tribunal's conclusion as to the status of *NACC* was different. It found that *NACC*'s shareholder status was essentially a mere option to acquire equity and that the company's role was mainly as a mere service provider to the operating company under a separate agreement.[143] The Tribunal rejected a legal opinion submitted by *Rudolph Dolzer* to the effect that the treaty definition of investment refers to any right, even one that can be exercised in the future.[144] "Any interest, which the investor [*PSEG*] may eventually have, may accrue, in part, to *NACC*, if the latter still has an ongoing equity participation in the investor company. But this is a matter which concerns only intra-corporate arrangements that are separate and distinct from any Treaty connection between *NACC* and the Respondent."[145] The Tribunal concluded with a reference to the *Enron* case, stating that "the corporate linkages can be recognized for the purpose of the jurisdiction of an arbitral tribunal to the extent that the consent to arbitration is considered to extend to a given entity, but not beyond. *NACC* is beyond the reach of the consent to arbitration as far as the Respondent is concerned."[146]

The Tribunal dismissed *NACC* from the arbitration, while affirming its jurisdiction with regard to the other two Claimants.[147]

---

[140] *Id.*, paras. 178–180.

[141] *Id.*, paras. 183–184.

[142] *Id.*, para. 184.

[143] *Id.*, paras. 188–189.

[144] *Id.*, para. 190.

[145] *Id.*, para. 192.

[146] *Id.*, para. 193; *Enron II* (note 24).

[147] *PSEG Decision* (note 121), para. 194 *et seq.*

M. Siemens A.G. *v.* The Argentine Republic (Case No. ARB/02/8)

The Tribunal consisted of Dr. *Andrés Sureda* as President and Judge *Charles Brower* and Professor *Domingo Janeiro* as Members. It rendered its decision on jurisdiction on 3 August 2004.[148] The dispute arose on the basis of the German-Argentine BIT.[149]

I. The Dispute

The dispute arose out of a contract to establish a system of migration control and personal identification. *Siemens* had participated in the bid through a local corporation (*SITS*) and had been awarded the contract, which was signed in 1998. The contract had a term of six years, with the possibility of two extensions of three years each. After a new government came to power in December 1999, it suspended the contract in February 2000, allegedly because of technical problems. The contract was finally terminated by Respondent on 18 May 2001. *SITS* filed three administrative appeals against the termination, all of which were rejected.

On 23 July 2001, *Siemens* notified Respondent of a breach of the BIT. Negotiations during the six-month cooling-off period were unsuccessful. On 23 March 2002, *Siemens* initiated ICSID arbitration proceedings.

II. The Decision

Argentina presented eight objections to jurisdiction, all of which were rejected by the Tribunal.

The first objection was that "Siemens had breached factual and temporal requirements of the Treaty." The objection related to the question whether *Siemens* could rely – by operation of the MFN clause in the BIT – on the

---

[148] *Siemens A.G. v. The Argentine Republic*, ARB/02/8, Decision on Jurisdiction of 3 August 2004, available at: http://www.asil.org/ilib/Siemens_Argentina.pdf (*Siemens v. Argentina Jurisdiction*).

[149] Treaty between the Federal Republic of Germany and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investments, 9 April 1991, German Federal Law Gazette (BGBl.), vol. 1993-II, 1244.

Argentine-Chile BIT[150] to avoid a requirement that the dispute be submitted to local courts before an ICSID claim could be filed. The BIT contained provisions on MFN treatment in Articles 3 para. 1, 3 para. 2 and 4 para. 4. The Tribunal first held that the MFN clauses in Article 3, which related to 'treatment,' did not limit the treatment to be provided to transactions of a commercial and economic nature. Rather, 'treatment' referred to treatment in general.[151] Although the clear wording of the MFN clauses in Article 3 referred only to 'investments' and not to 'investors,' the Tribunal concluded:

> The Treaty is a treaty to promote and protect investments, investors do not figure in the title. Fair and equitable treatment would be reserved to investments, and denial of justice to an investor would be excluded. While these considerations may follow a strict logical reasoning based on the terms of the Treaty, their result does not seem to accord with its purpose. More consistent with it is to consider that, in Article 3, treatment of the investments included treatment of the investor and hence the need to provide for exceptions that refer to them.[152]

The Tribunal further concluded that access to dispute settlement mechanisms was part of the 'treatment' of foreign investors and investments, and thus could be imported through operation of an MFN clause. The arbitrators thus concurred with the findings of the Tribunal in *Maffezini*.[153] It further held that an investor could "pick and choose," *i.e.* that claiming a benefit by the operation of the MFN clause did not trigger the application of *all* provisions of the treaty invoked.[154] The Tribunal thus rejected the first objection to jurisdiction.

The second jurisdictional objection directly related to the first. Argentina argued that if *Siemens* could rely on the Chile BIT, then the "fork-in-the-road" clause in that treaty applied and – since the dispute had been submitted by *SITS* to the administrative tribunals – the Tribunal was without jurisdiction. The Tribunal again rejected an understanding of the MFN clause which would mean that claiming one benefit by way of an MFN clause would mean importing the whole treaty:

---

[150] Tratado entre la Republica Argentina y la Republica de Chile sobre Promocion y Proteccion Reciproca de Inversiones, 2 August 1991, available at UNCTAD homepage (note 6).

[151] *Siemens v. Argentina Jurisdiction* (note 148), para. 85.

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

[153] *Id.*, paras. 102–103. *Cf. Emilio Agustin Maffezini v. The Kingdom of Spain*, ARB/97/7, Decision on Objections to Jurisdiction of 25 January 2000, available at ICSID homepage (note 38), para. 60.

[154] *Siemens v. Argentina Jurisdiction* (note 148), para. 109.

> This understanding of the operation of the MFN clause would defeat the intended result of the clause which is to harmonize benefits agreed with a party with those considered more favourable granted to another party. It would oblige the party claiming a benefit under a treaty to consider the advantages and disadvantages of that treaty as whole than just the benefits.[155]

The Tribunal therefore rejected the Respondent's second jurisdictional objection. In its third and fourth jurisdictional objections, Argentina argued that *Siemens* lacked *ius standi,* since the BIT required a direct relationship between investor and investment, but *Siemens* was not a direct holder of the shares. Argentina insisted that shareholders have no standing to claim for damages suffered by the company in which they own shares. The Tribunal responded that, in its opinion, shares held by a German company in an Argentine company constituted protected investments under the BIT.[156] It did not agree with Argentina's argument that a particular provision in the BIT concerning expropriation of assets in which an investor holds shares was an indication that indirect claims would not be allowed under other provisions of the BIT.[157] The arbitrators noted that this conclusion was in line with its understanding of previous ICSID jurisprudence and that *Siemens* thus had *ius standi.*[158]

The Tribunal next held that the dispute arose directly out of an investment[159] and was not merely hypothetical.[160] The Tribunal also found no merit in the further objection that Claimant had never properly notified Argentina of the dispute.[161] Nor did the Tribunal consider relevant the forum selection clause of the contract, which provided for the submission of disputes to the Federal Administrative and Contentious Courts of Buenos Aires. The Tribunal concurred with decisions of previous ICSID Tribunals, and especially the *Vivendi Annulment* Tribunal, that treaty claims and contract claims can be differentiated and that only contract claims are subject to contractual forum selection clauses. It found that the "dispute as formulated by the Claimant is a dispute under the Treaty"[162] and rejected the eighth objection to jurisdiction.

---

[155] *Id.*, para. 120.

[156] *Id.*, para. 137.

[157] *Id.*, para. 140.

[158] *Id.*, para. 144.

[159] *Id.*, para. 150.

[160] *Id.*, para. 160.

[161] *Id.*, paras. 170–173.

[162] *Id.*, para. 180.

The Tribunal concluded by finding that it had jurisdiction and decided to proceed to the merits of the case.

N. Joy Mining Machinery Ltd. *v.* Arab Republic of Egypt (Case No. ARB/03/11)

The Tribunal in *Joy Mining Machinery Ltd. v. Arab Republic of Egypt* rendered its award on jurisdiction on 6 August 2004.[163] The Tribunal consisted of *Francisco Orrego Vicuña* as President and *C. G. Weeramantry* and *William Laurence Craig* as Members of the Tribunal.

I. The Dispute

The dispute in *Joy Mining* arose out of a 1998 transaction between the British claimant corporation and an Egyptian state-owned company, *IMC*, related to *IMC*'s ongoing management of the exploitation of phosphate resources in the Egyptian desert.[164] Under the terms of the primary contract, *IMC* was to purchase mining equipment from *Joy Mining*, and *Joy Mining* provided bank guarantees which the buyer could hold until satisfied with the quality of the equipment supplied. The contract also included a dispute resolution clause, submitting disputes related to the quality of the equipment to arbitration by the United Nations Commission on International Trade Law (UNCITRAL) in Cairo, Egypt.

Not long after delivery, *IMC* experienced problems with the equipment. *Joy Mining* insisted that any failings were due to geological conditions at the site and the buyer's substandard maintenance. Because of this dispute, *IMC* refused to release the letters of quality guarantee that it received under the contract. Ulti-

---

[163] *Joy Mining Machinery Ltd. v. Arab Republic of Egypt*, ARB/03/11, Award on Jurisdiction of 6 August 2004, available at: http://www.asil.org/ilib/JoyMining_Egypt.pdf (*Joy Mining Decision*).

[164] Commentary on *Joy Mining* can be found in *Nick Gallus*, No Joy for British Mining Company at ICSID, Oil, Gas & Energy Law Intelligence, vol. 2, 2004, available at: http://www.gasandoil.com/ogel/; *Farouk Yala*, La notion d'investissement, Les cahiers de l'arbitrage, vol. 15, 2004, 7–19.

mately, *Joy Mining* brought a claim against Egypt under the U.K.-Egypt BIT,[165] alleging breach of a range of substantive protections including free transfer of funds, national treatment, full protection and security, and fair and equitable treatment, as well as the 'umbrella clause' requiring observation of undertakings.

Egypt objected to the jurisdiction of the Tribunal on three grounds. First, it argued that the forum selection clause in the contract should be respected, excluding all ICSID claims falling within its scope. Second, Egypt insisted that the state could not be held responsible for *IMC*'s actions, and therefore there were no breaches of the BIT that could be subject to ICSID arbitration. Finally, the Respondent took the position that Claimant had no 'investment' within the definition of the BIT and the Washington Convention.[166]

II. The Decision

Addressing the initial issue of the burden of proof on questions of jurisdiction, the Tribunal appeared to take a somewhat stricter approach than in some previous cases. It held that while the Tribunals in *Maffezini, CMS, Azurix* and others required only a *prima facie* showing that all jurisdictional requirements were satisfied, "[i]f [...] the parties have such divergent views about the meaning of the dispute in the light of the Contract and the Treaty, it would not be appropriate for the Tribunal to rely only on the assumption that the contentions presented by the Claimant are correct."[167]

The Tribunal then tackled the question whether *Joy Mining* owned an investment within the meaning of the BIT and the Washington Convention. The Egypt-U.K. BIT, in its Art. 1 lit. a, contained a broad and non-exhaustive list of assets considered to be 'investments.' The arbitrators considered whether a bank guarantee such as *Joy Mining* had given to IMC fell within the scope of this definition. Without a great deal of explanation, the Tribunal concluded that a "contingent liability" such as a bank guarantee cannot be seen as an "asset," and that to do so would "go far beyond the concept of investment, even if broadly

---

[165] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments, 11 June 1975, available at UNCTAD homepage (note 6).

[166] *Joy Mining Decision* (note 163), para. 26.

[167] *Id.*, para. 30.

defined."[168] The Tribunal then considered whether the guarantee could be considered a "pledge" or "claim to money or to any performance under contract having a financial value," to other investment types specified in the BIT. The answer was negative: "Even if a claim to return of performance and related guarantees has a financial value it cannot amount to recharacterizing as an investment dispute a dispute which in essence concerns a contingent liability."[169]

Although it had already determined that *Joy Mining*'s guarantee letters did not fall within the scope of BIT protection, it examined the scope of ICSID jurisdiction as well. The Tribunal reaffirmed the objective nature of ICSID jurisdiction, insisting that "[t]he parties to a dispute cannot by contract or treaty define as investment, for the purpose of ICSID jurisdiction, something which does not satisfy the objective requirements of Article 25 of the Convention."[170] The arbitrators listed these objective criteria as duration, regularity of profit and return, an element of risk, a substantial commitment, and contribution to the host state's development.[171] The Tribunal found the *Joy Mining* transaction lacking in several of these areas: The duration of the commitment was short, with the purchase price paid at an early stage; there was no regularity of return; and the risk involved was purely commercial in nature.[172] The transaction was therefore found to be outside the scope of ICSID jurisdiction, because it did not constitute an 'investment' for purposes of Article 25 of the Washington Convention.

The second objection to jurisdiction Egypt raised was that *Joy Mining* had presented no claims based on treaty breaches attributable to Egypt, since the case was based on a breach of contract by *IMC*. First, the arbitrators canvassed cases such as *Wena, CMS* and *SGS v. Pakistan* to distinguish between actionable and non-actionable contract breaches for treaty purposes. They noted that in *SGS*, the Tribunal had referred certain aspects of contractual claims to local ju-

---

[168] *Joy Mining Decision* (note 163), para. 45.

[169] *Id.*, para. 47 (distinguishing *Fedax N.V. v. Republic of Venezuela*, ARB/96/3, Decision on Jurisdiction of 11 July 1997, ILM, vol. 37, 1998, 1378).

[170] *Id.*, para. 50.

[171] *Id.*, para. 53; *Christop H. Schreuer*, The ICSID Convention: A Commentary, 2001, 140; *Noah Rubins*, The Notion of "Investment" in International Investment Arbitration, in: *Norbert Horn* (ed.), Arbitrating International Investment Disputes, 2004, 283, 297–300.

[172] *Joy Mining Decision* (note 163), para. 57.

risdiction, while retaining jurisdiction over treaty-based claims.[173] "In the present case," the Tribunal explained, "the situation is rendered somewhat simpler by the fact that a bank guarantee is clearly a commercial element of the Contract."[174] According to the decision, none of the treaty breaches alleged could be distinguished from the merits of the commercial dispute over the quality of the mining equipment. The arbitrators added that the presence of an 'umbrella clause' in the applicable BIT could not alter this conclusion. The Tribunal interpreted the 'umbrella clause' of the BIT more narrowly than some other ICSID Tribunals, holding that

> it could not be held that an umbrella clause inserted in the Treaty, and not very prominently, could have the effect of transforming all contract disputes into investment disputes under the Treaty, unless of course there would be a clear violation of the Treaty rights and obligations or a violation of contract rights of such a magnitude as to trigger the Treaty protection, which is not the case.[175]

Finally, the Tribunal addressed the effect of the UNCITRAL arbitration clause in the equipment supply contract. In light of its decision that *Joy Mining*'s complaint amounted to a simple breach of contract claim, the Tribunal found the situation to be precisely that envisaged in the *Vivendi Annulment* Award, where the *ad hoc* panel theorized that "[i]n 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."[176] *Joy Mining* protested that *IMC* and Egypt would defy the UNCITRAL clause and default on any award rendered by such an arbitration tribunal. The Tribunal rejected this argument, relying upon official statements made by *IMC* and the government of Egypt during the ICSID proceedings to the effect that *IMC* would consent to contractual arbitration and abide by any resulting award.[177] The Tribunal considered that such declaration was binding under international law and provided sufficient assurance to *Joy Mining* that it would have resolution of its dispute with IMC in an arbitral forum if it so desired.[178]

---

[173] *Id.*, para. 77; *SGS v. Pakistan* (note 44), para. 162.

[174] *Joy Mining Decision* (note 163), para. 78.

[175] *Id.*, para. 81.

[176] *Id.*, para. 90 (citing *Vivendi Annulment* (note 61), para. 98).

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

[178] PCIJ, *Legal Status of Eastern Greenland* (Denmark *v.* Norway), Judgment of 5 April 1933, Series A/B, No. 53, 52; ICJ, *Nuclear Tests Case* (Australia *v.* France), Judgment of 20 December 1974, ICJ Reports 1974, 253.

O. Salini Construttori S.p.A. and Italstrade S.p.A. *v.* Hashemite Kingdom of Jordan (Case No. ARB /02/13)

In this dispute (not to be confused with the previously decided dispute brought to ICSID by the same Claimants against Morocco[179]), the Decision on Jurisdiction[180] was rendered by H.E. Judge *Gilbert Guillaume* as President and *Bernardo Cremades* and *Ian Sinclair* as Members of the Tribunal. It is unclear when the decision was rendered or dispatched to the parties, but the arbitrators signed it between 9 and 15 November 2004.

I. The Dispute

The dispute arose out of a construction contract. In 1993, Claimants were awarded a public works contract entitled "Construction of the Karameh Dam Project." The contract was signed between the two Claimant companies as contractor and the Ministry of Water and Irrigation – Jordan Valley Authority (JVA) as Employer. The work was completed in October 1997.

Under the contract, Claimants had to submit their claims for payment to an engineer appointed by the Employer. The function of the engineer was to verify these claims and to certify to the employer the amount due. On 22 April 1999, Claimants submitted to the engineer and to the Kingdom of Jordan a draft final statement setting out the total outstanding amount claimed to be due, equivalent to about US$ 28 million. On 25 May 1999, the engineer informed the contractor that, according to his estimate, it was only entitled to about US$ 49,140. Subsequent negotiations between the parties failed, and in late 2000 Claimants were informed that only the sum determined by the Engineer would be paid.

In December 2001, Claimants notified Jordan that they considered this to be a breach of the BIT between Italy and Jordan.[181] On 8 August 2002, they filed a request for arbitration with ICSID.

---

[179] *Salini v. Morocco* (note 14).

[180] *Salini Construttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ARB /02/13, Decision on Jurisdiction of 29 November 2004, available at ICSID homepage (note 38) (*Salini v. Jordan Jurisdiction*).

[181] Agreement between the Government of the Hashemite Kingdom of Jordan and the Government of the Italian Republic on the Promotion and Protection of Investments, 22 July 1996, available at UNCTAD homepage (note 6).

II. The Decision

The Tribunal first had to decide whether Article 9 para. 2 of the BIT excluded its jurisdiction for claims related to the breach of the contract. That provision reads as follows: "In case the investor and an entity of the Contracting Parties have stipulated an investment Agreement, the procedure foreseen in such investment Agreement shall apply." The Tribunal analyzed the contract and the role of the JVA under Jordanian law and came to the conclusion that Article 9 para. 2 applied, since the JVA was an entity of Jordan. Thus, also the dispute settlement procedure of the contract applied to the dispute between the parties. The Tribunal rejected Claimants' additional argument that contractual claims could still be submitted as treaty claims, since this would render Article 9 para. 2 ineffective and useless.[182] Also, the contractual dispute did not arise between Claimants and Jordan, but between Claimants and the JVA. Relying on the decisions in *Salini v. Morocco*[183] and *RFCC v. Morocco,*[184] it noted that BIT jurisdiction could not be extended to cover breaches of a contract to which the state was not a party.

The Tribunal next had to deal with Claimants' argument that jurisdiction could be based – via the MFN clause of the BIT – on the investment treaties concluded by Jordan with the United States and United Kingdom, as these treaties contained no clause analogous to Article 9 para. 2.[185] The Tribunal began by analyzing a range of international arbitration precedents, including *Ambatielos* and *Maffezini*. It shared concerns about possible disruptive 'treaty shopping' raised in connection with the *Maffezini* decision.[186] The Tribunal ruled that the scope of application of the MFN clause could not extend to the conditions of dispute settlement. The Tribunal also considered that the scope of the clause could not be extended. Claimants had not submitted any proof (as the Commission of Arbitration had sought in *Ambatielos*) that the parties had intended to include dispute settlement within the ambit of MFN treatment. Claimants also failed to show that it was the Respondent's subsequent practice (as had the Tribunal relied on in *Maffezini*) to conclude treaties without provisions such

---

[182] *Salini v. Jordan Jurisdiction* (note 180), paras. 92–96.

[183] *Salini v. Morocco* (note 14), paras. 60–62.

[184] *Consortium RFCC v. Kingdom of Morocco*, ARB/00/6, Award of 22 December 2003, paras. 67–69, available at ICSID homepage (note 38).

[185] *Salini v. Jordan Jurisdiction* (note 180), paras. 101–119.

[186] *Id.*, para. 115.

as Article 9 para. 2. Thus, the Tribunal concluded that the scope of the MFN clause did not extend to dispute settlement.[187]

Claimants further argued that Article 2 para. 4[188] of the BIT, read together with other provisions, constituted an 'umbrella clause.' Therefore, they asserted, the Tribunal had jurisdiction to consider their contractual claims regardless of the effect of Article 9 para. 2. The Tribunal noted that Article 2 para. 4 was formulated differently from the clauses in the *SGS v. Pakistan* and *SGS v. Philippines* cases and concluded that the Jordanian treaty language could not be considered an umbrella clause.[189]

The Tribunal then examined the jurisdictional objections against the treaty claims. Jordan argued that the request for arbitration disclosed no arguable case that there had been a breach of the BIT. The Tribunal rejected this argument and observed that Claimants were free to characterize their claims as they deemed appropriate.[190] Mere assertions of a breach, however, would not suffice: The Tribunal would have to be convinced of its jurisdiction with regard to each and every claim. Examining, *inter alia,* the decisions in the ICSID cases *SGS v. Philippines,*[191] *Wena Hotels*[192] and several ICJ cases,[193] the Tribunal sought to "determine whether the facts alleged by Claimants in this case, if established, are capable of coming within those provisions of the BIT which have been invoked." The Tribunal thus established a duty of substantiation of claims. Since Claimants' main complaint was breach of contract, the Tribunal started its examination by noting that not every breach of an investment contract could be re-

---

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

[188] That provision reads as follows: „Each Contracting Part shall create and maintain in its territory a legal framework apt to guarantee to investors the continuity of legal treatment, including the compliance, in good faith, of all undertakings assumed with regard to each specific investor."

[189] *Salini v. Jordan Jurisdiction* (note 180), para. 130.

[190] *Id.*, para. 136.

[191] *SGS v. Philippines Jurisdiction* (note 38).

[192] *Wena Hotels Ltd. v. Arab Republic of Egypt*, ARB/98/4, Decision on Jurisdiction of 25 May 1999, ILM, vol. 41, 2002, 881 *et seq.*

[193] ICJ, *Oil Platforms* (Islamic Republic of Iran *v.* United States of America), Preliminary Objection, Judgment of 12 December 1996, ICJ Reports 1996-II, 803; ICJ, *Ambatielos* (Greece *v.* United Kingdom), Merits, Judgment of 19 May 1953, ICJ Reports 1953, 10; ICJ, *Legality of Use of Force* (Yugoslavia *v.* Italy), Provisional Measures, Order of 2 June 1999, ICJ Reports 1999, 481.

garded as a breach of a BIT. Citing the Tribunal in *RFCC v. Morocco,* the arbitrators stated:

> In order that the alleged breach of contract may constitute unfair or unequitable treatment, it must be the result of behaviour going beyond that which an ordinary contracting party could adopt. Only the state, in the exercise of its sovereign authority (*puissance publique*), and not as a contracting party, has assumed obligations under the bilateral agreement.[194]

Looking then in detail at the complaints brought forward, it found that *Salini*'s claim for breach of fair and equitable treatment fell short of this standard: "They present no argument, and no evidence whatsoever, to sustain their treaty claim and they do not show that the alleged facts are capable of falling within the provisions of Article 2 (3)."[195] Consequently, the Tribunal concluded that it had no jurisdiction to consider that claim.

Claimants had advanced a second treaty claim of discrimination. Allegedly, Jordan had refused to consent to contractual arbitration upon request, while offering such consent to other similarly-situated foreign investors. While the Tribunal observed that this claim was also insufficiently substantiated, it did not rule out the possibility that there might be a breach of the BIT and rejected Jordan's jurisdictional objection.[196]

Jordan raised an additional objection concerning jurisdiction *ratione temporis,* claiming that the parties' dispute arose before the BIT entered into force. But since the Tribunal had excluded all contractual claims and the alleged breach of fair and equitable treatment from its jurisdiction, it only needed to decide about the claim of discrimination. Since that claim arose after the entry into force of the BIT, the Tribunal found it had jurisdiction *ratione temporis* to hear the claim for alleged discrimination.[197]

P. Concluding Remarks

2004 has been an even more interesting year than 2003, especially in the area of jurisdictional issues. There now seems to be a solid trend of jurisprudence in-

---

[194] *Salini v. Jordan Jurisdiction* (note 180), para. 155.

[195] *Id.*, para. 163.

[196] *Id.*, paras. 164–166.

[197] *Id.*, paras. 167–178.

dicating that indirect and minority shareholders can bring claims under ICSID, provided that they qualify as 'investors' under the definition of the applicable investment treaty. At the same time, some conflicting decisions have emerged as to an investor's ability to initiate ICSID arbitration by merely asserting that it has a treaty claim. The decisions in *SGS v. Philippines, Joy Mining* and *Salini v. Jordan* indicate that contractual jurisdiction clauses may be given predominant effect and that Claimant could be required to prove the validity of a separate treaty claim as early as in the jurisdictional phase. *Siemens v. Argentina* and *Salini v. Jordan* also demonstrate conflicting opinion among tribunals on the scope of MFN clauses. On the substance of BIT protections, there appears to be growing support for the notion that before a breach of contract will amount to a breach of an investment treaty, the state must have acted in the exercise of its sovereign powers, rather than as an "ordinary" contractual partner. Furthermore, the 'transparency' standard established in the *Tecmed* award has been bolstered by the *MTD* decision and was indirectly confirmed in *Waste Management.*

The overview of this year's awards and decisions also indicates that ICSID Tribunals cannot be expected to blindly follow prior ICSID awards. ICSID arbitrators are clearly aware of the decisions already rendered on similar issues, but sometimes come to very different and even contradictory conclusions. This trend should be recognized as an asset rather than a drawback of the ICSID system. While in the short run contradictory decisions may produce some legal uncertainty, ultimately it is only through such repeated and critical examination that the standards of international investment law can emerge with clarity and stable coherence, to the benefit of both states and investors.